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EXTRA ANNOTATED EDITION
REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF KANSAS.

By C. F. W. DASSLER.

VOL. 13.

**CONTAINING A REVISED REPORT OF ALL CASES REPORTED
IN VOLUME 13 OF THE KANSAS REPORTS, WITH
NOTES AND REFERENCES, ETC.**

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PREFACE.

THIS volume contains all cases reported in original volume 18 of the **KANSAS REPORTS**. Several of the cases have full notes appended of cases reported in the **Northwestern Reporter**, **Pacific Reporter**, and **Minnesota Reports**. References to the subsequent volumes of the **KANSAS REPORTS** will be found to almost every case.

The paging of the old edition of the **KANSAS REPORTS** is indicated by * pages.

Leavenworth, Kan., July, 1886.

C. F. W. D.

JUDGES

OF THE

SUPREME AND DISTRICT COURTS

OF THE

STATE OF KANSAS

DURING THE PERIOD COVERED BY THIS VOLUME.

State Supreme Court.

HON. SAMUEL A. KINGMAN, Chief Justice.
 HON. D. M. VALENTINE, } Associate Justices.
 HON. D. J. BREWER, }

Judges of District Courts.

FIRST	DISTRICT—	HON. H. W. IDE.	
SECOND	"	"	P. L. HUBBARD.
THIRD	"	"	JOHN T. MORTON.
FOURTH	"	"	OWEN A. BASSETT.
FIFTH	"	"	E. B. PEYTON.
SIXTH	"	"	M. V. VOSS. ¹
SEVENTH	"	"	JOHN B. GOODIN. ²
EIGHTH	"	"	WM. H. CANFIELD. ³
NINTH	"	"	WM. R. BROWN. ⁴
TENTH	"	"	HIRAM STEVENS.
ELEVENTH	"	"	B. W. PERKINS.
TWELFTH	"	"	ANDREW S. WILSON.
THIRTEENTH	"	"	W. P. CAMPBELL.
FOURTEENTH	"	"	J. H. PRESCOTT.
FIFTEENTH	"	"	JOEL HOLT.

Judge of the Criminal Court of Leavenworth County.

HON. BYRON SHERRY.

Officers of the State Supreme Court.

CLERK—A. HAMMATT.
 REPORTER—W. C. WEBB.
 LIBRARIAN—D. DICKINSON.

¹ Died October 21, 1874. Succeeded by Hon. W. C. STEWART.

² Resigned February 1, 1876. Succeeded by Hon. H. W. TALCOTT.

³ Died February 26, 1874. Succeeded by Hon. J. H. AUSTIN.

⁴ Resigned March 1, 1875. Succeeded by Hon. SAMUEL R. PETERS.

JUDGES AND OFFICERS
OF THE
FEDERAL COURTS
FOR THE
DISTRICT OF KANSAS

During the Period Covered by this Volume.

United States Circuit Court.

(Held at Leavenworth on the 1st Monday in June, and at Topeka on the 4th Monday in November.)

HON. SAMUEL F. MILLER,

Associate Justice Supreme Court of the United States, assigned to the Circuit.

HON. JOHN F. DILLON,

Circuit Judge.

CLERK—HON. A. S. THOMAS.

United States District Court.

(Held at Leavenworth on the 2d Monday in October, and at Topeka on the 2d Monday in April.)

JUDGE—HON. C. G. FOSTER.

DISTRICT ATTORNEY—HON. GEORGE R. PECK.

U. S. MARSHAL—HON. WM. S. TOUGH.

REGISTERS IN BANKRUPTCY { HON. HIRAM GRISWOLD.
HON. FRED. SCOVILLE.
HON. J. JAY BUCK.

CLERK—JOSEPH C. WILSON.

RULES OF PRACTICE IN THE SUPREME COURT.

REVISED AT JANUARY TERM, 1871, AND AMENDED APRIL 1st, 1875.

RULE 1. Counsel for the plaintiff shall number the pages of the petition in error, and the transcript, before filing the same; and the clerk shall prepare for the court a copy of the same, numbering the pages as in the original.

RULE 2. Counsel shall file a written or printed brief in each case for each justice before commencing argument thereon; and the brief must refer specifically to the page of the transcript which counsel desires to have examined.

RULE 3. No case shall be docketed, nor process issued thereon, except where the state is appellant, until the plaintiff in error or appellant shall pay the clerk five dollars advance fees; nor shall any civil case be docketed until security for costs shall be given, approved by the clerk of the supreme court, or of the district court of the county from which the cause is brought, conditioned for the payment of all costs for which the plaintiff in error may be liable.

Execution on a judgment for costs having been returned unsatisfied, the clerk may give said securities, or their executors or administrators, notice of such return, and that, unless said costs are paid within 10 days after receipt of said notice, a motion will be made for a judgment against them; and if good cause shall not be shown why the same ought not to be done, judgment may be entered against said securities, or their executors or administrators, for the amount remaining unpaid, for which said plaintiff in error may be liable, and execution may be issued on such judgment as in other cases.

RULE 4. If the plaintiff in error fail to file the brief required of him by Rule No. 2, before the case is reached for hearing, the judgment below may be affirmed as of course.

RULE 5. On being admitted to practice in this court, each attorney who has not heretofore been admitted to the supreme court of the state of Kansas shall pay three dollars to the clerk, who shall furnish such attorney a certificate of admission, and a printed copy of the rules.

RULE 6. Any case may be submitted on behalf of either or both parties, at any time, whatever may be its place on the docket.

RULE 7. Causes will be taken up for decision in their order upon the docket, except as otherwise provided by law; but a cause may be taken out of its order, and assigned for argument or decision, for special reasons set forth in a motion filed.

RULE 8. In all cases disposed of in which the supreme court has original jurisdiction, a full record shall be made. In all other cases, no full record shall be made, except at the request and costs of the party desiring the same to be done.

RULE 9. The papers in all cases disposed of shall be filed and labeled in packages, on which shall be indorsed numbers corresponding with numbers on the margin of the journal where the final orders, respectively, are made.

RULE 10. No record or paper filed shall be taken from the custody of the clerk, unless by order of the court, or by written consent of the attorneys of record for all the parties.

RULE 11. Counsel for plaintiff in error shall furnish a copy of his brief to counsel for defendant in error, in each case, at least 15 days before the time set for the argument thereof; and the counsel for defendant in error shall furnish a copy of his brief to the counsel for plaintiff in error at least five days before the time set for the argument thereof. A compliance with this rule is essential to entitle a party to be heard in oral argument; and in case of a failure to comply, the court may in addition continue the case, or affirm or reverse the judgment.¹

RULE 12. One hour only, except with the consent of the court, shall be consumed in the oral argument of a case, by counsel for either party.

RULE 13. A motion for an order to revive an action or complete a transcript, except where counsel for both parties consent to the order, shall be filed, setting forth the grounds, and notice thereof given to opposing counsel, at least one day before being heard by the court.

¹ This is the amended Rule 11, as adopted April 17, 1875.

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SUPREME COURT.

STATE OF KANSAS. •

JANUARY TERM, 1874.

PRESENT:

HON. SAMUEL A. KINGMAN, Chief Justice.

HON. D. M. VALENTINE, } Associate Justices.
HON. D. J. BREWER, }

BOARD OF EDUCATION OF CITY OF ATCHISON *v.* WILLIAM SCOVILLE
and others.

January Term, 1874.

1. **Interpleader: Action.** An action in the nature of a bill of interpleader may be maintained under our system of practice whenever a proper case is made therefor, and whenever the plaintiff has no adequate remedy in the nature of an action at law.
2. **Remedies: Equity: Election of.** There is no rule that requires a party to resort to one equitable remedy in preference to some other equitable remedy, where both remedies are equally applicable to the facts constituting the cause of action or defense, and where both are equally available to the parties.
3. **Interpleader: Several Claimants.** The owner of a building owes the contractor for erecting the same a certain sum of money, (the amount thereof not being disputed.) Various other persons claim to have liens upon the fund which the owner of said building owes to the contractor, as follows: Certain persons claim as subcontractors, and that they have mechanics' liens on said building to secure their respective claims; others claim that they are creditors of the contractor, and have garnishment liens on said fund by virtue of attachment proceedings in a justice's court; others claim that they are judgment creditors of the contractor, and have garnishment liens on said fund by virtue of proceedings in aid of execution before a judge *pro tem.* of the district court. Each of these various persons claims that his own claim is prior and paramount to that of any

- other person; and in the aggregate these claims amount to vastly more than the amount which the owner of the building owes to the contractor, and the owner of the building cannot well pay any of said claims without great hazard to himself, and several of said claimants are proceeding, and about to proceed, against the owner of the building, to collect in separate actions their respective claims. *Held*, in such case, that the owner of the building has a cause of action for interpleader against the various claimants of said fund.
4. ———: **Concurrent Remedies.** The remedy given by section 43 of the Civil Code does not supersede the action of interpleader; but in cases where such remedy might be substituted for the action of interpleader the two remedies are concurrent.
5. **Execution: Proceedings in Aid of: Not a Judgment.** An order of a judge *pro tem.* of the district court in a proceeding in aid of execution under section 490 of the Civil Code, that a garnishee shall pay over to the judgment creditor certain money which the garnishee owes to the judgment debtor, is not a final determination of the liability of said garnishee to pay said money to said judgment creditor.¹
6. **Garnishment: Order not Final.** An order of a justice of the peace in an attachment proceeding pending before such justice under section 42 of the justices' act, that a garnishee shall pay into court certain money which the garnishee owes to the defendant in the action, is not a final determination of the right of the plaintiff in the action to said money. [Fitch v. Manhattan Fire Ins. Co., 23 Kan. 369.]

Error from Atchison district court.

The Board of Education of the City of Atchison, brought suit against William Scoville, H. T. Smith, and William C. Smith, as partners, M. M. Trimmer and John F. Thompson, as partners, D. P. Blish and John B. Silliman, as partners, A. B. Decker, and Sarah A. Baker, and also against Clark & Co., and eight others as defendants. The petition recited that there was in plaintiff's possession the sum of \$700.91, due to Clark & Co. or their creditors, being a balance due for building a certain school-house; that there was also due the further sum of \$92.47½ for extra work done thereon, which the plaintiff believed was due to Clark & Co. or their creditors, but of which defendants Trimmer & Thompson (who are creditors) claimed \$80.47½; that at November term, 1872, of said district court the defendants Scoville & Smith obtained a judgment by confession against Clark & Co. for \$748.58, and afterwards, on proceedings in aid of execution, they obtained an order that *plaintiff pay over to them the sum of \$527.22 within thirty days; that before said time had expired Trimmer & Thompson brought an action in the district court against the plaintiff for \$428 of said money, claiming that they were entitled to priority of payment, and they also brought an action before a justice for \$80.47½ for extra work, and both of said actions were pending and undetermined; that Blish & Silliman and A. B. Decker had also obtained judgments against Clark & Co. before a justice, and on proceedings in garnishment had obtained orders for

¹ See note at end of case.

the plaintiff to pay, in the former case \$124, and in the latter case \$45.16; that S. A. Baker had obtained judgment against Clark & Co. before a justice for \$45.75 and costs, and threatened to proceed against plaintiff as garnishee, and that all the other defendants were creditors of Clark & Co., as subcontractors on said work, and they were claiming mechanics' liens for labor or materials, and were all threatening proceedings against the plaintiff for payment out of said fund; that plaintiff had insisted in each of said proceedings that it ought not to be held to pay any of said claimants until all parties should be brought into court, so that their respective rights thereto might be adjudicated together; that plaintiff was not indebted to any of said defendants except as growing out of said contract with Clark & Co., for building said school-house; that plaintiff had not colluded with any of the defendants; and praying that plaintiff be allowed to bring the amount due into court, that all the parties be required to interplead together, and that plaintiff might be discharged from further liability on payment into court of the amount due for the benefit of such of the parties as should appear to the court to be entitled thereto, and that in the mean time the defendants be enjoined and restrained from further proceeding against plaintiff. The petition also showed that the claims of the defendants joined as creditors of Clark & Co. aggregated \$1,726.76. This petition was verified by affidavit. To this petition the defendants demurred, and the court, at *20 the March term, 1873, sustained the demurrers, and rendered judgment in favor of the defendants for costs.

D. Martin, for plaintiff in error.

1. Does the remedy of interpleader exist in this state? The remedy of interpleader in cases of this nature is familiar in equity practice. 2 Story, Eq. Jur. §§ 806, 807, *et seq.*; Van H. Eq. Dr. 204, 205, *et seq.*; Adams Eq.; Story, Eq. Pl. § 291 *et seq.* By the Code, the forms of actions only are abolished, but the same redress may be had as before the adoption of the Code. Gen. St. 631, § 10; Nash, Pl. & Pr. 3; Kimball v. Connor, 3 Kan. *430; Fitzpatrick v. Gebhart, 7 Kan. *42. But if no other provision of the Code sanctions an interpleader by a plaintiff, such a remedy is fully authorized in this case by section 727 of the Code. In states having Codes like ours it has been held in numerous cases that the remedy of interpleader still exists, notwithstanding the remedy allowed to defendants to bring in new parties. Chamberlain v. O'Connor, 8 How. Pr. 45, 46; Beck v. Stephani, 9 How. Pr. 193, 196, 197; Pepon v. White, 2 Code R. 109; Sherman v. Partridge, 11 How. Pr. 158, 159; Patterson v. Perry, 14 How. Pr. 507.

Is this a proper case for interpleader? The petition shows that the plaintiff has in its possession a certain sum of money belonging to Clark & Co., the contractors, or to their creditors, the other defendants, who were subcontractors and material-men; that plaintiff is not indebted to any of said defendants except on said transaction

for building a school-house; that each of the defendants has either actually commenced proceedings, or threatened such, against the plaintiff, to compel payment in full, without any regard to the rights of the claimants, and although plaintiff can only pay each of them in full with great loss to itself, being compelled to pay a great deal more than it owes; that plaintiff is a disinterested party as between the different creditors of and claimants under Clark & Co.; that no judgment has yet been obtained against plaintiff; that plaintiff has

not colluded with any of the defendants; that it does not know *21 which of the defendants is *legally entitled to said money, and therefore cannot safely pay it to any one of them, unless they are all made parties to the action, offering to bring the money into court to be paid as shall be decreed by the court after hearing all the claimants as to their respective rights thereto. The petition contained all the averments that are material in such a case. As to the propriety of the remedy in this case we refer to 2 Van Santv. Pl. 349, 351; 1 Wait, Pr. 165 *et seq.*; Richards v. Salter, 6 Johns. Ch. 445.

In the garnishee proceedings, the plaintiff was not a *defendant*, and therefore was not entitled to relief under section 43 of the Code. It was not a *party*, and could neither prosecute nor defend. All that it could do was to answer under oath all questions put to its officers, and further it could not go. It was only a *witness*. It answered because under the law it was bound to do so. All reference to the plaintiff having suffered any default, or being guilty of any laches, is out of place and without foundation. Has the plaintiff's right to compel the defendants to interplead been barred or concluded by any adjudication? The court below held that the proceedings in aid of execution in the case of Scoville & Smith v. Clark & Co. were an adjudication which bound the plaintiff herein; that while the order was not a judgment, it was *in the nature of a judgment*; and that it was too late to interplead after that order was made. The court below held that the orders made by the justice in the proceedings in garnishment were not in the nature of judgments, and therefore that they constituted no bar or objection to an interpleader. We contend that the effect and force of each of these orders is the same, and that none of them are judgments against the plaintiffs, nor "in the nature of judgments." And it has frequently been decided that the order made in the proceedings in aid of execution is not a judgment, and that the creditor of the judgment-debtor is not concluded by the proceedings. Union Bank of Rochester v. Union Bank of Sandusky, 6 Ohio St. 254; Edgerton v. Hanna, 11 Ohio St. 323; Welch v. Pittsburgh, Ft. W. & C. R. Co., Id. 569. And this court has held

that no execution can issue on such order. Arthur v. Hale, *22 6 Kan. *161. Neither is *the plaintiff concluded by the proceedings in garnishment. Rice v. Whitney, 12 Ohio St. 358. The fact that Trimmer & Thompson commenced suit before this

action was brought is no valid objection to this case, but is a circumstance in its favor. It shows that injury to the plaintiff was imminent, and not merely prospective. It is not usual to commence a case of interpleader until the plaintiff is actually in litigation, although it may be proper to do so. In such case, in this state, the party seeking relief from the conflicting claims may elect to bring an action like this, or proceed under section 43 of the Code. The remedies are concurrent, and he may have his election. 1 Wait, Pr. 166, 174. In this case the former was the only adequate remedy, as an injunction is part of the remedy of interpleader, and an injunction was necessary in this case to protect plaintiff from vexatious litigation.

W. R. Smith, Everest & Greenawalt, Horton & Waggener, Thos. Metcalfe, and J. L. Berry, for defendants.

We contend that the court below committed no error in sustaining said demurrers, or in refusing to grant an injunction, as prayed for by plaintiff. Admitting that, under the Civil Code of this state, a bill of interpleader would lie in certain cases, we contend that the case at bar, as shown by plaintiff's petition, is deficient in every essential legal element to authorize or constitute such an action. The true origin of jurisdiction of a bill of this nature is that there is no remedy at law at all or the legal remedy is inadequate in the given case. And the bill always supposes that the plaintiff is a mere holder of a stake or fund, which is equally contested by the other party, and that the respective claims against him are all of the same nature or character; and if the bill shows that any one defendant has a legal right paramount to that of any other, it is demurrable, and is *especially* so where there is no privity (between the parties defendant and plaintiff) of contract or duty. For the true doctrine, supported by authority, is that in cases of adverse independent title, the

*23 *party holding the fund must defend himself as well as he can at law, for otherwise it would be asking a court to exercise equity jurisdiction upon a controversy between different parties where there is no privity of contract between them and the plaintiff who calls for the interpleader; and where the claimants assert their rights under adverse titles, and not in privity, and where their claims are of different natures, the bill is not maintainable. And the bill would be equally defective if it did not admit and show a title in each of the claimants; for if it in anywise appears from the bill itself that any one of the defendants is clearly entitled to the debt, or any portion thereof, in exclusion of the other, then it is demurrable, and no such bill should be filed except where the plaintiff cannot otherwise be protected from unjust litigation, and then it should be filed immediately after or before the commencement of proceedings against the plaintiff, and should not be delayed until any of the claimants have obtained any legal right as against the plaintiff.

The petition shows that the plaintiffs made a contract with Clark

& Co. for the erection of a school-house; that they never complied with the terms of said contract, and that the plaintiff completed the building itself; that the claim of defendants Trimmer & Thompson is based entirely upon an independent cause of action against the plaintiff to the amount of \$80.47, and not by reason of any funds in plaintiff's hands which any of the other defendants make any claim upon. The petition shows that certain defendants are seeking to enforce their claims against the plaintiff under the mechanics' lien law; that the defendants Scoville & Smith have obtained judgment on their claim against Clark & Co., and, by proceedings in aid of execution, obtained an order of said court against plaintiff before the filing of plaintiff's petition herein; and that said judgment and order now remain of full force. These defendants certainly show a legal right to the payment of a *certain* sum paramount to that of any other of the

defendants; and of this the plaintiff had full knowledge long
*24 before the commencement of the action at bar. The *petition shows that defendants Trimmer & Thompson have commenced an action in the court below against plaintiff, as defendant therein, claiming the sum of \$428 on account of an agreement with plaintiff and defendants Clark & Co., by which Trimmer & Thompson were to receive payment of their sum directly from plaintiff, and that said action was commenced before the petition was filed in this action, and is yet undetermined, and that plaintiff had full knowledge thereof before the commencement of this action. The petition shows that defendants Blish & Silliman, before the commencement of this action, had obtained judgment against Clark & Co. for the amount of their claim, which certainly shows that as to these defendants, they could make no claim against plaintiff on this specific fund. The petition shows that defendant A. B. Decker obtained judgment against Clark & Co. for the amount of his claim, and had instituted proceedings in garnishment, and obtained an order for the payment of his claim against plaintiff before the commencement of this action. The petition also shows that defendant Sarah A. Baker obtained a judgment against Clark & Co. for the amount of her claim, of which plaintiff had full knowledge before commencing this action herein. Now, can it be said by this court that the respective claims of the defendants are of the same nature or character, and that each of the defendants claims a right to the identical fund of \$700.91? Can it be said that there is a privity, between all the defendants and the plaintiff, of contract or duty in regard to this special fund? Does not the petition show that most of the defendants found their claims upon independent titles and rights? and does not the petition admit that defendants Scoville & Smith have a legal claim upon this fund to the amount of \$527.22, paramount to that of any of the other defendants?

If the right to file a bill of interpleader as an *independent* action is recognized under the Civil Code, then the same rules must exist

as were formerly recognized, and which obtained in chancery in such cases. *Washington Life Ins. Co. v. Lawrence*, 28 How. Pr.

*25 435. It would *seem clear that the plaintiff had a perfect and speedy remedy under the provisions of the Civil Code, and that it was not necessary for it to have resorted to any of the ancient land-marks, or to have navigated its legal craft in the ancient and muddled waters of English equity jurisprudence. It is sufficient for this court to see that the questions involved in this action are fully contemplated and met by our own Civil Code; for, in the absence of a statute, a bill of interpleader does not ordinarily lie as an independent action except when there is a privity of some sort between all the parties, and where the claim by all is of the same nature and character. *Lincoln v. Ruthland & B. R. Co.*, 24 Vt. 639. The plaintiff, after the commencement of the action of *Trimmer & Thompson* against it, had a perfect remedy under the provisions of the Civil Code, upon making affidavit, and obtaining an order upon all parties to appear and maintain or relinquish their claims against it. Code, § 43. This is a substitution for the ancient bill of interpleader, and provides a *summary* mode of relief in the same cases in which a bill of interpleader was allowed in chancery. This is undoubtedly the remedy that the plaintiff should have resorted to, (*Vosburgh v. Huntington*, 15 Abb. Pr. 254; *Wilson v. Duncan*, 11 Abb. Pr. 3; *Sherman v. Partridge*, 1 Abb. Pr. 260; *Mechanics' B. Ass'n v. Kiersted*, 4 Duer, 640;) and the plaintiff, under any circumstances, must not by its own act, as in the case at bar, have placed itself in a position to be sued, and must have been ignorant of the rights of the defendants, (*U. S. v. Vietor*, 16 Abb. Pr. 153; *Bell v. Hunt*, 3 Barb. Ch. 391.) The doctrine of interpleader has certainly no application under the mechanic's lien law, which doctrine is applicable to all the defendants in this action, who are proceeding to enforce their claims against the owner of the school building. *Chamberlain v. O'Connor*, 8 How. Pr. 45; *Dry-dock M. E. Church v. Carr*, 2 Barb. 60. Certainly the bill of interpleader will not lie in favor of the plaintiff as against such of the defendants as had obtained rights, by service of a notice in garnishment or attachment upon it against the property of *Clark & Co.*, (*U. S. Trust Co. v. Wiley*, 41 Barb. 477;) and, there being a defect of parties in this action, the demurrer was properly sustained.

*26 *VALENTINE, J. That an action in the nature of a bill of interpleader may be maintained under our system of practice, whenever a proper case is made therefor, and whenever the plaintiff has no other adequate remedy, we have no doubt. And we think the action may be maintained whenever the plaintiff has no adequate remedy in the nature of an action at law. The first and main question, then, for our consideration is whether a proper case for interpleader has been made out in this particular case. Involved, however, in this main question are several minor questions which we shall

consider as we proceed. The court below decided, upon various demurrers to the petition, that the petition did not state facts sufficient to constitute a cause of action as against any of the defendants; and this petition in error is now instituted for the purpose of having that decision reversed. Now, if the petition in the court below did state facts sufficient to constitute a cause of action in favor of the plaintiff, and against any two or more of the defendants, the decision of the court below must be reversed as between the plaintiff and those two or more defendants.

The action of interpleader is undoubtedly an equitable remedy, and for that reason principally it cannot be maintained in any case where the party seeking it has another plain and adequate remedy in the nature of an action at law. Indeed, as a rule, the action of interpleader cannot be maintained where another plain and adequate remedy has been given by statute; for, as a rule, the remedy given by statute is considered as a *legal* remedy, in contradistinction to an *equitable* remedy. But the remedy given by statute may sometimes be an equitable remedy, and, when it is, then it does not supersede some other previously existing equitable remedy unless it has been expressly so enacted, but the second remedy is merely cumulative, and the two remedies are in effect concurrent. There never has been

any rule in equity that we are aware of requiring a party to
*27 *resort to one equitable remedy in preference to some other equitable remedy where the two remedies are equally applicable to the facts constituting the cause of action or defense, and where both are equally available to the parties; and we think no such rule has ever existed.

In the present case the plaintiff is a school-district. It employed the defendants Clark & Co. to build a school-house. Clark & Co., with the assistance of several subcontractors, built the school-house. The school-house now owes Clark & Co., the contractors, \$793.38½. This amount does not seem to be disputed. Clark & Co. claim the whole of it. Other defendants claim the same, or portions thereof, by virtue of being subcontractors who furnished labor and materials for the school-house, and by virtue of having mechanics' liens thereon. Other defendants claim said fund, or portions thereof, by virtue of being creditors of the contractor, and by virtue of garnishment liens obtained in attachment proceedings against him in a justice's court. And still another defendant claims the larger portion of said fund by virtue of a garnishment lien obtained in the district court before a judge *pro tem.*, in a proceeding in aid of execution. Clark & Co. (the contractors) claim directly from the school-district. All the other defendants claim under and through Clark & Co., except as to a portion of Trimmer & Thompson's claim, of which we shall speak hereafter; but each defendant claims that his right to said fund is paramount to that of any other defendant. The amount which the defendants claim in the aggregate is vastly more than the plaintiff owes

to Clark & Co., and therefore the plaintiff could not well pay the claim of any one of the defendants without great hazard to itself. For the purposes of this case, we shall assume that mechanics' liens may be taken upon school-houses, and such other public buildings; also, for the purposes of this case, but without expressing any opinion thereon, we shall assume that the action of interpleader does not lie in favor of the owner of a building to compel the holders of mechanics' liens thereon (contractors and subcontractors) to interplead with each other, and with *the contractor, and thereby have determined the extent and priority of their respective liens. And yet there may be cases where the action ought to lie.

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Under our statutes a promissory note may be given for the amount covered by the mechanic's lien. Laws 1871, p. 253, § 1; Laws 1872, p. 294, § 1. And in such a case it is not necessary for the holder of the note to commence an action to enforce the lien until after the note becomes due, (Laws 1872, p. 297, § 4,) although the note may not become due for ten or twenty or any other number of years. Now, suppose that there are twenty or more subcontractors holding notes for various sums, due at various times, and the aggregate amount of these notes is vastly more than the owner of the building owes the contractor, or is liable for to the contractor and subcontractors taken together; and suppose the contractor disputes all these notes, and that each subcontractor claims that his own note is valid, unpaid, and secured by a lien upon the building, but disputes the notes and supposed liens of all the others. Suppose, also, that it is claimed that some of the notes were not given for labor or material furnished for the building; that some of them were obtained fraudulently; that some of them are paid; that some of the supposed liens were obtained irregularly or fraudulently; that some of the holders of the notes are not the real owners of the same, etc.; and suppose the holder of each note intends to contest the lien of every other holder of a note. Must the owner of a building keep his money five, ten, fifteen, or twenty years, until some one is ready to sue him, although his debt to the contractor is all the time due and *drawing interest*, which interest he will eventually have to pay? The action or defense given by the mechanic's lien law, and by section 43 of the Civil Code, is hardly an adequate remedy in such a case.

For the purposes of this case, and for that only, we shall also assume the following, to-wit: (1) A party who has a debt coming to him secured by a mechanic's lien may abandon or waive the mechanic's lien, commence an ordinary action for the debt, sue out an attachment, and garnish any debtor of his debtor. (2) A garnishment lien may be obtained upon a fund already subject to a mechanic's lien held by some other person, but of course the mechanic's lien will remain prior in right to the garnishment lien. (3) When a party has two claims, one of which is secured by a mechanic's lien and the other is not, he may sue out an attachment and

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garnish a fund subject to said mechanic's lien, and to various other mechanics' liens held by other parties, to secure one or both of his said claims; but, in such a case, he of course waives his mechanic's lien unless he commences a regular action to foreclose the same. We shall also, for the purposes of this case, assume (and this is probably a correct assumption) that a garnishee cannot require an attaching creditor and the debtor (his creditor) to interplead with each other as to who shall receive the amount due from the garnishee to the debtor; and yet, if there were other persons claiming to hold prior liens on the fund due from the garnishee to the debtor in attachment, the only adequate remedy for the garnishee to protect himself from these conflicting claims would be an action of interpleader. The garnishment lien attaches when the garnishee is served with notice, (Gen. St. 667, § 206; Id. 787, § 51,) and continues until the attachment is dissolved or the plaintiff's claim is satisfied; and there is no provision for the determination of the extent, force, validity, or priority of this kind of lien in an action to foreclose a mechanic's lien. Laws 1871, p. 255, § 5. Indeed, the garnishee in such a case would have no adequate remedy except by the action of interpleader; and hence, in such a case, the action would lie.

It is claimed, however, that section 43 of the Civil Code furnishes an adequate remedy. We do not think so. Under that action the holder of the fund is not entitled to any remedy until he is sued, and the commencement of the suit may be postponed almost indefinitely. If the holder of the fund has no remedy except the one given to him by section 43 of the Civil Code, he may be compelled, for an almost indefinite period of time, to hold said fund always ready to pay the same to the person entitled thereto, and to pay it at any

*30 *time when called upon, with *accumulated interest*, although the holding of the same may be no benefit to him. His debt due to the contractor, in a case like the one at bar, does not stop drawing interest because others have obtained supposed liens thereon. Sometimes undoubtedly the remedy given by said section 43 of the Code is an adequate remedy; but even then we do not think that the legislature intended that it should take the place of the action of interpleader. In such cases it was probably intended that the two remedies should be concurrent. Such seems to be the opinion of Mr. Wait as he gathers it from the New York authorities. 1 Wait, Pr. 166, 167, 174. The remedy given by section 43 of the Code, as applied to cases like this, is, in its nature, an equitable remedy; and we know of no rule that requires that one equitable remedy should supersede or take precedence of another equitable remedy, where both are equally applicable to the case. But it is claimed that the plaintiff in this action (the school-district) had already been sued by the defendants, Trimmer & Thompson, and that therefore the plaintiff as defendant in that suit, had a right, under said section 43 of the Code, to have all the other parties brought in and have them inter-

plead as to who should receive said fund, and as to how much each should receive; and, therefore, that the plaintiff had another adequate remedy.

But if this were true, still the remedy given by said section is an equitable remedy as applied to this case, and, therefore, the plaintiff still had no adequate remedy *at law*. But it cannot be that said section was intended absolutely to supersede the action of interpleader, even in a case like the one at bar. If such were so, it would lead to insuperable difficulties in practice. Suppose that twenty or more different persons should each claim to be entitled to a particular fund, and suppose that one of these persons should sue the holder of the fund for the recovery of the same, and should, in the same suit, set up twenty or more separate and distinct causes of action, and ask judgment on the whole of them: would the holder of the fund be bound to forego his action of interpleader, and in its stead

*31 resort to his remedy under *said section 43 of the Code?

Would he be bound to bring in as co-defendants with himself all the adverse claimants to said fund, and have them litigate their right to said fund while he was at the same time in the same suit on the same trial litigating with the plaintiff the questions arising in the other twenty separate and distinct causes of action in which himself and the plaintiff alone were interested? But suppose there were various other persons, not claimants to said fund, but interested in the subject-matter of some one or more of these various other causes of action set up by the plaintiff against the defendant: must these other persons also all be brought in so that their claims may also all be determined in this same suit? And so on, *ad infinitum*. Each of these different causes of action set up in said petition may be concerning a fund, to each of which there may be twenty or more different claimants. Now, suppose that each adverse claimant to one of these funds should commence an action against the holder thereof at about the same time: would the holder be bound under said section 43 to bring in all the adverse claimants into each suit, or could he bring them into one suit only and have the other suits enjoined? And if he could bring them into one only, and have the others enjoined, into which should he bring them, and which should he have enjoined? If these suits were brought in various counties, or in various courts, they could not well be consolidated. Or, if there were various other matters to litigate in each one of these suits, they could not well be consolidated, although they might be brought in the same court. Now, if it be agreed that the holder of the fund may enjoin the litigation concerning this fund in all the suits but one, why not in that one too, and allow him to bring an original action divested of all extraneous matters, and have it determined in that action to whom the fund belongs? After a careful consideration of the whole question we have come to the conclusion that wher-

ever, under the former chancery practice, a bill of interpleader would lie, an action in the nature of a bill of interpleader will now lie.

*32 With respect to a portion of Trimmer & Thompson's claim *it would seem that the school-district has made itself absolutely liable; or at least Trimmer & Thompson so claim; and hence, with respect to this portion of said claim, the action of interpleader will not lie. This portion of said claim must be litigated in another suit.

There are two other questions involved in this case: *First*. Is an order of a judge *pro tem.* of the district court in a proceeding in aid of execution, under section 490 of the Civil Code, that a garnishee shall pay over to the judgment creditors certain money which the garnishee owes to the judgment debtor, a final determination of the liability of said garnishee to pay said money to said judgment creditor? *Second*. Is an order of a justice of the peace in an attachment proceeding pending before him, under section 42 of the justices' act, that a garnishee shall pay into court certain money which the garnishee owes to the defendant in the action, a final determination of the right of the plaintiff in the action to said money? We must answer both of these questions in the negative. Neither of said orders is a judgment. The making of them is not an adjudication between the parties. It does not determine their ultimate rights. It simply gives to the creditor the same right to enforce the payment of the money from the garnishee that the debtor previously had. It is in effect only an assignment of the claim from the debtor to the creditor. The creditor gains no more or greater rights than the debtor had, and the garnishee loses no rights. And the payment of the money can be enforced from the garnishee to the creditor only by an ordinary action. It is not necessary that an order, under section 490 of the Civil Code, be made by the court as a court. It may be made by a judge of the court, at chambers; and, in the present case, it was made by a judge *pro tem.* Now, can it be possible that a proceeding for the recovery of money may be determined finally, without parties plaintiff or defendant, without pleadings, before a judge at chambers, and without a jury? Final jurisdiction is always conferred upon courts, and not upon judges at chambers. Besides, in proceedings

*33 for the recovery of money, a man's *rights can be determined against his will only by a jury. "The right of trial by jury shall be inviolate." Const. Bill of Rights, § 5. And no legislative act can abridge or impair that right. But suppose said order is an adjudication, a final determination, of the rights of the parties: then there should be some way of directly enforcing it,—either by execution against the property of the garnishee, or by imprisonment of his person. Now, it has already been decided in this court, and well decided as we think, that an execution is not allowable in such a case. *Arthur v. Hale*, 6 Kan. *161, *165. And we think it is equally clear that the order cannot be enforced by imprisonment of the garnishee. *Union Bank of Rochester v. Union Bank of Sandusky*, 6 Ohio St. 254;

Edgerton v. Hanna, 11 Ohio St. 323; **Welch v. Pittsburgh, Ft. W. & C. R. Co.**, Id. 569. "No person shall be imprisoned for debt except in case of fraud." Const. Bill of Rights, § 16. Now, suppose the garnishee owes a debt to the judgment debtor, as is claimed in the present case. He is ordered to pay it into court, or to the judgment creditor. He is unable to do it, or indeed he may even refuse to do it. May the court, or judge at chambers, imprison him therefor? If they can, then they may not only imprison him for debt, but they may imprison him forever therefor, or at least until he pays the debt; for there is no provision for his discharge before he pays the debt. Would not this be imprisonment for debt, with a vengeance? But the statute does not seem to authorize the court or judge to order the garnishee to pay the money into court, or to the judgment creditor. It simply provides that the court or judge may order the money "to be applied towards the satisfaction of the judgment." Civil Code, § 490. Under this order the money may be paid voluntarily by the garnishee, or it may be collected from him by an ordinary action. This is the view taken of the question by the supreme court of Ohio. **Edgerton v. Hanna**, 11 Ohio St. 323, and other cases above cited. Section 490 of our Code is the same as section 467 of the Ohio Code,

except that immediately after the words above quoted the following words are inserted *in our Code and omitted in the

Ohio Code, to-wit: "and may enforce the same by proceedings for contempt in case of refusal or disobedience." Now, these words probably do not mean that the court may imprison a garnishee for not paying *money which he owes* (a debt) into court, or to the judgment creditor; but if they do, then we think that they are unconstitutional to that extent. **Union Bank of Rochester v. Union Bank of Sandusky**, 6 Ohio St. 254, 260-262. Section 473 of the Ohio Code is the same as section 498 of our Code; and both read as follows: "If any person, party, or witness disobey an order of the judge or referee, duly served, such person, party, or witness may be punished by the judge as for a contempt." This section is about as strong as the new words inserted in section 490 of our Code, and yet with this section the supreme court of Ohio made the decisions above cited.

With regard to the order made by the justice in the attachment and garnishment proceedings, we would say that the plaintiff in such proceedings has his remedy to enforce the payment of the money due from the garnishee by an ordinary action under section 43 of the justices' act, and perhaps also by an action or proceeding under section 44 of the justices' act; but he has no other remedy. **Rice v. Whitney**, 12 Ohio St. 358.

In conclusion we would say that we think the petition shows a good cause of action for interpleader. It shows that there are several persons claiming the same thing from the plaintiff; that the plaintiff has no beneficial interest in the thing claimed; that some of the defendants have already instituted proceedings therefor against

the plaintiff, and that others threaten so to do; that the plaintiff cannot determine to whom it belongs without great hazard to itself; that the plaintiff has no adequate remedy at law, nor indeed any other adequate remedy; that while the thing in dispute is a debt to Clark & Co., one of the defendants, yet there is no dispute about the amount of the debt; and that while some of the defendants
 *35 do not claim the whole of the debt, yet that Clark & Co. do, and the others, in the aggregate, claim vastly more than the debt.

The judgment of the court below is reversed, and cause remanded, with the order that the demurrer to the petition be overruled, and for such other proceedings as may be proper in the case.

(All the justices concurring.)

NOTE.

Orders made in garnishment proceedings can seldom be considered as final adjudications, *Muse v. Lehman*, 30 Kan. 519; 8 S. C. 1 Pac. Rep. 804; in an action subsequently brought against the garnishee by a judgment creditor to enforce an order to pay over money or deliver property, a garnishee may answer, and show whether he had money or property in his possession belonging to the judgment debtor, or was indebted to him, and, if so, what the character of such property or indebtedness was, or any other fact affecting the question of his liability as garnishee, *Mull v. Jones*, 5 Pac. Rep. 388; error does not lie to the district court from a ruling of the justice of the peace refusing to vacate and discharge a process in garnishment, *Miller v. Noyes*, 7 Pac. Rep. 602; nature of judgment, *Fitch v. Manhattan Fire Ins. Co.*, 23 Kan. 366; review of proceedings, *Brown v. Tuppeny*, 24 Kan. 29; certificate of deposit, *Bank v. Gulick*, 24 Kan. 359; extent of liability, *Phelps v. Atchison, T. & S. F. R. Co.*, 28 Kan. 165; *Muzzy v. Lantry*, 30 Kan. 49; 8 S. C. 2 Pac. Rep. 102; pension money, *Cranz v. White*, 27 Kan. 319.

Foreign corporations doing business may be garnished for a debt due to one of its employees, etc., when, *Burlington & M. R. R. v. Thompson*, 1 Pac. Rep. 622; wages due at date of service of process are bound, when, *Id.*; affidavit that debt is exempt is evidence that such debt is exempt in subsequent actions against garnishee, when, *Muzzy v. Lantry*, 2 Pac. Rep. 102; stockholders' unpaid subscriptions may be reached by garnishment, when, *McKelvey v. Crockett*, 2 Pac. Rep. 386; pledge of personal property to secure an indorser leaves the legal title in the pledgeors, and their interest therein subject to garnishment, when, *Williams v. Garlick*, 8 Pac. Rep. 469; garnishee—pleas in suit by his own creditor, *Herlow v. Orman*, 6 Pac. Rep. 935; pleading attachment or garnishment as a defense, *Clark v. Marbourg*, 6 Pac. Rep. 548; against one who had a contract to herd cattle for stipulated price, *Guthman v. Keam*, 1 N. W. Rep. 129; affidavit must conform to statute—jurisdiction, *Rasmussen v. McCabe*, 1 N. W. Rep. 196; plaintiff may prove indebtedness to defendant notwithstanding denial of liability by garnishee, *Feary v. Cummings*, 1 N. W. Rep. 946; bonds of railroads subject to garnishment, when, *Warren v. Booth*, 1 N. W. Rep. 502; garnishee *prima facie* not liable to defendant for lumber sold on account of a third person, *Hyde v. Minneapolis Lumber Co.*, 1 N. W. Rep. 740; no recovery—variation of state of facts pleaded, *Ruby v. Schee*, 1 N. W. Rep. 741; third person may come in, and prove claim allowed defendant by administrators belonged to him, *Gage v. Ames*, 1 N. W. Rep. 806; garnishee discharged, when, *Dolby v. Tingley*, 2 N. W. Rep. 866; surplus of chattels pledged subject to, *Davis v. Wilson*, 3 N. W. Rep. 52; effect of garnishment of joint makers of note, *Hirth v. Pfeifle*, 3 N. W. Rep. 289; joint claim garnished, when, *Markham v. Farrell*, 3 N. W. Rep. 262; payment of money into court by garnishee—effect, *McDonald v. Lewis*, 3 N. W. Rep. 300; defect in an execution fatal to its own validity is equally fatal to this proceeding, *Kentzler v. Chicago, M. & St. P. Ry. Co.*, 3 N. W. Rep. 369; examination and personal appearance of garnishee—right to have, *Hawthorn v. Unthank*, 3 N. W. Rep. 518; agreement to relinquish uncertain claim is binding, when, *Turner v. Burnell*, 4 N. W. Rep. 30; order for judgment appealable, when, *Croft v. Miller*, 4 N. W.

Rep. 45; rents to grow due in the future are not subject to garnishment, *Thorpe v. Preston*, 4 N. W. Rep. 227; failure to enter adjournment will not affect judgment, when, *Bushnell v. Allen*, 4 N. W. Rep. 599; a judgment of one justice's court cannot be garnished before another, *Sievers v. Woodburn S. W. Co.*, 5 N. W. Rep. 311; a different judgment from the one already entered cannot be rendered upon notice to show cause, *Langford v. Ottumwa Water-power Co.*, 5 N. W. Rep. 574; the court is at liberty to consider whole record, *Farrington v. Sexton*, 5 N. W. Rep. 654; a municipality not subject to garnishment, *Merrill v. Campbell*, 5 N. W. Rep. 912; requisites of a garnishee's disclosure, *Spears v. Chapman*, 5 N. W. Rep. 1038; disclosure of garnishee in justice's court must be explicit, *Wenich v. Scribner*, 6 N. W. Rep. 91.

Right of garnishee to claim exemption of demand, etc., *Cummings v. Fearey*, 6 N. W. Rep. 98; garnishee discharged, when, *Noble v. Bates*, 6 N. W. Rep. 237; right of redemption is subject to garnishment, *Becker v. Dunham*, 6 N. W. Rep. 406; assignment of debt before service of summons cuts off plaintiff, *Williams v. Minneapolis & St. L. R. Co.*, 6 N. W. Rep. 445; particularity required in affidavit, *Weimeister v. Manville*, 6 N. W. Rep. 859; judgment cannot be rendered against garnishee until judgment against defendant, *Laidlow v. Morrow*, 7 N. W. Rep. 191; effect of delay on proceedings, *Blake v. Hubbard*, 7 N. W. Rep. 204; property exempt from execution also exempt from garnishment, *Wilson v. Bartholomew*, 7 N. W. Rep. 227; amended return of service insufficient, *Kraft v. Roths*, 7 N. W. Rep. 232; void judgment against defendant is essential to a valid judgment against garnishee, *O'Rourke v. Chicago, M. & St. P. R. Co.*, 7 N. W. Rep. 582; forgetfulness of garnishee is not inexcusable negligence, when, *Evans v. Mohr*, 7 N. W. Rep. 593; garnishee may be ordered to make her answer more definite, *Lusk v. Galloway*, 8 N. W. Rep. 608; plaintiff acquires only defendant's title—assignment, *Howe v. Jones*, 8 N. W. Rep. 451; failure of affidavit to conform to law is fatal, *Conway v. Judge of Ionia*, 8 N. W. Rep. 583; partner not subject to garnishment for copartner's debts, when, *Darland v. Rosencrans*, 8 N. W. Rep. 776; no jurisdiction of court—debt not due at time of service of process, *Morris v. Union Pac. R. Co.*, 8 N. W. Rep. 804; supplemental complaint after decision of court—too late for plaintiff to file, *Mahony v. Stevenson*, 9 N. W. Rep. 76; striking certain answer of a garnishee from the files was error, *Coffman v. Ford*, 9 N. W. Rep. 118; judgment against garnishees as trustees erroneous, *Van Winkle v. Iowa Iron & Steel Fence Co.*, 9 N. W. Rep. 211; questions raised by garnishee's answer cannot be considered, *Brainard v. Simmons*, 9 N. W. Rep. 383; damages for libel cannot be garnished until after judgment, *Detroit Post & Trib. Co. v. Reilly*, 9 N. W. Rep. 492; bank is liable for county funds deposited by treasurer generally, when, *Bank v. Gandy*, 9 N. W. Rep. 566; (earnings of railroad attachable in hands of trustee, when, *First Nat. Bank v. Portland & O. R. Co.*, 2 Fed. Rep. 881); setting aside default of garnishee not abuse of discretion, *Hinskamp v. Van Leuven*, 10 N. W. Rep. 240; motion to dissolve injunction granted, when, *Sweet v. Oliver*, 10 N. W. Rep. 275; public funds subject to garnishment, when, *Long v. Emsley*, 10 N. W. Rep. 280; liability of garnishee to principal debtor and third person, *Singer v. Townsend*, 10 N. W. Rep. 365; assignee for creditors cannot be held as garnishee in proceedings instituted subsequent to assignment, *Gimble v. Ferguson*, 10 N. W. Rep. 789; order discharging garnishee may be reviewed on error, before final judgment, *Turpin v. Coates*, 11 N. W. Rep. 300; liability of executor to garnishment before and after final distribution, *J. I. Case Threshing-mach. Co. v. Miracle*, 11 N. W. Rep. 580; pension money may be garnished, when, *Webb v. Holt*, 11 N. W. Rep. 658; contradictory statements—discretion of court, *Buckham v. Wolf*, 12 N. W. Rep. 623; reclamation of property—rights of owner, *Wells v. American Exp. Co.*, 12 N. W. Rep. 441; answer of garnishee is not pleading, *Brainard v. Simmons*, 12 N. W. Rep. 484; owner of building—contractor's debt, *Hopson v. Dinan*, 12 N. W. Rep. 876; answer of garnishee that he believes debtor is the head of a family, living with his family, not sufficient to show him entitled to exemption, *Smith v. Chicago & N. W. Ry. Co.*, 14 N. W. Rep. 335; assignment of book-accounts can be garnished, when assignment void, by service on assignee, *Ide v. Harwood*, 14 N. W. Rep. 884.

Constable liable as garnishee for money collected by execution, when, *Storm v. Adams*, 14 N. W. Rep. 70; jurisdiction of defendant obtained by service by publication in garnishee proceedings, *Id.* 69; money paid for liquor license not subject to, in hands of treasurer, *Pundt v. Clary*, 14 N. W. Rep. 167; exempt salary earned in another state may be garnished in this state, *Mooney v. Union Pac. Ry. Co.*, 14 N. W. Rep. 848; indorsement of amount of judgment to be taken on

summons, *Clark v. Foxworthy*, 15 N. W. Rep. 842; whether garnishee can show assignment invalid as against creditor who garnished him, *Wood v. Losey*, 15 N. W. Rep. 557; debt payable to third person, and not defendant, not subject to garnishment, *Manassfield v. Stevens*, 16 N. W. Rep. 455; service of notice on debtor—time, *Williams v. Williams*, 16 N. W. Rep. 718; service on agent of foreign corporation not sufficient, *Upton Manuf'g Co. v. Stewart Bros.*, 16 N. W. Rep. 84; contingent claim not subject to garnishment, when, *Buchanan Co. Bank v. Cedar Rapids, I. F. & N. W. Ry. Co.*, 17 N. W. Rep. 787; judgment rendered against garnishee, with no notice of time and place, is void, *Thomas v. Hoffman*, 17 N. W. Rep. 431; garnishment of non-resident—action under statute, *Axtell v. Gibbs*, 18 N. W. Rep. 895; garnishee dismissed, when, *Young v. Ball*, 18 N. W. Rep. 225; joint liability to principal debtor not existing—two or more parties cannot be held as garnishees, etc., *Id.*; judgment against garnishee taken, when, *Iron Cliffs Co. v. Lahais*, 18 N. W. Rep. 121; assignee of fraudulent assignment may be garnished, when, *Vernon v. Upson*, 19 N. W. Rep. 400; garnishment of assignee in suit against assignor, when liable, *Lord v. Meacham*, 19 N. W. Rep. 846; costs and disbursements—negligence of garnishee, when remedied, *Selz v. First Nat. Bank*, 19 N. W. Rep. 48; sale of mortgagor's interest, *Smith v. Grant*, 19 N. W. Rep. 184; questions put to garnishee, when required to be reduced to writing, and submitted to the court, *Elwood v. Crowley*, 19 N. W. Rep. 857; chattel mortgage, as a fraud, when it may be attacked, *North Star Boot & Shoe Co. v. Ladd*, 20 N. W. Rep. 834.

Indebtedness of garnishee—right of inquiry into, *Hollingsworth v. Fitzgerald*, 20 N. W. Rep. 836; joint liability of garnishees—advantage taken of an omission to claim such liability only by answering severally, *Goll v. Healy*, 20 N. W. Rep. 674; statutory remedy, *Folkerts v. Standish*, 21 N. W. Rep. 891; evidence of garnishment—instruction assuming fact, *McDonald v. Moore*, 21 N. W. Rep. 504; witness fees—refusal to answer—judgment, *Stockberger v. Lindsey*, 21 N. W. Rep. 782; estoppel—declarations of garnishee, *Starry v. Korab*, 21 N. W. Rep. 600; admissions *pendente lite*—accord without satisfaction—estoppel, *Schlitz v. Meyer*, 21 N. W. Rep. 248; fire insurance money—loss, to whom payable—chattel mortgage, *Coykendall v. Ladd*, 21 N. W. Rep. 788; chattel mortgage—suit by third party, *Daggett v. McClintock*, 22 N. W. Rep. 105; assignment of note—agreement to pay excess of proceeds to another creditor, *Witter v. Little*, 23 N. W. Rep. 909; service of supplementary complaint, *Tucker v. Vaughan*, 23 N. W. Rep. 846; property coming into garnishee's hands after service, *Nash v. Gale*, 2 Minn. 810, (Gil. 235); garnishee's liability on promissory note, *Cole v. Sater*, 5 Minn. 468, (Gil. 378); service on firm, *Hinkley v. St. Anthony Falls Water-power Co.*, 9 Minn. 55, (Gil. 44); property cannot be taken until after judgment against, *Langdon v. Thompson*, 25 Minn. 509; assignment of fund before filing affidavit, *Black v. Brisbin*, 3 Minn. 360, (Gil. 253); state railroad bonds, *Banning v. Sibley*, 3 Minn. 389, (Gil. 282); *Kidder v. Sibley*, 3 Minn. 406, (Gil. 300); indebtedness must be absolute, *Gies v. Bechtner*, 12 Minn. 379, (Gil. 188); earnings of railroad taken possession of by trustees, *De Graff v. Thompson*, 24 Minn. 452; order for judgment against garnishee is not appealable, *Croft v. Miller*, 26 Minn. 817; S. C. 4 N. W. Rep. 45; right of redemption of mortgagor may be reached by garnishment until sale or foreclosure, *Becker v. Dunham*, 27 Minn. 82; S. C. 6 N. W. Rep. 406; when claimant is treated by court and parties as party to end of proceedings, it is too late then to object to not being made such by special order, *Williams v. Pomeroy*, 27 Minn. 85; S. C. 6 N. W. Rep. 445; burden of proof on claimant of property garnished, *North Star Boot & Shoe Co. v. Ladd*, 23 Minn. 881; S. C. 20 N. W. Rep. 834.

AMERICAN BRIDGE CO. v. TIMOTHY MURPHY.

January Term, 1874.

1. **New Trial: Verdict: Weight of Evidence.** Where the verdict of a jury has been rendered upon oral testimony, and the testimony tending to support the verdict would be sufficient therefor if it was not contradicted by other testimony, and the district court has approved the verdict by refusing to set it aside and to grant a new trial, the supreme court will not reverse the judgment of the district court and order a new trial where the only ground therefor is that the verdict is not sustained by sufficient evidence.
2. **Evidence: Receipt.** A receipt for money is only *prima facie* evidence of the truth of the statements therein contained.¹
3. **Payment: Receipt: Estoppel.** Where a debtor pays a portion of his debt, which portion he admits to be due at the time he pays it, but claims that it is all that is due, and that it is the whole of the debt, and the creditor receives the same and signs a receipt in full therefor, but at the same time claims that it is only a portion of the debt, and that the other portion still remains due, *held*, that the creditor is not estopped by his receipt from afterwards suing the debtor and recovering the balance of the debt not yet paid.

Error from Leavenworth district court.

Action by Murphy to recover a balance alleged to be due him on a written contract for the boarding of persons in the employ of the bridge company. The answer set up an accounting, and payment of balance found due on such accounting. The evidence for the *36 plaintiff was the oral testimony of the plaintiff and Preston Kuhn. The evidence for the defendant was the receipt of Murphy, and the oral evidence of Helm, Thorn, and Gates. Murphy's receipt is as follows:

"LEAVENWORTH, April 24, 1872.

"Received of G. Gates, agent for the American Bridge Company, \$134.41, (exclusive of \$53.00 left in Justice GOULD's court, as garnished in case of Gordon & Bro. v. T. J. Murphy, subject to order of said court,) the same being in full for all money due on board of hands with said Murphy.
T. J. MURPHY."

Gates, a witness for the bridge company, testified: "I claimed all that was due the plaintiff was the amount named in the receipt in full, given me by plaintiff. Murphy claimed there was a larger amount due." And Helm, on the same side, testified that the par-

¹Where a person delivers money to the cashier of a bank, for the express purpose of paying a note, and receives from the cashier an ordinary memorandum, or receipt, stating the sum he has deposited, such memorandum or receipt is open to explanation by evidence *akunde*. *Ellicott v. Barnes*, 81 Kan. 170; S. C. 1 Pac. Rep. 767.

Receipts in general are only *prima facie* evidence of payment. *Stout v. Hyatt*, post, *243. See, also, *Watkins v. Parsons*, post, *426.

ties came to his office "to settle," and "the question was discussed as to the amount due Murphy," and "finally Murphy concluded to take the money and give the receipt. After they had looked the matter over, I read and explained the receipt to him." The jury found in favor of Murphy, and they also returned four special findings as follows: "(1) The defendant did not settle with the plaintiff on or about the twenty-fourth of April, 1872. (2) On the twenty-fourth of April, 1872, Murphy signed and delivered to the defendant a receipt in full for all moneys due, but did so under protest. (3) The receipt was signed and delivered by Murphy to the company after he had consulted with his attorney, and after the attorney had explained to him the effect of the receipt. (4) No settlement found." Judgment on the verdict in favor of Murphy; at February term, 1873.

Stillings & Fenlon, for plaintiff in error.

The weight of the evidence was clearly against the plaintiff below, to such a degree as to make a trial by a jury a mere farce, if the verdict can be upheld. *Prima facie*, at least, the receipt was good against Murphy, and he was bound to overthrow it by sufficient and competent evidence. He admits that he and the agent of the bridge

*37 company were *engaged in settling and accounting at the time of the receipt, but claimed he signed it under protest; but his attorney wrote the receipt for him under his direction. Mr. Kuhn's testimony shows they were at the time making a settlement of disputed accounts, and this is substantially all of the evidence tending to impeach the receipt. On this testimony alone it would be a mockery of common sense to say the receipt should be overthrown; but when taken in connection with the defendant's evidence, it would also be an outrage on justice to permit the verdict to stand. First for the defense is the receipt itself, by the language of which Murphy acknowledged the payment of \$134.41, "*the same being in full for all moneys due on board of hands.*" Next was the testimony of Helm that the parties came to his office to settle; that they looked the matter over; that he read and explained the receipt; that Murphy concluded to take the money and give the receipt. Then Gates, the agent of the company, says the subject had been a matter of talk with him and Murphy for several days; that he (Gates) claimed that all that was due was the amount expressed in the receipt; that the receipt was read to Murphy, and the money paid him. And on this evidence the jury, the palladium of our liberties, found that no settlement had been made! If juries can be permitted to perpetrate such diabolical outrages on common sense, and steal one man's money to give to another, by the brute power of their verdict, it is about time our constitution was changed, so that this beneficent institution transmitted to us by King John, of holy memory, might depart in peace like the other relics of barbarism.

The second and third special findings are inconsistent with the general verdict. Can a man, upon a disputed account, after days of

discussion in regard thereto, deliberately give his receipt "in full thereof," after being fully aware of the contents and effect, without fraud or deceit on the part of him securing it, still be entitled to recover an additional amount on the claim so receipted in full?

*38 Chit. Cont. 834, *note; Bonnell v. Chamberlin, 26 Conn. 487; Fuller v. Crittenden, 9 Conn. 401; Tucker v. Baldwin, 13 Conn. 136; Hurd v. Blackman, 19 Conn. 177; Steph. N. P. 1616.

Pendery & Goddard and J. W. Taylor, for defendant in error.

As we understand it, the plaintiff in error claims that, before and at the time of the execution of said receipt, there was an unsettled and disputed account existing between the parties; that the parties finally settled said account by plaintiff in error paying to defendant in error the sum mentioned in said receipt, and the defendant in error accepting the same in full, and executing the receipt. In other words, that plaintiff in error claimed that there was due to defendant in error on said account the sum mentioned in the receipt; that defendant in error claimed that there was several hundred dollars more than that sum due to him, and this difference was compromised by the payment of the amount mentioned in the receipt, and the execution of the receipt; that there being a dispute as to the amount due, it furnished a valuable consideration for said compromise; and that defendant in error, by making the compromise and executing the receipt, barred himself from recovering on said account. There is no controversy as to the fact that had said receipt not been given the defendant in error would have been entitled to recover the amount found by the jury. We submit that the receipt was not conclusive; that it was simply a receipt for so much money, and is only *prima facie* evidence of anything; and that Murphy was not bound thereby, but could show by parol evidence that no settlement had been made. 2 Pars. Cont. (6th Ed.) 555; Dutton v. Tilden, 13 Pa. St. 46; Bell v. Bell, 12 Pa. St. 235; Kirkpatrick v. Smith, 10 Humph. 188; Cole v. Taylor, 22 N. J. Law, 59; Ryan v. Ward, 48 N. Y. 204. As between the parties a receipt is always open to explanation. Frink v. Bolton, 15 Ill. 343; 32 Ill. 558; Elder v. Hood, 38 Ill. 533.

The plaintiff in error gave nothing more than it admitted to be justly due. The defendant in error received nothing more than was admitted to be his due. There was no controversy or dispute as to that fact,—the plaintiff in error simply paid what it admitted

*39 to be a just claim; the defendant in error executed his receipt for the same. What consideration then passed from plaintiff in error to defendant in error to compensate defendant in error for giving up anything, or compromising anything? Will the plaintiff say it would not have paid the defendant the amount mentioned in the receipt had he not agreed to accept it in full? Such a position cannot be maintained. It admitted that it owed that amount to the defendant; and, irrespective of the question whether it owed any larger amount or not, it was bound to pay that amount, and by

paying it it only performed its duty. *Bright v. Coffman*, 15 Ind. 371; *Wheeler v. Wheeler*, 11 Vt. 66. A receipt in full of a sum less than the amount due, in no way discharges the right to recover the balance. *Dusenbury v. Dusenbury*, 48 N. Y. 205; *Masterton v. Beers*, 31 N. Y. 409; *Curtiss v. Martin*, 20 Ill. 558.

But, for the sake of argument, should we admit that Murphy would be barred by the receipt, if the same was executed by him of his own free will at a time when he possessed the capacity to make the same, and without any fraud practiced by plaintiff in error, yet the same would be liable to be set aside on the ground of fraud, or on the ground of the lack of capacity on the part of defendant in error to contract at time of executing the same. There was evidence in the case below that Murphy, at the time he executed said receipt, was drunk, and that Gates, the agent of the plaintiff in error, knew that he had been drinking; and the question was fairly submitted to the jury, whether at the time he signed the receipt he knew what he was doing, and whether there was fraud practiced by the agent for the plaintiff in obtaining the receipt. Where the party, when he enters into a contract, is in such a state of drunkenness as not to know what he is doing, the contract is void altogether. 1 Pars. Cont. (6th Ed.) 383, note *b*; *Gore v. Gibson*, 13 Mees. & W. 623; *Pitt v. Smith*, 3 Camp. 33. And a person who takes an obligation from another under such circumstances is guilty of actual fraud. *Mitchell v. Kingman*, 5 Pick. 431; *Gerrish v. Towne*, 3 Gray, 90; *Grant v. Thompson*, 4 Conn. 203; *Lang v. Whidden*, 2 N. H. 435.

Every legal presumption obtains to support the verdict of a jury, and it is incumbent on the plaintiff to show affirmatively that
 *40 there was error, before this court will disturb the *verdict. If there was evidence before the jury tending to prove every fact necessary to be found by the jury, in order to support the verdict, this court will not reverse the judgment below. The instructions of the court not being presented, it will be presumed that the law was correctly given by the district court.

There having been evidence before the jury on the trial below tending to prove the incapacity of defendant in error to contract at the time of executing said receipt, on account of drunkenness, and tending to show fraud on part of defendant in error in obtaining said receipt, and it not appearing to the contrary, it will be presumed that the jury found every fact necessary to support their verdict.

VALENTINE, J. Where the verdict of a jury has been rendered upon oral testimony, and the testimony tending to support the verdict would be sufficient therefor if it were not contradicted by other testimony, and the district court has approved the verdict by refusing to set it aside and to grant a new trial, this court will not reverse the judgment of the district court and order a new trial to be granted where the only ground therefor is that the verdict is not sustained

by sufficient evidence. This principle has already been decided in *Luke v. Johnnycake*, 9 Kan. *511, *519; *Kansas Pac. Ry. Co. v. Montelle*, 10 Kan. *126, *127; *Davenport v. Elliott*, Id. *587; *St. Joseph & D. C. R. Co. v. Chase*, 11 Kan. *47; *Brewster v. Hall*, 12 Kan. *161; *Atchison, T. & S. F. R. Co. v. Stanford*, Id. *354.

2. A receipt for money is only *prima facie* evidence of the truth of the statements therein contained.

3. Where a debtor pays a portion of his debt, which portion he admits to be due at the time he pays it, but claims that it is all that is due, and that it is the whole of the debt, and the creditor receives the same and signs a receipt in full therefor, but at the same time claims that it is only a portion of the debt, and that the other portion still remains due, the creditor is not estopped by his receipt from afterwards suing the debtor and recovering the balance of the debt not yet paid.

In support of these last two propositions we would refer to the cases of *Ryan v. Ward*, 48 N. Y. 204; *Bright v. Coffman*, 15 Ind. 371; *Wheeler v. Wheeler*, 11 Vt. 60, 66; *Curtiss v. Martin*, 20 Ill. 558, 577; and other cases cited in briefs of counsel.

The judgment of the court below is affirmed.

KINGMAN, C. J., concurring; BREWER, J., dissenting.

JOHN T. BRADY and others v. ISAAC SWEETLAND and others.

January Term, 1874.

Officers: De Facto: School-District. The office of school-district treasurer was in dispute between two persons, one of whom was in possession and the other not, but both claimed to be legally entitled to the office. The claimant not in possession commenced an action of *quo warranto* against the other to obtain possession of the office. The clerk of said school-district, and the disputant in office, who was really treasurer *de facto*, if not treasurer *de jure*, hired a school teacher. The director and the other claimant hired another teacher. These three persons last mentioned took possession of the district school-house, and prevented the other three from occupying, using, or controlling the same. *Held*, that injunction will lie in favor of the clerk and the treasurer *de facto* to restrain the director, and the other two persons acting with him, from further interfering during the pendency of said action of *quo warranto* with the right of said clerk and treasurer *de facto* (they being a majority of the school-district board, and acting for the board) to take charge of and use and control said school-house.¹

¹When the power is vested in a district board of a school-district, composed of three, to contract with and hire a teacher for and in the name of the district, and a written contract is signed by two members of the board in the absence of each other, without consultation with each other, or with the other member, and

Error from Nemaha district court.

Injunction brought by John T. Brady, as treasurer, and Nathaniel Slosson, as clerk, of school-district No. 51 of *Nemaha county, against Isaac Sweetland, as director of said school-district No. 51, and Lawrence R. Wheeler and D. L. Anderson. The district judge granted a temporary injunction, and afterwards, September 13, 1873, on motion, dissolved such injunction.

Nathan Price, for plaintiffs in error.

The petition states a good cause for an injunction. The custody of the school-house is given to the district board, (Gen. St. c. 92, § 43;) and said board are given the right to contract with and hire qualified teachers, (Id. § 45.) When a power or right is vested in a number of persons by law, that power may be exercised by a majority of them, unless there is some statute restrictive of such power. The petition in this case shows that a majority of the school board had exercised the power of hiring a qualified teacher, and that the director and defendant Wheeler, who was not in office at all, but was endeavoring to get into the office of treasurer, attempted to usurp the powers of the board, and with the defendant Anderson took possession of the school-house, and run a school. Certainly, on the facts shown, they are trespassers, and an injunction will always be granted to restrain a trespass when the case is of that nature that full compensation cannot be had in damages. Wil. Eq. Jur. 381, 382, 405; Daniell, Ch. 1639, 1650, 1653; 2 Story, Eq. Jur. § 927; St. Joseph & D. R. Co. v. Dryden, 11 Kan. *186.

C. W. Johnson, for defendants.

The plaintiffs in their petition do not show any cause of action in this: that they do not show the contract with the Philbrooks (teacher) was in conformity to law. Gen. St. 921, § 27.

An action of *quo warranto* was brought by Wheeler, as plaintiff, against Brady, as defendant, and is now pending. *There is no law authorizing an injunction in favor of a defendant against a plaintiff during pendency of suit. It is the defendant who is enjoined, not a plaintiff. Injunction is a provisional remedy, except when it is the final relief demanded, and a defendant has no right to invoke it. In a case where injunction is the only relief sought, and is the final order to be obtained, it cannot be granted *in vacation*, because that is to force a trial of the merits of the action in vacation. The validity of the school contract could not be tried at chambers, where the district was no party; neither could the right of office between Wheeler and Brady, though that was what was sought; that is, to try the validity of a contract and an election in a collateral proceeding at chambers. The injunction was granted

without any meeting of the district board, upon the application of a party seeking to be employed as a teacher, such contract is not binding upon the school-district. Dassler, Comp. Laws 1885, p. 826, c. 56; Aikman v. School-district, 27 Kan. 129.

without notice, in violation of section 241 of the Code. Wheeler set out his cause of action in a petition, and Brady seeks to enjoin Wheeler without himself answering Wheeler's petition.

What interest had these plaintiffs in what, at most, was a trespass to the real estate of the school-district? There is no law giving the treasurer and clerk a right to sue the director for possession of the school-house. The defendant Anderson was in possession, teaching a school. Instead of suing him in forcible entry and detainer, plaintiffs seek to oust him by injunction, and close the public school, —a result they accomplished by injunction, and continued by appeal, —a proceeding more likely to injure, than plaintiffs are to be injured. Hil. Inj. § 13.

VALENTINE, J. The plaintiffs in error, who were plaintiffs below, filed a petition in the district court, asking for a certain injunction to restrain the defendants from committing certain acts which the plaintiffs alleged the defendants were then committing and about to commit. The district judge granted a temporary injunction to restrain the defendants from committing said acts, but afterwards, on motion of the defendants, dissolved the same, solely on the *44 ground that the *petition did not state facts sufficient to constitute a cause of action. No evidence was used on the hearing of said motion to dissolve the injunction except the petition, which was sworn to, and made an affidavit as well as a petition. For the purposes, then, of this case we must consider the facts stated in said petition as true; and upon such consideration, did the judge of the court below err? The material facts stated in said petition are, substantially, as follows: The plaintiff John T. Brady was the treasurer of school-district No. 51 of Nemaha county; the plaintiff Nathaniel Slosson was the clerk of said district; and the defendant Isaac Sweetland was the director of the same. These three persons, by virtue of their offices, constituted the school-district board of said district. The defendant Lawrence R. Wheeler, however, claimed to be entitled to the office of treasurer of said school-district, and had previously instituted an action in the nature of *quo warranto* to have his rights determined, and to obtain possession of said office. This action was still pending. During the time this office was in dispute the plaintiffs, Brady and Slosson, hired teachers for said school-district. About the same time the defendants Sweetland and Wheeler also hired a teacher for said school-district, to-wit, the defendant D. L. Anderson. The defendants then took possession of the school-house of the district, and refused to permit the plaintiffs to have charge or control thereof, and refused to permit the teachers hired by the plaintiffs to teach therein. The injunction prayed for is to restrain the defendants from further interfering with the plaintiff's management and control of said school-house.

We think the injunction ought to be granted. Admitting, for the sake of the argument, that Wheeler is legally entitled to the said office of treasurer, and still, as the office is occupied by another person who claims to be holding it rightfully and legally, Wheeler has no right to interfere therewith until some court, in a proper proceeding therefor, determines in his favor. He cannot, while he is merely

claiming the office, employ teachers, and take charge and control of the property of the district, nor can he even unite with one of the members of the school board for such a purpose. He has no right to attempt to take forcible possession of the office. He may prosecute his action of *quo warranto* to a final determination, and then, if it be determined in his favor, the court will put him in possession of the office. Gen. St. 760; Code §§ 656, 657. But if the action should be determined adversely to him, he will, of course, never get possession of the office. And pending the litigation concerning Wheeler's or Brady's right to hold said office, Brady, as treasurer *de facto*, claiming to hold the office as treasurer *de jure*, will have the right to hold and perform all the functions thereof unmolested by Wheeler or any one else. State v. Durkee, 12 Kan. *308. The power to hire teachers, and to take charge of and control the property of the school-district, belongs exclusively to the school-district board, (Gen. St. 925;) and any two members of the board may act for the board, (Gen. St. 999, § 1, subd. 4.)

The judgment of the court below must be reversed, and cause remanded for further proceedings.

(All the justices concurring.)

THOMAS E. TUTT and others v. P. S. FERGUSON and others.

January Term, 1874.

1. Judgment: Action to Enjoin: Laches and Negligence: Defense.

Where a party prosecutes an action to perpetually enjoin the collection of a judgment previously rendered against him, on the ground that at the time of the rendition of said judgment he had a good defense to the action in which said judgment was rendered, of which defense he was at the time ignorant; and where neither the petition, the evidence, nor the findings of the court below in the action to enjoin said judgment tend to show any diligence on the part of said party in ascertaining said defense so as to set it up in the action in which said judgment was rendered; but, on the contrary, where the record shows that said defense arose nearly four years before said judgment was rendered, and over six years before said action to enjoin said judgment was commenced; and where all the circumstances of the case tend to show that said party should have known of said defense when said judgment was rendered,

*46

and that he was guilty of gross negligence in not knowing it,—the action to perpetually enjoin the collection of said judgment cannot be maintained.¹

- 2 ———: **Judicial Sales: Irregularities: Action by Sheriff.** A sheriff sold certain real estate on execution. Afterwards the sale was confirmed. Afterwards the sheriff refused to pay to certain persons their share of the proceeds of the sale. These persons then sued the sheriff and his sureties, and recovered a judgment against them for the amount due to said persons. Afterwards the sale was ordered to be set aside by the supreme court on the ground of an apparent irregularity in the notice of sale. The notice was in fact regular, but it appeared to be irregular on account of a false return made by the sheriff. The said parties who obtained said judgment were not parties to the proceeding in the supreme court. The question of whether the sale shall be set aside is now pending upon additional evidence in the district court. *Held*, in an action brought by the sheriff and his sureties and others to perpetually enjoin the collection of said judgment, that neither the said irregularity in said sheriff's return, nor the order of the supreme court concerning said sheriff's sale, nor both together, are sufficient to authorize the plaintiffs to maintain said action.

Error from Wyandotte district court.

Action brought by Pembroke S. Ferguson, James A. Cruise, John E. Zeitz, Isaiah Walker, Moses M. Brodwell, and Allison B. Bartlett, as plaintiffs, against Thomas E. Tutt, Dent G. Tutt, John F. Baker, Wilkins F. Wheatley, Thomas F. Thatcher, and Edmund Terry, as defendants, to enjoin the Tutts and Baker from collecting a judgment recovered by them against said Ferguson and his sureties on his official bond as sheriff of Wyandotte county, at the June term, 1869, for \$2,350 and costs. Said judgment was rendered against Ferguson and his sureties on the ground that he had sold certain real estate in Wyandotte county, on an execution issued on a judgment rendered October 10, 1865, in favor of Edmund Terry against Wheatley & Thatcher, which sale had been confirmed by the court, and then refused to pay the money in accordance with the decree and order of the court. At the June term, 1872, the district court decreed a perpetual injunction.

- *47 *D. B. Hadley*, for plaintiffs in error.

Can equity interfere to enjoin a judgment at law on the ground that the defendants had neglected to avail themselves of a defense which existed at the time of the trial? It seems well settled that it cannot. *Amer. Ch. Dig.* 642; *Dodge v. Strong*, 2 Johns. Ch. 230; *Clute v. Potter*, 37 Barb. 199; *Truly v. Wanzer*, 5 How. 141; *Creath's Adm'r v. Sims*, Id. 192.

Has the supreme court set aside the sale made by Sheriff Ferguson, July 14, 1866, and the confirmation thereunder? This question is determined in the negative by a simple examination of the facts.

¹ Parties to actions in courts of justice should act with the greatest vigilance in protecting their rights, otherwise they may forever lose the opportunity of having their rights considered in a court of justice. See *Noble v. Butler*, 25 Kan. 650.

Who were the parties to the sale, and the judgment and decree of the court in which the sale was made? The plaintiffs in that action were Michael Dively, Edward C. McCarty, and Edmund Terry, and the defendants were Wilkins T. Wheatley, Thomas F. Thatcher, Moses M. Brodwell, the Great Republic Fire Insurance Company, of St. Louis, Thomas E. Tutt, Dent G. Tutt, John F. Baker, John M. Chrysler, Gabriella F. Wheatley, Mary Thatcher, and Isabella Chrysler. Who were the parties in the case taken to the supreme court on the motion which was overruled at the June term of the Wyandotte district court? Edmund Terry was named as plaintiff, and Wheatley and Thatcher alone as defendants. By reference to the case in 6 Kan. 427, it will be seen that the judgment of the district court was reversed on two grounds: (1) The sale was made on a day not named in the notice published by the sheriff; (2) the lot sold was not the one described in the notice. But the record here shows that these errors in the sheriff's notice did not exist. Before the district court took any action under the mandate, further than to file it, under an order of court the Tutts and Baker gave said Dively, McCarty, and Terry, and all the other defendants, notice that they would, on the first day of March term, 1871, file evidence of a correct publication of said sheriff's sale. The proof was filed at the same *48 term, showing that the publication on which the *sale was made was correct, but by mistake the sheriff had attached to his return an erroneous publication. Clearly, with all this evidence before the court, it would not sustain the motion to set aside the sheriff's sale. The cause set out in the motion for setting aside the sale did not exist. It would have been overruled whenever called up and the evidence presented to the court. The sale and confirmation, then, stand to-day as valid and effective as before the decision in the supreme court. That decision was made upon an untrue statement by the parties presenting the case. Again, the Tutts and Baker were not parties to the proceedings in the supreme court, and had no opportunity of being heard. It is submitted that it was a most palpable error for the court to find that the supreme court had set aside the sheriff's sale.

James F. Mister, also for plaintiffs in error.

The principle of *res adjudicata* is invoked in behalf of the judgment obtained by Thomas E. Tutt and others v. P. S. Ferguson and others, and affirmed by this court, and is certainly decisive as to Ferguson, Cruise, Zeitz, and Walker, which settles the case, as the other parties have no interest whatever in the controversy. When any tribunal has jurisdiction of the subject-matter of, and the parties to, any controversy, and renders a judgment thereon, such judgment is conclusive between the parties. *Anthony v. Halderman*, 7 Kan. *50; *Norton v. Graham*, 7 Kan. *166.

After a sheriff's sale has been confirmed, and the sheriff and his sureties sued for the purchase money, they cannot raise any question

of irregularity in the confirmation of the sale, or in any of the prior proceedings. *Wheatley v. Terry*, 6 Kan. *427; *Ferguson v. Tutt*, 8 Kan. *370.

Judgments at law will not be opened or set aside except for fraud, or to relieve grievous hardships not otherwise remediable. They will not be opened to favor a payment which the complainant neglected to establish at a trial at law. • *Schlatter v. Hunt*, 1 Mo. 654; *Sumner v. Whitley*, Id. 708; *Ford v. Circuit Court*, 2 Mo. 145; *Matson v. Field*, 10 Mo. 100.

*49 **Nelson Cobb*, for defendants in error.

The right of Tutt & Co. to the balance of the proceeds of the sale under the execution on the foreclosure suit obviously depends upon their ownership of the equity of redemption in the premises sold at the time of the decree. This was the position in which they stood. They had purchased under their attachment sale, and the confirmation of their purchase was not set aside until long afterwards. This was the position set up by them in their answer in that suit. They claimed to be owners of the property under their purchase at the sale under the attachment suit. They now claim that the decree requiring the balance of the purchase money to be paid to them was made in their favor as attaching or judgment creditors. This is obviously an after-thought, inconsistent with their answer in the foreclosure suit, and inconsistent with their subsequent claims to the possession. It is also inconsistent with a proper decree in the foreclosure suit. If they had then appeared as attaching or judgment creditors only, the court would have ordered their debt to be paid out of the money remaining from the proceeds of the sale, after satisfying the mortgage, if sufficient, not that the whole of the money so remaining should be paid to them. *Ball v. Ryers*, 3 Caines, 84; *Van Nest v. Yeomans*, 1 Wend. 87.

It is only by regarding Tutt & Co. as owners of the equity of redemption that the decree in the foreclosure suit can be sustained; and when a decree or judgment is susceptible of more than one explanation, that one will be adopted which sustains the judgment. Since that decree, however, their standing as owners of the equity of redemption has been taken away by the action of this court in setting aside the sale and confirmation in the attachment suit under which they purchased. They stand, then, in the attitude of attempting to enforce a judgment against the sheriff for money charged to have been collected by him, after their right to that money is gone.

*50 The right of Tutt & Co. to recover against the sheriff *and his sureties depends upon the validity of the execution under which he acted, and his acts and return to such execution. While it is true that a sheriff cannot defend himself from paying money collected on the ground of irregularity in the prior proceedings, these proceedings

being sufficient to protect him in executing the writ, yet it is equally true that if he has collected money on void process, he may defend himself from such payment; otherwise he would be liable to pay the money to the person who claimed it under the process without right, and to refund the money to him from whom it had been acquired.

The execution in the foreclosure suit, issued at the instance of Tutt & Co., and under which the sale was made to Bartlett, was void, and conferred no title on the purchaser, and imposed no duty of collecting the money upon the sheriff. Tutt & Co. being defendants, and owners of the equity of redemption in the premises, had no right to sue out an execution to sell their own land, and the order of sale, so sued out at their own instance, was void. 1 Freem. Ch. 392. The evidence clearly shows that the judgment of foreclosure had been fully paid before this execution was issued. When a judgment has been satisfied, either by payment or by operation of law, no further execution can be issued on it, and such execution, if issued, will not give the officer holding it any right to levy upon, hold, or sell property under it, (Reed v. Pruyn, 7 Johns. 427; Hammatt v. Wyman, 9 Mass. 137; Cliver v. Applegate, 5 N. J. Law, 479;) and a sale under such an execution passes no title, (Woodcock v. Bennet, 1 Cow. 711; Swan v. Saddlemire, 8 Wend. 676; Jackson v. Anderson, 4 Wend. 474; Jackson v. Bowen, 7 Cow. 21.) A court of equity will interfere by injunction to stop proceedings under an execution on a judgment that has been paid or otherwise satisfied, and prevent the collection of such judgment. Parish's Heirs v. Ferris, 6 Ohio, 430; Brinkerhoff v. Lansing, 4 Johns. Ch. 69.

The sale under the foreclosure suit made to Bartlett has been set aside on petition in error to this court, and all rights acquired by such sale, either by the purchaser Bartlett, or by those who are to receive the purchase money, fall with it. 6 Kan. *427. The defendants below in this case strongly insist that this sale has not been set aside, because they, Tutt & Co., were not parties to the motion made for that purpose, and the finding of the court that it was so set aside constitutes the principal error assigned in this court. It is a sufficient reply to this objection to say that the motion to set aside the sale follows, in this respect, the writ under which the sale was made. All the parties named in the execution are parties to the motion to set aside the proceedings under it. If the execution is valid, not naming all the parties to the judgment on which it is issued, the motion is valid also; and if the motion is defective, the execution is also, but this defect would be fatal to any rights of the defendants Tutt & Co. under it.

But since the mandate of this court has been filed in the district court, reversing the action of the latter court in refusing to set aside the sale to Bartlett, Tutt & Co. have appeared in that court, and filed evidence to sustain the sale. They are therefore, by their own act,

parties to the motion which they claim is still pending in the district court. According to their own showing, the question whether the sale to Bartlett shall stand, is yet pending and undetermined. They clearly have no rights under that sale until it is settled whether it is valid or not. The sale is either good for all purposes or bad for all purposes. It cannot be good enough to compel the sheriff to collect the purchase money, and yet not good enough to be confirmed by the court. It is submitted that the true test of the sheriff's liability is his right to compel Bartlett to pay the amount of his bid. He cannot be required to pay over what he has no legal right to collect.

Can the sheriff compel Bartlett to pay the amount of his bid? Not when the sale to him has been set aside, or while, as defendants below contend, the question whether it shall be or not is yet pending and undetermined; nor after it appears that the judgment on which the execution issued had been fully paid, before the execution was sued out or the sale made. Either of these defenses would be available to Bartlett, if sued by the sheriff for the amount of his bid; *52 and they are *equally available to the sheriff in an action on his bond for not collecting it.

The sheriff and his sureties could not avail themselves of the defense that their judgment of foreclosure had been paid before execution, and the execution was therefore a nullity, when sued on their bond, for the reason that neither they nor their attorneys knew the fact that such payment had been made. Still less could the sheriff or his sureties have set up the fact that the sale to Bartlett had been set aside. The suit against them was instituted in February, 1868, and the decision of this court was rendered at the July term, 1870, and the mandate was filed in the district court, March 21, 1871. Under these circumstances, the sheriff and his sureties have the right to claim the interference of a court of equity. The general principle is that where a judgment has been recovered in an action at law, and defendant has a good defense, which it was impossible for him to interpose at the trial, as when the circumstances which create the defense have arisen since the trial, or where the facts constituting such defense were unknown to the defendant at the time of the trial, and could not, with reasonable diligence, be ascertained, a court of equity will interpose by injunction, and prevent the plaintiff from collecting or proceeding with his judgment. *Gainsborough v. Gifford*, 2 P. Wms. 424; *Jarvis v. Chandler*, 1 T. & R., 320; *Farquharson v. Pitcher*, 2 Russell, 81; *Mosby v. Leeds*, 3 Call, 439; *Nomaque v. People*, 1 Breese, 147; *Union Bank v. Geary*, 5 Pet. 99.

VALENTINE, J. Portions of this litigation have been brought to this court at least six times. Four cases have been reported, to-wit: *Wheatley v. Tutt*, 4 Kan. *195; *Wheatley v. Tutt*, Id. *240; *Wheatley v. Terry*, 6 Kan. *427; and *Ferguson v. Tutt*, 8 Kan. *378. One case was dismissed, to-wit, *Bartlett v. Wheatley*, and this is the sixth

case. Other cases were litigated in the court below which have not been brought to this court. In this opinion we shall mention *53 such cases only as have some bearing upon *the case now before us. In the investigation of this case it will be necessary to examine more particularly the rights of said Thomas E. Tutt, Dent G. Tutt, and John F. Baker, than those of most of the others, as they are the real parties in interest in asking to have the judgment of the court below in this case reversed.

The record upon which this reversal is asked shows as follows: On September 9, 1861, an action was commenced by Thomas E. Tutt, Dent G. Tutt, and John F. Baker against Wilkins T. Wheatley and Thomas F. Thatcher. An attachment was issued therein, and levied on lot 5, in block 6, in the city of Wyandotte. Judgment was rendered in the case on April 10, 1863, in favor of Tutts and Baker, and against Wheatley & Thatcher, for \$1,483 and costs, and said lot was ordered to be sold. Afterwards the undivided half of said lot was sold at sheriff's sale to Tutts and Baker for the sum of \$1,667, and the sale was confirmed October 5, 1863. Tutts and Baker took a sheriff's deed for said undivided half of said lot, and the sheriff returned the writ for the sale of said property satisfied. Afterwards the confirmation of said sale was reversed by the supreme court, (*Wheatley v. Tutt*, 4 Kan. *195,) and the mandate from the supreme court was filed in the district court at the *January term*, (so the record shows, but *quere*,) 1867. Nothing seems to have been done with said case, or concerning it, since. Hence we suppose Tutts and Baker have lost their judgment lien, (Code 1859, § 434; Code 1868, § 445,) and have also lost their interest in the lot, (Code 1859, § 458; Code 1868, § 467.)

On May 20, 1865, another suit was commenced in which Michael Dively, Edward McCarty, and Edmund Terry were plaintiffs, and Wilkins T. Wheatley, Thomas F. Thatcher, Moses M. Brodwell, the Great Republic Insurance Company, Thomas E. Tutt, Dent G. Tutt, John F. Baker, John M. Chrysler, Gabriella H. Wheatley, Mary Thatcher, and Isabella Chrysler were defendants. This action was on a note given

by Wheatley & Thatcher to Brodwell, and indorsed by Brodwell *54 (waiving presentment, notice, etc.,) to Terry. The *action was also to foreclose a deed of trust given by Wheatley and wife (to-wit, Gabriella Wheatley) to Dively & McCarty, trustees, on the undivided half of said lot 5, to secure the payment of said note. Hence, Terry was the real plaintiff, and Dively & McCarty were merely nominal plaintiffs. The defendants Tutt & Tutt and Baker seem to have set up their claim against said Wheatley & Thatcher, and their interest in said lot 5. Judgment was rendered October 10, 1865, in favor of Terry, and against Wheatley & Thatcher, for \$2,317.90, and costs. The court found that Terry's lien on said lot was prior to that of Tutts and Baker, and ordered that if said judgment was not paid in ten days said undivided half of said lot should

be sold to pay, first, the costs, next, Terry's judgment of \$2,317.90, and interest, and then that the remainder should be paid to Tutts and Baker, and that all the parties' interests in said undivided half of said lot should be forever afterwards barred and foreclosed. It seems from the record that on October 20, 1865, (precisely ten days after the judgment was rendered,) Brodwell paid to Terry, in New York city, the precise amount of Terry's judgment, (less costs and interest,) to-wit, \$2,317.90. Yet, strange as it may seem, nobody knew of this payment, except possibly Brodwell and Terry, until about six years afterwards. After this supposed payment, Terry's counsel, to-wit, Bartlett, filed a *præcipe* in the district court for an execution on said judgment. The clerk of the district court, said James A. Cruise, issued it; and the sheriff of said county, said P. S. Ferguson, sold the said property under it to said M. M. Brodwell, the person who, it is said, paid said judgment. But Brodwell failed, however, to make payment on said sale, and the sheriff therefore returned no sale. Upon this execution, however, the sheriff collected from Chrysler about \$125, which was sufficient to pay all the costs. An *alias* execution was then, on May 24, 1866, issued by said clerk (on the *præcipe* of Tutts and Baker) to said sheriff, and the sheriff then sold said property, (the undivided half of said lot,) on *55 July 14, 1866, to said Bartlett, for \$4,500. The sheriff returned that said amount of \$4,500 was paid by Bartlett, although in fact it never was paid. The sale was confirmed on November 1, 1866. No sheriff's deed was ever executed to Bartlett under this sale, although it seems that Bartlett afterwards claimed to own the property, and afterwards, on January 21, 1868, sold the property to one John Arthur for \$4,500. Arthur still claims and has possession of the property. Bartlett now claims "that he did have an interest in said property derived from another source, in no way connected with this matter."

On June 16, 1869, counsel for Wheatley & Thatcher, to-wit, J. P. Usher, moved the district court to set aside said sale, and to set aside said confirmation, on the ground of irregularities, to-wit, "because said sale was not duly advertised, nor was made in conformity to law." No notice of this motion was given to any one except Bartlett and Ferguson, and no one else appeared on the hearing of the motion. There are some mistakes in this motion in the title of the case, in the number of the case, etc.; but still we are inclined to think it was sufficient as to Bartlett and Ferguson, who voluntarily appeared to answer it, and would perhaps have been sufficient as to any one if notice had been given. The motion was overruled at the June term, 1869, of the district court.

On July 8, 1869, Wheatley & Thatcher alone proceeded by petition in error in the supreme court against said Terry alone for the purpose of reversing the said rulings of the district court. And at the July term, 1870, the supreme court reversed said rulings of the dis-

trict court. *Wheatley v. Terry*, 6 Kan. *427. The mandate from the supreme court ordering the reversal was filed in the district court on March 24, 1871. Counsel for Terry, J. P. Usher, (so the record shows, though probably it should have said counsel for Wheatley & Thatcher,) moved the district court to allow said mandate to be filed among the papers of the case, and to set aside the order confirming said sale in accordance with said mandate. The district court, however, never

*56 took any action upon the motion or the mandate except to order the *mandate to be filed. Previously, however, to-wit, on

March 6, 1871, counsel for Tutts and Baker filed a motion in the district court "for leave to file additional evidence of the publication of the advertisement of the time and place of" said sheriff's sale, etc.; and on the said twenty-fourth of March, 1871, said motion was sustained. Additional evidence was then introduced showing that the sale was regularly made. The notice was all regular, showing that "lot No. 5" would be sold on the fourteenth of July, 1866, and was published regularly for five weeks before the sale, while the notice appended to the sheriff's return, and brought to the supreme court, was an irregular notice that had been previously published for two weeks only, and then discontinued, when the said regular notice was inserted in the newspaper in its place. This irregular notice stated that "lot No. 2" would be sold on June 30, 1866. It should not have been annexed to the sheriff's return, nor should it have been used in the case; and if Tutts and Baker had received any notice of any motion, or any proceeding in any court to set aside said sheriff's sale, they would probably have had said irregular notice stricken out, and the regular one inserted in its place; or if the sheriff had done his duty in the first instance, and inserted the regular notice instead of the irregular one, no such motion or proceeding would have been instituted; or even after said motion was made, if the sheriff, instead of making a voluntary appearance to the motion as he did, and waiving all objections thereto, and consenting that it should be heard *instantly*, had asked the court to allow him to amend his return in accordance with the facts, said sale would not have been ordered to be set aside by the supreme court, as it was, or by any other court; for the district court would have allowed the sheriff to make such amendment, and then the return would have shown the sale, the notice, etc., to have been regular, and the supreme court would have sustained it. It now seems that Terry and his counsel, (Bartlett and

Usher,) and the purchaser, Bartlett, as well as Wheatley & *57 Thatcher, the principal defendants in that action, all wanted the sale to be set aside. The money for the payment of costs, officers' fees, etc., had already been collected from Chrysler without any sale of said lot. Hence the officers, as well as others entitled to costs, had but very little interest in the matter. This leaves Tutts and Baker as being about the only persons who were particularly desirous that said sale should not be set aside, and yet no notice was

ever given to them of any proceeding in either the district court or the supreme court instituted for the purpose of having said sale set aside or vacated. It is a general rule of equity (and the case at bar is an equity proceeding) that he who seeks equity must do equity. Good faith must be practiced as well by the person who seeks equity as by the person from whom equity is sought.

On February 7, 1868, Thomas E. Tutt, Dent G. Tutt, and John F. Baker commenced an action against P. S. Ferguson, sheriff, and John E. Zeitz, Isaiah Walker, and James A. Cruise, sureties on the official bond of said sheriff, to recover from said sheriff and his sureties the amount which said sheriff collected, or ought to have collected, from Chrysler and Bartlett on the last-mentioned judgment, after deducting the amount it would take to pay the judgment in favor of Terry, and costs. In June, 1869, judgment was rendered in this case in favor of Tutts and Baker, and against Ferguson and his sureties, for \$2,350, and costs. This case was taken to the supreme court by Ferguson and his sureties, and at the July term, 1871, of the supreme court, the judgment of the court below was affirmed. *Ferguson v. Tutt*, 8 Kan. *370. In October, 1871, an execution was issued for the collection of this last-mentioned judgment, and following said execution the following proceedings were had: On December 30, 1871, the present action was commenced by Pembroke S. Ferguson, James A. Cruise, John E. Zeitz, Isaiah Walker, Moses M. Brodwell, and Allison B. Bartlett, as plaintiffs, against Thomas E.

Tutt, Dent G. Tutt, John F. Baker, Wilkins F. Wheatley,
 *58 Thomas F. Thatcher, and Edmund *Terry, as defendants, for the purpose of forever enjoining the collection of the judgment rendered in favor of Tutts and Baker, and against Ferguson and his sureties, on said sheriff's bond; and on June 17, 1872, judgment was rendered in the district court perpetually enjoining the collection of said judgment, as prayed for by the plaintiffs below, (defendants in error in this court,) Ferguson and the others. This judgment was rendered upon the ground solely that said sheriff's sale to Bartlett was void, and the reasons given why it was void are as follows: *First*, the Terry judgment had been paid before said sheriff sale was made; *second*, said sheriff sale was ordered to be set aside by the supreme court.

First. The said Terry judgment was paid on October 20, 1865. The judgment on the sheriff's bond, now sought to be perpetually enjoined, was rendered in June, 1869, nearly four years after said payment was made. The judgment in the case at bar perpetually enjoining the last-mentioned judgment was rendered June 17, 1872, nearly seven years after the payment of said Terry judgment, and about three years after the judgment was rendered now sought to be enjoined. Now, if the fact of the payment of said Terry judgment is a good ground for enjoining the said judgment on the sheriff's bond, then, *a fortiori*, it would have been a good ground for not rendering

such judgment on the sheriff's bond. In other words, said payment would have been a good defense to the action in which said judgment on the sheriff's bond was rendered. But it was not interposed in that action. Why not? The principal defendants in the court below, except Ferguson, (who did not testify in the case at bar,) testified that they did not know of said payment at the time said action was pending, nor at any other time since up to about the time of the commencement of this action, which was December 30, 1871, over six years after said payment was made. But why did they not know it? Did they exercise any diligence in hunting up their defenses?

Were they not guilty of the grossest negligence in not knowing *59 of said payment in time *to make it available as a defense to said action? If the sheriff's sale was void because of said payment, then the payment ought to have been known in less than six years. In fact, it ought to have been known before any execution was issued; certainly before the sale or the confirmation of the sale; most certainly before said motion was made to set aside the sale; and beyond all question before said judgment was rendered on the sheriff's bond. The want of such knowledge can only be accounted for on the ground of fraud or gross negligence. Cruise was the clerk of the district court who issued said executions, who made all the entries in the case, and who kept all the papers connected with the case. Ferguson was the sheriff who sold the property, who returned that the money for which the property was sold was paid, and who allowed his said sale to be confirmed. Counsel for defendants in error say that the sheriff did not make return that said money was paid. It is true that he did not make such a return in just so many words. But he did so return by necessary and unavoidable inference or implication. He returned that the property "was then and there duly struck off and sold by me [him] to Allison B. Bartlett for the sum of \$4,500, he being the highest and best bidder therefor." He did not return that the money was not paid. It was his duty to collect the money before he made his return. *Ferguson v. Tutt*, 8 Kan. *370. And in his return he says: "*This writ is returned satisfied.*" See *Armstrong v. Garrow*, 6 Cow. 465, 467. Besides, we do not think it would be good policy to allow an officer, after he has made a return which, if liberally construed, would show that he did his duty, and after other persons have acted upon such construction, to come in for the purpose of evading another duty, and say, by drawing fine distinctions concerning the construction of his own language, that his return does not show that he did his duty, and thereby, by means of his own ambiguous language, escape and evade the just consequences of his own omissions or laches in other respects.

Bartlett, another plaintiff below in the case at bar, made *60 an affidavit on March 9, 1872, which affidavit *was used as evidence in the case at bar on the trial thereof, and in which affidavit he states, among other things, the following: "He

was employed as attorney for the defendants in the suit of Thomas E. Tutt *et al.* v. Wilkins T. Wheatley *et al.*;" "that he has been employed in such capacity on one side or the other in all suits and actions that grew out of the proceedings therein; that he was sole attorney of the plaintiffs in the cause wherein Edmund Terry *et al.* were plaintiffs and Wilkins T. Wheatley *et al.* were defendants; he had the sole control of the note and trust deed declared upon in said last-named suit, and had the entire control of the judgment rendered therein;" "that he has had frequent and continued correspondence with said Edmund Terry, who recovered the judgment upon the note and trust deed aforesaid;" "that this deponent had no knowledge or intimation from said Terry, or from any other person, by letter or otherwise, that the judgment in favor of said Terry in said cause has been paid until since the last term of this court, and a short time before filing the petition in this cause."

The petition in this cause was filed December 30, 1871, and the said judgment was paid October 20, 1865. Brodwell, who paid said judgment to Terry, is still living, and is one of the plaintiffs' below (defendants in error) in this case. It will be remembered that it was nearly a year after said judgment was paid by Brodwell before said sale was made; more than a year before it was confirmed; nearly four years before any attempt was made by any one to set aside either the sale or the confirmation thereof; and more than six years before any attempt was made to avoid the sale on the ground that the judgment had previously been paid. Does this show diligence? Why did not some of the parties inform Terry or Brodwell that there was litigation concerning said sale? Why did not the sheriff (Ferguson) or Terry's counsel (Bartlett) inform Terry of said sale, and inquire of him what they should do with that portion of the proceeds thereof, to-wit, \$2,317.90, and interest, belonging to Terry? Why did not some one of the parties now interested in having said judgment against the sheriff and his sureties enjoined

*61 *exercise some diligence in ascertaining that the Terry judgment was paid? Not one of these questions is answered by the record. Now, as the record does not show that there was any diligence exercised in ascertaining this fact of payment so as to set it up as a defense in the action on the sheriff's bond, we think the judgment rendered on said bond cannot be perpetually enjoined merely because of said payment. Neither the petition in the court below, nor the evidence, nor the findings of the court, show any diligence. In this respect all are defective. None of them show a complete cause of action; and for this reason we think the judgment of the court below ought to be reversed, and a new trial granted. The record shows that a motion for a new trial was made and overruled. In this the court below also erred.

Second. But it is claimed that said judgment should be enjoined because said sheriff's sale was subsequently ordered to be set aside

by the supreme court. There are several answers to this: (1) Said sale was ordered to be set aside for a supposed irregularity, which never in fact existed. It was ordered to be set aside purely for the fault of the sheriff himself in making a false return. And can he now take advantage of his own wrong? Is it possible for an officer to create a good cause of action, (as is claimed he can in this case,) or a good defense, (as is claimed he can to the action on the sheriff's bond,) in favor of himself by his own wrongful acts? We suppose not. (2) Tutts and Baker were not made parties, and had no notice of said motion to set aside said sale, and hence the motion was rightfully overruled in the district court as to them. *Mitchell v. Milhoan*, 11 Kan. *617. Whatever order, however, might have been made on the motion would, under such circumstances, have been immaterial as to them. (3) Tutts and Baker were not made parties to the petition in error in the supreme court, nor had they any notice thereof; and hence said order of reversal could not affect them or their rights. *Ferguson v. Smith*, 10 Kan. *401; *Armstrong v. Durland*, 11 Kan.

*15; *Hodgson v. Billson*, Id. *357. No judgment of reversal *62 *was ever rendered in the supreme court against Tutts and

Baker, nor could there have been any such judgment; for the supreme court has no more power to render a judgment against a party over whom it has no jurisdiction than any other court has. (4) Said sale has never been set aside as against Tutts and Baker. (5) Nor can it now be set aside for a mere irregularity on the part of the sheriff in making his return of the sale, after the sale has been confirmed, after judgment has been rendered against the sheriff and his sureties for refusing to pay over money collected on said sale, so as to benefit the sheriff and his sureties, and to the injury of the parties who obtained such judgment.

The decree of the district court perpetually enjoining the collection of said judgment is reversed, and a new trial awarded.

(All the justices concurring.)

HENRY C. CAMPBELL v. A. H. BLANKE and others.

January Term, 1874.

1. **Continuance: Promise of Witness.** A party who relies upon the promise of a witness residing in a county other than that in which the case is pending to be personally present at the trial, and makes no effort to obtain his deposition, does so at his peril, and, if such witness fails to attend, cannot ordinarily have a continuance on account thereof.¹

¹ Upon facts of case, held that no sufficient diligence was shown to authorize a continuance, see *Tucker v. Garner*, 25 Kan. 454; ought to have been granted, *State v. Hagan*, 23 Kan. 490; affidavit for, how treated, *State v. Roark*, 23 Kan. 147; absent witness, *Knauer v. Morrow*, 28 Kan. 860; costs of, *Hodgin v. Barton*, 28 Kan. 740; discretion of court, *Moon v. Helfer*, 25 Kan. 189; absence of counsel, *Markson v. Ide*, 29 Kan. 700; in justice's court, *McGowen v. Campbell*, 28 Kan. 25.

2. **Pleading: Allegation of Partnership.** A bill of particulars in the name of certain parties plaintiffs as partners, which describes them as partners, and alleges that by their firm name, giving it, they drew a draft upon the defendant, which he accepted, and attaches a copy of the draft with the acceptance indorsed thereon, and also alleges that the defendant has not paid the same, and that it is now due said plaintiffs, is sufficient, even though there be no distinct and formal averment that the plaintiffs were partners.

Error from Labette district court.

Action brought by "August H. Blanke, Henry W. Blanke, August Hausman, and Frederick W. Blanke, copartners, *doing business under the name of Blanke & Bros., plaintiffs, against Henry C. Campbell, defendant." The plaintiffs had judgment at the March term, 1873, of the district court.

Ayres & Fox, for plaintiff in error.

F. A. Bettis, for defendants in error.

BREWER, J. This was an action on a bill of exchange, brought first in a justice's court, and thence taken on appeal to the district court of Labette county, in both of which courts defendants in error obtained judgment for the amount of the bill and interest. Plaintiff in error insists that the district court erred in overruling his application for a continuance on the ground of absent testimony. We think not. The testimony was that of a witness residing in Cherokee county. The deposition of this witness was not taken, nor any effort made to take it. The affidavit alleges that the witness agreed to be present, but failed, as affiant was informed and believed, on account of sickness. This is not a showing of sufficient diligence. The law will not compel the attendance of a witness from an adjoining county. His attendance is purely voluntary, and a party relies upon such voluntary attendance at his peril. At least such is the general rule, and this case presents no exception. *Educational Ass'n v. Hitchcock*, 4 Kan. *36.

Again, the plaintiff in error insists that the bill of particulars did not contain a statement of facts sufficient to constitute a cause of action. The specific objection is that there is no formal allegation of the partnership of the plaintiffs. The bill of particulars is entitled "A. H. B., H. W. B., A. H., and F. W. B., co-partners, doing business under the name of Blanke & Bros., plaintiffs," etc. It commences with a like recitation, and alleges *that the "plaintiffs, by the name of Blanke & Bros., made their certain bill of exchange," etc.; alleges the acceptance of such bill by the defendant, and attaches a copy; and also alleges that defendant has not paid the same, or any part of it, and that the same is now due said plaintiffs. We think this is sufficient precision and formality for the pleadings of a justice's court at least. Civil Code, § 123; Justices' Act, § 84.

The judgment will be affirmed.

(All the justices concurring.)

JOHN M. ALEXANDER v. J. P. TOUHY.

January Term, 1874.

1. **Landlord and Tenant: Lease: Removal of Buildings.** Where a lessee, by the terms of the lease, is to be deemed the owner of the buildings erected by himself on the leased premises, he may sell or remove said buildings from the leased premises during the continuance of the lease; and a provision in the lease that the lessee may remove said buildings at the expiration of the lease does not prevent him from removing them during the continuance thereof.
2. —: **Lease: Covenants: Re-entry: Forfeiture.** Where a lease contains a provision that "if default shall be made in any of the covenants herein contained, then it shall be lawful for the 'lessor' to re-enter the said premises, and to remove all persons therefrom;" and default was made by the lessee; but the lessor never re-entered the premises, nor did anything else for the purpose of creating a forfeiture of the lease; but, on the contrary, sued the lessee for the full amount of the rent which would accrue for said premises up to the time when the lease would expire by the force of its own limitations, although that time had not yet arrived: *held*, that the lease must be considered as still subsisting, in full force and operation, at the time of the commencement of said suit.

Error from Leavenworth district court.

Alexander brought suit against William C. Eagles, J. P. Touhy, and Alexander Repine, as defendants, to recover certain money alleged to be due under a lease from Alexander to Eagles, to replevy certain personal property, and to enjoin Touhy from removing from the leased premises a certain building erected thereon by Eagles, the lessee, and sold to him by Eagles. To this petition Touhy demurred. At the May term, 1873, the district court sustained the demurrer, and dissolved and discharged the temporary injunction previously granted as to said Touhy.

Clough & Wheat, for plaintiff in error.

The parties to the lease made an express stipulation as to when and under what circumstances Eagles, the lessee, might remove improvements, which express stipulation was to the effect "that at the expiration of the term of seven years," ending on the thirtieth of June, 1873, Eagles might, if he had previously fulfilled all his covenants in that lease contained, remove such improvements as he might have erected on the premises during said term. By thus expressly contracting as to when and under what circumstances Eagles might remove improvements, all such rights of removal as he would otherwise have had are negatived by the contract, and he was limited as to right of removing improvements, and under that contract he could of course exercise only such right of removal at the expiration of the lease and not before,—at least not until he had fully complied with the terms thereof. "The express mention of one thing implies the exclusion of another." *Broom*, Leg. Max. 626-642; *Parker v. Goddard*, 39 Me. 144; *Adams v. Goddard*, 48 Me. 212. There cannot be

any implied contract where, or on a subject as to which, an express contract has been made. *Walker v. Brown*, 28 Ill. 383; *Chit. Cont.* 24, notes; *New Orleans & J. R. R. v. Pressley*, 45 Miss. 66; *Roach v. Hulings*, 16 Pet. 319; *Bigelow v. Jones*, 4 Mass. 448; *Galloway v. Holmes*, 1 Doug. (Mich.) 380; *Drake v. Dodsworth*, 4 Kan. *160; *Bird v. Morrison*, 12 Wis. 163. These authorities are, we submit, conclusive that any such implied right of removal as Eagles would have had if the clause in relation to that matter had not been in the lease, did not exist, and could not be exercised by him. The

*66 petition shows that he had not complied, and that the circumstances did not exist under which the contract would, if he had fully performed the lease on his part, have permitted him to remove; and by the demurrer Touhy not only admitted non-payment of rent; and non-compliance with the lease by Eagles, but also admitted that Eagles was insolvent, and was about to remove the improvements for the purpose of defrauding the plaintiff. In view of the cases above cited, we suppose it will be conceded that neither Eagles, nor any one claiming under him, had any right to remove buildings, improvements etc., without having first, on his part, fully complied with and performed that contract,—the terms of the lease, on his part; and it stands for true on demurrer that Eagles had not done so. Of course, Touhy had no greater right than Eagles, and held whatever interest, if any, he purchased from Eagles subject to the same terms and conditions as Eagles. *Maddox v. White*, 4 Md. 72; 1 Hil. Mortg. 227.

The last quarter's rent of the entire term came due before the suit was brought, as the rent after the first year was to be paid in advance, in equal quarter-yearly payments, and therefore plaintiff had a cause of action against Eagles to recover all of the unpaid rents, which cause of action was fully stated in the petition; and the default of Eagles to set out and keep the trees, and his default in paying taxes, each operated to forfeit the lease, without demand, because of which plaintiff could re-enter without demand. *Davis & Burrell*, 5 E. L. & Eq. 417; *Byrane v. Rogers*, 8 Minn. 281, (Gil. 247.)

Though we do not consider it necessary in this case to determine whether the lease was forfeited or not, as we think plaintiff had his cause of action and right to sue whether the lease was or was not forfeited, that suing for rent does not operate to waive a forfeiture, even though the suit was to recover the rent for the non-payment of which the lease was forfeited. *Campbell v. McElevey*, 2 Disney, 574; *Gillilan v. Spratt*, 41 How. Pr. 27; *Tayl. Landl. & Ten.* § 499; *Hartshorne v. Watson*, 4 Bing. (N. C.) 178; *Hartshorne v. Watson*, 33 E. C. L. 657; *Doe v. Batten*, Cowp. 243. But whether there had or had

not been a forfeiture is immaterial in this case. The suit is
*67 to recover *rent, and to keep the security for the payment thereof where the parties to the contract agreed it should remain until Eagles had performed the requirements of the lease on his part.

Green & Foster, for defendant in error.

There was no error in sustaining the demurrer of defendant in error. By the contract of lease it clearly appears that in contemplation of the parties the improvements which Eagles might put on the premises should be his personal property; otherwise reference would not have been made to their removal at the end of the term; nor would the parties have provided for the assessment and taxation of the improvements separately from the realty, if it had been intended that they should have become a part thereof. Gen. St. 543, c. 56, § 31. The improvements, then, being Eagles' personal property, it was competent for him to sell them, and make a good title, or they might have been sold on execution, and the purchaser have acquired a perfect title; so that in whichever way Touhy obtained his interest, his right of removal was complete. Tayl. Landl. & Ten. § 551; *Keogh v. Daniell*, 12 Wis. 163.

The petition does not show any forfeiture of the lease, but, on the contrary, treats the tenancy as still subsisting pending the litigation, by suing for the whole rent due up to the end of the term; and a lessor cannot avoid a lease for a breach of the covenant when, by his own act, subsequent to the breach, he treats the tenancy as still subsisting. *Garnhart v. Finney*, 40 Mo. 449. And, in order to show a forfeiture for non-payment of the rent, the lessor must allege and prove a demand for the rent on the day it becomes due. Tayl. Landl. & Ten. §§ 297, 493, 495; *Meni v. Rathbone*, 21 Ind. 454; *Smith v. Whitbeck*, 13 Ohio St. 471; *Boyd's Lessee v. Talbert*, 12 Ohio, 212; *Bowman v. Foot*, 1 Amer. Law Reg. (N. S.) 352.

The mere fact of the non-payment of rent does not work a forfeiture of the lease, but demand must be made at the proper time for the rent, and the ten-days' notice must be given as required by section 7 of the landlord and tenant act, (Gen. St. 540,) before the lease *68 can be determined; and no such demand or notice is alleged, and the petition is therein insufficient. Chapter 131, § 4, Comp. Laws 1862, under which the lease was made, gave the remedy of ten days' notice only against tenants at will and from year to year.

The statutes give no lien to the landlord except in the single case of rent due for farming land; and provides specifically that rents shall be collected as other debts; and there is no more a landlord's lien than a vendor's lien.

The tenant has a right to remove any improvements placed by him on the premises for his enjoyment during the term. Tayl. Landl. & Ten. 546; *Van Ness v. Packard*, 2 Pet. 137; *Johnson v. Carter*, 16 Mass. 444; *Brown v. Lillie*, 6 Nev. 244; *Antoni v. Belknap*, 102 Mass. 193; *Perkins v. Swank*, 43 Miss. 349; *Meigs' Appeal*, 62 Pa. St. 28; *Northern Cent. Ry. Co. v. Canton Co.*, 30 Md. 347. And the provision in the lease that the lessee might remove at the expiration of the term does not abridge the lessee's rights to remove during the

term, but rather enlarges, so as to allow a removal at the expiration of the term.

VALENTINE, J. The plaintiff, Alexander, leased to William C. Eagles two certain lots in Leavenworth city for the term of seven years, commencing on July 1, 1866. Eagles covenanted to pay certain rent, to set out and take care of certain trees, and to pay all taxes that might be levied on the improvements made by himself. The following stipulations are contained in said lease, to-wit: "And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises, and to remove all persons therefrom." "And it is agreed that at the expiration of said term of seven years the said party of the second part, having previously filled all his said covenants herein contained, may remove from said premises any and all improvements which he may have erected thereon during said term. It is further understood that said party of the second part shall pay all taxes, general or special, that may be assessed against any and all improvements that may be put on said premises during said term."

*69 *Eagles did not perform all of his said covenants, and in May, 1873, the plaintiff commenced this action against Eagles and the other defendants, Touhy and Repine. The action was—*First*, to recover \$350, including the following items, to-wit: \$150 for rent not paid, \$150 as damages for not setting out and taking care of said trees, and \$50 for taxes levied on said improvements and paid by the plaintiff; *second*, replevin for a house removed from said premises, and placed on other premises; *third*, for an injunction to restrain the defendants from removing other buildings from said premises. It seems from the petition below that the defendant Eagles had erected six buildings on said premises. The petition below set up all of these facts, and other facts. The only allegation, however, relating particularly to the defendant Touhy reads as follows: "The said plaintiff further avers that the said J. P. Touhy claims to have purchased one of the said buildings, which he threatens to remove from said premises, and which he is now preparing to remove from said premises."

Touhy demurred to this petition on the grounds—*First*, that it did not state facts sufficient to constitute a cause of action against him; *second*, several causes of action were improperly joined. The court below sustained the demurrer on the first ground, and to reverse that ruling the plaintiff now brings the case to this court. We think, however, that the demurrer was rightfully sustained. The lease evidently contemplated that Eagles should be the owner of all the buildings erected by himself on said premises. He was to pay the taxes on them. He was to have the privilege of removing them at the expiration of his lease. There was nothing in the lease to prevent him from

removing them sooner, and there was no provision giving the plaintiff any lien upon them prior to the termination of the lease; and if the buildings belonged to Eagles, he of course had the right to sell them or to remove them, or to authorize any one else to remove them, at his pleasure. There is no law to prevent him from so doing, and the provision in the lease that he may remove them at the expiration *of the lease can hardly be construed as preventing him from removing them or selling them during the continuance of the lease.

It will be noticed that the only provision in the lease that contemplates in any degree a forfeiture of any kind is the one which provides that "if default shall be made in any of the covenants herein contained, then it shall be lawful for the" plaintiff "to re-enter the said premises, and to remove all persons therefrom." A default alone does not create a forfeiture; it only gives the plaintiff the right to demand a forfeiture. He must "re-enter the premises, and remove all persons therefrom," or demand a removal, in order to create a forfeiture. But nothing was ever done under this provision for the purpose of creating a forfeiture. On the contrary, the plaintiff sued the defendants for all the rent that would accrue for said premises up to the time when said lease would expire by the force of its own limitations, although that time had not yet arrived; thereby ratifying and confirming the continued existence of said lease. The lease was therefore subsisting in full force and operation when this action was commenced. For the same reasons that the demurrer was rightfully sustained the injunction against Touhy was rightfully dissolved.

The judgment of the court below is affirmed.

(All the justices concurring.)

CITY OF TROY v. ATCHISON & N. R. Co. and others.¹

January Term, 1874.

1. **Municipal Corporation: Power to Contract.** Where a city has made a valid subscription of \$50,000 to a railroad company, and issued \$25,000 of its bonds in payment of one-half the subscription, it can make a valid contract whereby, in consideration of its stock in the company and \$6,000, it is relieved of any liability for the remaining \$25,000 of its subscription; and this, whether it has issued its bonds for said \$25,000 or not.
- *71 *2. —: **City Ordinance: Evidence: Estoppel.** Where a city fails to provide any book for the record of its ordinances, but its ordinances, after their passage and approval, are placed and kept on file in

¹Cases and laws recognizing the power of municipalities to aid railroads by issuing bonds, cited and referred to. *Leavenworth, L. & G. R. Co. v. Douglas Co.*, 18 Kan. 184. See *Leavenworth Co. v. Miller*, 7 Kan. 298, and note.

the office of the city clerk, and a third party obtains a duly-certified copy of an ordinance so placed and kept on file, and acts in good faith upon such ordinance, and is induced partly thereby to make a large expenditure of money, in a subsequent controversy between such city and such third parties or their assigns, the rule of equitable estoppel will apply to such city, and the due passage and existence of said ordinance may be shown by parol testimony.

Motion for a rehearing.

This case was brought to this court on error from Doniphan district court, and was heard and decided at the July term, 1873, and is reported in 11 Kan. *519. This court affirmed the judgment of the court below. After the opinion was filed, the plaintiff in error, the City of Troy, filed a motion for a rehearing.

Nathan Price, in support of said motion.

W. W. Guthrie, in opposition.

BREWER, J. Counsel presses earnestly on our attention, upon a motion for rehearing, two principal points: First, he claims that the court erred in its statements as to the issue of \$25,000 of city bonds, and hence erred in its judgment as to the power of the city to make the contract referred to. There was a slight error in the statement of facts in the opinion filed in this case, (11 Kan. *526,) though the facts are correctly stated in the opinion filed when the case was here on error to reverse the temporary injunction order. *Atchison & N. R. Co. v. City of Troy*, 10 Kan. *517. The error is this: The city subscribed for \$50,000 of stock, to be paid for with \$50,000 of its bonds. The opinion states that \$25,000 of these bonds had *72 been issued, and the remaining \$25,000 were *placed in the hands of trustees as security only for the payment of \$6,000. The facts are, as a re-examination of the record shows, that no bonds were issued except the \$25,000 placed in the hands of the trustees as security. But this certainly cannot alter the power of the city. A valid contract of subscription having been made, it was entitled to \$50,000 of stock, and owed \$50,000 of bonds. The issue of these bonds could have been enforced by *mandamus*. It could in like manner have compelled the issue of the stock. With the legal rights and obligations existing by virtue of this contract of subscription, it can contract in reference to those rights and obligations as well as it could in reference to the bonds and stock when already issued. It sold its right to the stock, and was released from its obligation to issue the bonds, for the sum of \$6,000,—a contract it had the same right to make that it would have had, in case both bonds and stock had been issued, to have purchased its outstanding bonds by the sale of its stock and the payment of a difference of \$6,000. We regret the error in the statement of the facts, and are grateful to counsel for calling our attention to it. But we cannot see that the change in the facts affects in the slightest the question as to the power of the city.

It was not an error that affected the nature of the original contract of subscription, or the later one of sale, but only the extent to which the original contract had been carried into effect by one party to its terms.

The other, and really the important, point is that the court sustained the introduction of parol testimony to show the passage of an ordinance. A careful re-examination of the question does not satisfy us that we were wrong in the views expressed in the opinion, and those views we reaffirm. It may, perhaps, be proper to state, in order to guard against misapprehension, that we do not by any means hold that a party may, independent of any question of equitable estoppel, and without other and corroboratory circumstances, introduce parol proof of the passage of an ordinance, and found thereon

*73 any claim against the city. *Here the findings show that the railroad company had, on the strength of the acts of the city, and relying on the certified copies of the ordinance and other proceedings of the city council, duly attested, been to an extra expenditure of a large sum of money,—facts presenting a strong foundation for the application of the doctrine of equitable estoppel. A certified copy of the ordinance, duly attested by the proper officers, is in evidence. Record evidence is before the court also of the passage by the council of resolutions, and of other proceedings of the council, which imply the previous passage of such an ordinance, and are meaningless without it. An election, which is a matter of public notoriety, is shown to have been held,—an election which implied the existence as well as required the authority of a prior ordinance, and public notice of which is shown to have been posted about the city. The ordinance itself is produced from the files of ordinances kept by the city register. The testimony of the city officials is that they had no book in which to record the ordinances, and that they were thus kept on file, waiting till some book should be purchased in which to record them; and also that the proceedings of the council were kept on slips and pieces of paper. Under all these corroboratory circumstances, and with the pressure of the equitable estoppel, we cannot say that the district court erred in admitting parol proof that the ordinance did, as a matter of fact, pass the council, and receive the approval of the mayor.

The distinction which counsel presses between acts which are within the scope of the ordinary powers of a city and those which belong only to its extraordinary powers, does not seem to us to be material in this case.

The motion will be overruled.
(All the justices concurring.)

*74 *D. W. POWERS and others v. AMOS KINDT.

January Term, 1874.

1. **Supreme Court: Error must be Specified.** Only such alleged errors as are specifically pointed out by counsel will be considered by this court. When counsel claim that the testimony does not support the findings, without pointing out which finding is objected to, or wherein the testimony fails to support it, this court will not ordinarily look through a lengthy record to see if there be not some particular fact unsupported by testimony.
2. **Trespass: Fences: Damages.** In an action for damages by cattle to growing crops, proof that the growing crops were not inclosed by a legal and sufficient fence will not defeat the action, when it appears that the cattle were driven upon the premises by their owners, and that the latter were guilty of a wanton and willful want of care.¹
3. —: **Apportionment of Damages.** Where growing crops are destroyed by trespassing cattle belonging to two parties, trespassing repeatedly through the season; and where, in the nature of things, it is impossible to distinguish between the trespass of one lot of cattle and that of the other, or to determine the actual amount of damage done by either separately; and where the district court apportioned the damage according to the number of cattle belonging to the respective parties, and allowed the owner of the crops to recover in an action against one of the parties only the proportion of the damages given by such apportionment: *held*, that such party had no grounds to complain of the amount of the judgment.

Error from Saline district court.

The case is stated in the opinion.

John G. Spivey, for plaintiffs in error.

The conclusions of fact by the court are not findings as conclusions of fact from the testimony, but merely a report on the evi-

*75 dence, and insufficient to sustain the judgment, and *said conclusions of fact are not sustained by the evidence, and do not sustain the judgment.

The court having found that defendant in error had no legal fence or inclosure around his premises, and failing to find (as the evidence clearly fails to show) that plaintiffs in error were guilty of driving and herding their cattle on the premises of defendants in error, as alleged, is fatal to the judgment of the court.

The finding of the court that the cattle of witness Hughes and others, jointly with cattle of plaintiffs in error, caused certain portions of damages complained of, is fatal; and the more clearly so be-

¹ Wild prairie grass, growing on land, is a part of the realty, and belongs to the owner of the land; and a person merely in the possession of the land, without any claim to the land, and without any license or permission from the owner of the land to use the grass, cannot recover, even in an action of trespass *quare clausum frept*, and even from a wrong-doer, for the destruction of the grass. *Hesley v. Baker*, 19 Kan. 9.

cause the evidence of defendant in error and others shows that the cattle of other parties, and even of Kindt, defendant in error, did damage to said crops and premises.

The testimony showing that plaintiffs in error were the owners of premises used as a cattle ranch, adjoining those of defendant in error; and also showing that plaintiffs in error employed men to keep their cattle from the crops and premises of defendant in error,—surely does not render them liable in damages as having driven and herded their cattle on premises and crops of defendant in error, or sustain such allegation, when they (plaintiffs in error) would not have been liable if they had turned their cattle loose, and they had roamed on premises of defendant in error, and destroyed his crops, if that had been alleged.

The testimony does not show any just or true rule for measuring damages of defendant in error.

E. W. Hodgkinson and Case & Putnam, for defendant in error.

The court's findings are gross negligence, and wanton and willful trespass, on the part of Powers & Co., and the amount of damages; and that Kindt was guilty of negligence in not having a legal fence only, except as to corn in crib, and in that respect had a legal fence. If the testimony warrants such findings, there is no error in the case.

That it does, there is no doubt. And this court has decided *76 that where a *trespass is wantonly and maliciously committed, the injured party may recover, (*Larkin v. Taylor*, 5 Kan. *445, *446;) and in the case at bar the evidence clearly shows wanton and malicious trespass.

BREWER, J. Defendant in error brought his action in the district court, and recovered a judgment for damages to his growing grass and corn, done by the cattle of plaintiffs in error during the years 1869, 1870, and 1871. Several points are presented by counsel for plaintiffs in error in his brief, some of which we do not feel called upon to notice; as, for instance, where he claims that the conclusions of fact are not sustained by the evidence, without specifying which particular finding he objects to, or wherein the testimony fails to support it. With the increasing pressure of business in this court, we have not time to notice any but such objections as are specifically and clearly pointed out.

It is insisted that because the findings show that Kindt had no legal fence or enclosure around his premises he was not entitled to recover. But the court also finds that Powers' cattle were driven and herded upon the premises of Kindt against his wishes and consent, and while so driven and herded destroyed the property as alleged; and as a conclusion of law, from the various facts found, that Powers was guilty of a wanton and willful want of care. This brings the case within the rule laid down in *Larkin v. Taylor*, 5 Kan. *433, *446. It is claimed that because the plaintiffs in error employed

herders to watch their cattle, and keep them off from other parties' crops and premises, they could not be held liable where they would not have been held liable if they had simply turned them loose, and they had roamed upon Kindt's premises, and done the damage complained of. This ignores the fact that the court finds that these cattle were driven and herded upon Kindt's premises, which brings in the element of gross negligence, or wanton and willful want of care.

It is true, the testimony is conflicting on this point; but there *77 is positive testimony to *support the finding, and of course this must be taken as conclusive.

Another objection is that, as to one item of damage, it was not done by the cattle of plaintiffs in error solely, but that other cattle were with theirs, and assisted in the destruction. The finding is that in 1870 Powers' cattle, to the number of 600, were driven and herded upon Kindt's premises, and that they, with 25 head of cattle belonging to one Hughes, ate up and destroyed 100 acres of grass of the value of one dollar an acre. The total amount of damage would then be one hundred dollars, caused by 625 head of cattle. There is nothing in the findings or testimony tending to show how much of this damage was done by any specific cattle, and, in the nature of things, it could not well be shown. The cattle, as appears from the testimony, were off and on the premises, sometimes but two or three, and sometimes all of them together. It would be impossible, under such circumstances, to show what damage each particular steer or number of steers did. Would the plaintiff thereby lose all redress? Clearly not. The court apportioned the damage according to the number of cattle belonging to the respective parties. Finding that 625 cattle had destroyed one hundred dollars' worth of grass, the owners of 600 head were held responsible for \$96 of the damages. We do not mean to decide that this rule of apportionment is one that ought always to be enforced, but we do hold that the plaintiffs in error have no ground to complain of it. These are the only questions that seem to demand especial notice, and, no error appearing in them, the judgment will be affirmed.

(All the justices concurring.)

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*WILLIAM J. LARIMER v. FANNY KELLY.

January Term, 1874.

New Trial: Misconduct of Jurors: Intoxicating Liquors. Where a case has been submitted to the jury, and the jury have retired to consider of their verdict, but afterwards have separated by permission of the court, and with the consent of both the parties, the mere drinking of intoxicating liquor by one of the jurors while the jury are thus separated will not of itself have the effect to require that the verdict afterwards rendered by the jury shall be set aside, and a new trial granted.¹

Error from Woodson district court.

This case was here twice before. 10 Kan. *298, *307. On filing the mandate in the court below (Allen county district court) a change of venue was taken to Woodson county, where the case was tried at the June term, 1873. Verdict and judgment in favor of Kelly for \$285.50.

H. W. Talcott and L. W. Keplinger, for plaintiff in error.

W. A. Johnson, for defendant in error.

VALENTINE, J. The record shows that this case was regularly tried before a jury in the court below. The jury retired to consider of their verdict. Afterwards one of the jurors became sick, and the court, with the assent of both parties, allowed the jury to separate till next morning at 8:30 o'clock. At about 8 o'clock the next morning one of the jurors took a drink of intoxicating liquor. Afterwards the court convened, and the jury again retired to consider of their verdict, and subsequently returned into the court-room, and rendered their verdict in favor of the plaintiff below, (defendant in error,) and against the defendant below, (plaintiff in error,) for the sum

*79 of \$285.50. Afterwards the defendant below moved for a new trial on the ground, among others, for misconduct of jury. The court overruled the motion, and rendered judgment for the plaintiff in accordance with said verdict. The only question now presented for our consideration is whether the drinking of said intoxicating liquor by said juror was sufficient to invalidate the verdict of the jury, and whether the court erred in refusing to set aside said verdict, and to grant a new trial for that reason. We must answer this question in the negative. There is nothing to show that the plaintiff below furnished said liquor, nor who furnished it. It may have been furnished by the defendant below. There is nothing to

¹Where the question submitted to the district court upon a motion for a new trial was the alleged intoxication of a member of the jury while the case was on trial, and upon which there was competent, but conflicting, oral testimony, the finding of the trial court thereon will be accepted as controlling in the supreme court. *State v. Tatlow*, 8 Pac. Rep. 267. See the full note to this case at pages 271 *et seq.*, treating the question of intoxication at length. Impeaching verdict of jury. See *State v. Home*, 9 Kan. 82.

show that the liquor had any influence on the juror's mind, or that it had any influence upon him in any respect, or that it rendered him any the less competent to render a correct verdict. There is nothing to show how long the liquor was drank before the verdict was rendered. The liquor was drank at about 8 o'clock in the morning. The verdict may have been rendered at 8 o'clock in the evening. The only question, then, is whether the mere drinking of intoxicating liquor by a juror, where the liquor does not appear to have had any appreciable influence upon the juror or his conduct, is sufficient to require that the verdict rendered by him, and eleven other jurors against whom no objection is made, shall be set aside. We have already decided that the verdict of a jury cannot be set aside in such a case where the liquor was drank before the jury retired to consider of their verdict, (*Perry v. Bailey*, 12 Kan. *539,) and we cannot see that the drinking of the liquor after the jury have retired to consider of their verdict, but while separated, can make any difference.

The judgment of the court below is affirmed.

(All the justices concurring.)

*80 *H. JENNINGS and others v. STATE OF KANSAS.

January Term, 1874.

1. **Recognizance: Pleading.** In an action upon a forfeited recognizance, given upon the continuance of a criminal cause from one term to another, an allegation of the filing of an information, an order of continuance, etc., is sufficient, without averring a prior arrest and a preliminary examination, or a waiver of it.¹
2. **Process: Commitment.** The warrant of commitment issued upon such continuance is a process of the court, and should be under the seal of the court, and signed by the clerk, and should not be under the hand of the judge.
3. **Information: Record: Presumption.** Where the information is not preserved in the record, it will be presumed that it sufficiently and fully charged a crime of which the court had jurisdiction; and then a warrant which refers to the filing of the information, and states generally the character of the crime, without stating the particular facts and circumstances of the case, or the county in which the crime is charged to have been committed, will be held sufficient.
4. **Recognizance: Omission of Record.** An omission to file and record the recognizance, as required by section 144 of the Criminal Code, before the forfeiture, is not such an omission as will defeat a recovery.
5. **Courts: Description of District Court.** A description of the district court of Cloud county as the "Twelfth judicial district court, sitting in and for the county of Cloud," is not a misdescription, though perhaps unnecessarily full.

¹Sufficiency of petition, in actions of forfeited recognizances, determined. See *Swardsfeger v. State*, 21 Kan. 477, and cases there cited. See *Gay v. State*, 7 Kan. 248, and note.

6. Recognizance: Rules of Decision. Section 154 of the Criminal Code has made radical and sweeping changes in the rules of decision in actions on forfeited recognizances, and under it the old decisions are of little value as authority in this state.

Error from Cloud district court.

An action was instituted by the county attorney in the name of the State against Hezekiah Jennings, B. C. Sanders, Milo Stevens, and Richard Werst, upon a recognizance taken in a criminal action, executed by said Jennings as principal and the other defendants as sureties. The defendants demurred to the petition. At the May term, 1873, the district court overruled the demurrer. The defendants then filed a general denial, the case was tried, and judgment *81 was given against *the defendants.

L. J. Crans, for plaintiffs in error.

The court erred in overruling the demurrer. The second ground of demurrer was that the petition did not state facts sufficient to constitute a cause of action. The petition sets out that "Hezekiah Jennings, one of the defendants above named, was, at the May term of the said district court, in the year 1872, sitting in and for said county of Cloud, by the county attorney of said county, charged with grand larceny, as appears from the information filed in said case at said term of court; whereupon it was ordered," etc. The county attorney could not file an information against any person, for any offense, until such person had had a preliminary examination therefor, as provided by law, unless such person waived his right to such examination. Gen. St. 832, § 69; *State v. Barnett*, 3 Kan. *250. There is no averment of an arrest, nor of a preliminary examination, nor of waiver thereof. These averments are necessary, and must be proved. The petition does not show that the principal defendant was legally in custody, charged with a public offense. Gen. St. 844, § 154; *Id.* 647, § 87.

The petition avers: "It was ordered by the court that this cause be continued, and the defendant held to bail in the sum of \$800 for his appearance at the next term of said court; and in default thereof he stand committed to the common jail of Cloud county; and if there be no jail in Cloud county, then that the defendants be committed to the jail of the county of Riley, there to remain until he be discharged by due course of law; which order of commitment was duly issued by said court, and delivered to the sheriff of Cloud county, a copy of which commitment is hereto attached, and made part of this petition." There is no such commitment, as is averred, attached to the petition. The paper attached to said petition was not duly issued by the court, and is not a proper commitment. It was not duly issued.

*82 "The *mittimus* must be in writing, and under the hand and seal of the magistrate, and show the time and place of making it." 2 Hale, 122; 1 Chit. Crim. Law, 109; 2 Hawk. P. C. c. 16, § 13. The *mittimus* is not signed by the magistrate. The certificate is made

by a person styling himself "clerk of the Twelfth judicial district," (an office unknown to the law;) and he signs it thus: "W. E. REED, Clerk District Court." Clerk of what district court? of what county? of what state, or country? "Where a recognizance is taken by a sheriff, his attestation must show the county for which he is sheriff, otherwise the recognizance will be void." *State v. Austin*, 4 Humph. 213. A glance at our statutes shows it was the duty of the judge to sign the *mittimus*. "It shall be the duty of the magistrate to commit to prison until he find the same, specifying in the warrant the cause of commitment, and the sum in which security was required." Crim. Code, § 10. "When such person shall fail to recognize, he shall be committed to prison by an order under the hand of the magistrate." *Id.* § 47. "If the defendant is committed to jail the magistrate shall make out a written commitment, signed by him, which shall be delivered to the jailor by the officer who executes the order of commitment. He shall indorse upon the order of commitment the sum in which bail is required." *Id.* § 56. "Warrants authorized by law to be issued in criminal cases may be under the hand of a magistrate issuing the same, and shall be as valid and effectual in all respects as if sealed." *Id.* § 310. These sections, as well as sections 258, 280, and 302, show that it is the duty of the judge to sign the commitment.

A jail is required to be kept at the county-seat of each county, (Gen. St. 254, § 4,) and it is the duty of the jailor to receive in custody under his charge any person lawfully committed to such jail, (Gen. St. 358, § 189.) The magistrate can only commit to the county jail, and the commitment should name the place of imprisonment. *Rex v. Smith*, 2 Strange, 934; *Rex v. Fell*, 1 Ld. Raym. 424. The *mittimus* here sets out, "Hezekiah Jennings is required to be safely kept and confined in the jail of *Riley county*, in the state of *83 *Kansas*." The paper *is addressed to the sheriff of *Cloud county*, directing him to imprison in another county. There is authority under our statutes to imprison in a different county from the one in which the arrest was made, or the hearing or commitment was had; but, in the first place, the commitment must be to the county jail of the original county, and then, *on the application of the sheriff*, in case there is no sufficient jail in the county, the committing magistrate or judge of the district court or criminal court of such county may order any person charged with crime, and ordered to be committed to prison, to be sent to the jail of the county nearest having a sufficient jail. Gen. St. 532, § 16.

The clerk of the court had no authority to issue a warrant of commitment. Section 135, c. 82, might, at first sight, seem to imply such right, but that section applies to warrants of arrest, provided for by section 126, directing warrants to be issued on filing of informations; and this section is to be so construed as to mean informations legally filed; that is, in all cases where the court has jurisdiction to

try offenses on information without preliminary examination, or in such extreme cases as section 71 provides for. There are but few instances in which the clerk is authorized to issue warrants or orders in criminal cases. These are found in section 126, to issue warrants of arrest after information filed; in section 247, after conviction, when the defendant is not present, and when his attendance is necessary, to issue warrants of arrest; and in sections 254, 255, and 256, after conviction, in certain cases, to certify sentences, which shall be a sufficient authority to the sheriff or officer. These are the only sections in the Statutes which confer authority on the clerk; and as they do not provide for the issuing by him of such a paper as the one called a "*mittimus*," the paper was not a *mittimus*, nor could the jailor receive or hold a person thereunder.

Again, said paper, as well as the petition, simply says that Hezekiah Jennings was charged with grand larceny. They do not allege when or where the offense was committed, and that the court had *84 jurisdiction thereof. "It should set forth *the complaint on which it was founded." *Com. v. Ward*, 4 Mass. 497; *Brady v. Davis*, 9 Ga. 73; 1 Chit. Crim. Law, 111.

The petition further alleges that the defendants entered into a "recognizance, a copy of which is attached and made a part of this petition." The plaintiff makes profert of a recognizance, and produces a bond. The paper commences as a bond,— "Know all men by these presents;" not as a recognizance,— "Be it remembered." It sets out, as a bond, that the makers "are held and firmly bound in the penal sum of," not that the parties "acknowledged themselves to owe." It concludes as a bond, and was so considered by the officer when he wrote at the foot thereof: "This bond as to amount," etc. "A recognizance is an acknowledgment of record of a pre-existing debt owing by the cognizors to the state, not as sureties, but as principals." *Gay v. State*, 7 Kan. *394. "A writing in the form of a bond, with collateral conditions, is not such an instrument as carries with it any of the evidence which in law distinguishes a recognizance from other obligations." *State v. Floyd*, 9 Ark. 313. "When the statute requires a recognizance, a bond will not answer," (*Laturner v. State*, 9 Tex. 451;) "nor will a deposit of money," (*Butler v. Foster*, 14 Ala. 323.) Our statutes allow money to be deposited. This alleged recognizance was not acknowledged. The officer wrote at the foot these words: "This bond, as to amount and sureties, approved this twentieth day of May, 1872." "An acknowledgment signed and sealed by the accused and two others, at the foot of which the judge wrote the words, 'attested and approved,' was not a recognizance, but was unauthorized and void." *State v. West*, 3 Ohio St. 509. It was not taken before a person properly qualified to take it, the sheriff having no legal warrant or *mittimus* authorizing him to arrest or hold the party. "An instrument of writing in the form of a recognizance in a criminal proceeding, but which was taken before the clerk of the

district court, acknowledged before him, and approved by him is void." *Morrow v. State*, 5 Kan. *563; S. C. 6 Kan. *228. "A recognizance ought to state the ground on which it was taken, *85 so that it may appear that the magistrate *taking it had jurisdiction and authority to demand and receive it." *State v. Smith*, 2 Greenl. 62; *Com. v. Downey*, 9 Mass. 520; *Com. v. Daggett*, 16 Mass. 447.

The paper on which this action was founded was not filed; and said paper, it is admitted, "was never in the possession of the clerk of the district court of Cloud county, nor filed by him, prior to the twelfth of November, 1872, nor ever recorded in the Recognizance Docket of said court." Filing was essential to give the paper force as a recognizance. "Every recognizance taken by any judge, justice of the peace, sheriff, or other officer must be certified by him *forthwith* to the clerk of the court to which the defendant is recognized. The clerk must thereupon record the recognizance in the Recognizance Docket, *and from the time of filing it has the same effect as if taken in open court.*" Gen. St. 642, § 144. The recognizance must be filed and made a *record* of the court to sustain a suit, (*Morrow v. State*, 5 Kan. *563,) and this must be averred in the declaration, (*McAllister v. Reab*, 4 Wend. 487.) "A declaration upon such recognizance will be bad unless it aver that such return and memorandum were made." *Sargeant v. State*, 16 Ohio. St. 267. "The recognizance must contain all the essential parts, both of the obligation and condition, and none of the essential parts can be supplied by oral testimony. A memorandum is not a recognizance." "A recognizance which is defective in any particular which by law is essential to its validity cannot be aided by oral testimony." *Dennard v. State*, 2 Ga. 137. This bond does not show to what court the accused was recognized, or, at least, shows a different court from the one in which the forfeiture was declared. It says: "Shall be and appear before the district court aforesaid." The word "aforesaid" applies to the language: "The Twelfth judicial district court, sitting in and for the county of Cloud, in the state of Kansas." There is no such court in Cloud county. The court in which the forfeiture was made was "The district court of Cloud county." This is the proper title of the court. Gen. St. 304, §§ 1, 3, 4; Id. 822, § 9; Const. art. 2, § 18; Id. art. 3, §§ 1, 5, 6, 7, 10, 13. "The recognizance must show on its face the court to which the defendant is bound to appear." *State* *86 *v. Rye*, 9 Yerg. 386. "A recogni*zance requiring a defendant, in a criminal case, to appear before the circuit court of a county (there being no such court) cannot be enforced against the recognizers by virtue of forfeiture taken in the district court." *Sherman v. State*, 4 Kan. 570. A recognizance should fix the time for appearance, and cannot be forfeited at a subsequent period. *State v. Sullivant*, 3 Yerg. 281; *Com. v. Bolton*, 1 Serg. & R. 328; *Com. v. Cayton*, 2 Dana, 138; *People v. Derby*, 1 Parker, Crim. Rep. 392.

The petition sets up a *recognizance*, "entered into by said Hezekiah Jennings with B. C. Sanders, Milo Stevens, and Richard Werst, as sureties," and the exhibit shows a *bond*, naming *Hezekiah Jennings* as principal, and *Hezekiah Jennings*, B. C. Sanders, Richard Werst, and Milo Stevens as sureties. If the latter had been offered in evidence under a declaration upon the former it would have been held a fatal variance. 1 Chit. Pl. 334, 336.

The petition should have contained a "statement of the facts constituting the cause of action." Code, § 87. "Whatever circumstances are necessary to constitute the cause of complaint must be stated in the pleading." 1 Chit. Pl. 245. The petition failed to allege such facts as would authorize the sheriff to take a *recognizance*,—that the officer had the principal defendant legally in custody, charged with a public offense; that he was discharged therefrom by reason of giving the *recognizance*; that an obligation was entered into having the essential requisites of a *recognizance*; that the same was filed before forfeiture, so as to give it the effect of a *recognizance* taken in open court; that it was recorded as required by law in the *Recognizance Docket*, or that the court to which the accused was recognized declared the *recognizance* forfeited. For these reasons the court should have sustained the demurrer of the defendants. 2 Chit. Pl. 472, note *h*; *Id.* 473, notes *l*, *p*; *Id.* 479, notes *d*, *e*.

At the trial the court erred in admitting in evidence the papers copies of which are attached to plaintiff's petition. This trial occurred on the third day of May, 1873, the alleged forfeiture on the eleventh of November, 1872; and when the objections were *87 urged against the reading of the papers the *one called the *recognizance* was not yet filed and made a paper of the court; nor was it filed until after the court had found for the plaintiff; nor had it been recorded in the *Recognizance Docket*. Crim. Code, §§ 136, 137, 144, 147, 148, 150. The papers clearly were not evidence. "In an action upon such an instrument it is error for the district court to permit the same to be introduced in evidence, whatever the other evidence in the case may have been." *Morrow v. State*, 5 Kan. *563. The reasons urged in support of our demurrer show that this evidence should have been rejected.

The court erred in finding the issues for the plaintiff. The case made sets forth all the evidence offered in the court below. There was no evidence to show that Jennings was ever in custody, legally or otherwise; that he was charged with a public offense; that he was discharged from custody by reason of giving a *recognizance*. There was no evidence that the paper read in evidence was ever taken by the sheriff; he simply approved the bond as to amount and sureties. Such is his return,—no more, no less. There was no proof that either of the defendants subscribed their names to the paper called the "*recognizance*." This was necessary. Crim. Code, § 136. There was no allegation in the petition of the execution of a written in-

strument which, under section 108 of the Civil Code, would, through failure to verify the answer, cause the same to be taken as true. It says that "the said Hezekiah Jennings entered into a recognizance with B. C. Sanders, Milo Stevens, and Richard Werst, his sureties." Nowhere does it declare that Jennings and his sureties entered into a recognizance to or with "the state of Kansas." Without such an averment the plaintiff does not show capacity or title to sue. Had the alleged recognizance been offered and read without objection, the want of proof of execution and signature would have been dispensed with. We having objected, such proof was required. The evidence which the plaintiff produced, coupled with the admission of plaintiff's counsel, was proof beyond doubt that the paper read in evidence never was certified to the clerk of the district court, and never

*88 filed or *recorded so as to make it what a recognizance is,—
 "an obligation of record." The plaintiff having failed to show that there was "an obligation of record," that the conditions of such obligation had not been complied with; and that the court in which said obligation was recorded had legally forfeited the recognizance,—the court below should have found for the defendants instead of the plaintiff, on the evidence.

H. A. Hunter and E. J. Jenkins, for the State.

It was not necessary to allege in the petition in this case that there was a preliminary examination, or waiver thereof. *State v. Finley*, 6 Kan. *366. In the criminal prosecution the defendant might plead such fact (if it existed) against the information; but when the petition in this case states that Jennings was in said information "charged with grand larceny," and said information being filed in the proper court, it alleged that he was charged with a public offense; for grand larceny is a public offense under the statute.

No matter how a person comes before a court, whether by warrant, or whether brought before the court *without process*, or by his voluntary appearance. When there, the court has an undoubted right to inquire into any charge against him, as to the cause of his detention, and to admit him to bail, and take recognizance of him and his sureties, if in the judgment of the court the case requires such a course. *Mix v. People*, 26 Ill. 34. The court ordered Jennings to be committed, in default of bail, to the jail of Cloud county, if there be a jail in said county; and if there be no such jail, then in the jail of Riley county, which the court could properly do. Gen. St. c. 53, § 16. The recognizance was properly taken and approved by the sheriff. Jennings being in the custody of the sheriff under the commitment on which the amount of bail was fixed by the court, the sheriff could approve the recognizance or "bond," and discharge the defendant. *Crim. Code*, § 143; *Ingram v. State*, 10 Kan. *630.

No particular form of the recognizance or certificate was necessary; and it is not material what language is used, so *that it appears that the parties gave, and the officers took and accepted, the recognizance for the purposes contemplated by law. 17 Ill.

174; Crim. Code, § 154; *Gay v. State*, 7 Kan. *404; *McLaughlin v. State*, 10 Kan. *581. The rule of the common law requiring strict construction of recognizances has been changed and modified by statute. Crim. Code, § 154.

The failure to file the recognizance with the clerk, or to record the same in the Recognizance Docket, did not invalidate the recognizance as between the cognizors and the state. *Benham v. Conklin*, 3 Ohio St. 509; *State v. Williams*, 14 Ohio St. 140. The statute requiring the filing and recording of a recognizance is only directory; and, as between the cognizors and the state, has no more to do with the validity of the recognizance than a failure to record a deed between the grantor and grantee. If the cognizors signed the recognizance, and delivered it to the sheriff, it did not change their rights for the sheriff to hold the recognizance instead of delivering it to the clerk, and the clerk recording it as required by law. The object of requiring the recognizance to be returned to the clerk, and recorded in the Recognizance Docket is merely to prevent the same from being lost or destroyed. *Benham v. Conklin*, *supra*; Crim. Code, § 154.

BREWER, J. This was an action in the district court of Cloud county upon a forfeited recognizance. As the record fails to show affirmatively that all the evidence is preserved, we must presume that there was sufficient to sustain the general finding in favor of the plaintiff; so that the only questions before us arise on the overruling of a demurrer to the petition, and the effect of a fact admitted by the county attorney upon the trial.

The petition alleges no proceedings prior to the information. It alleges the filing of an information charging Hezekiah Jennings with the crime of grand larceny. It does not aver a prior arrest, a preliminary examination, nor a waiver of one. Hence counsel claim that the petition fails to show that the principal defendant
*90 *was legally in custody, or that any recognizance could lawfully be required of him. This is a mistake. Under some circumstances an information may be filed without prior proceedings. Gen. St. 832, §§ 69, 71; Laws 1871, p. 279, § 2. If a party pleads to an information, and goes to trial upon it, he cannot thereafter claim a discharge from custody, or an arrest of judgment, because of the want of a prior examination. So, where a petition alleges the filing of an information by the proper officer, in the proper court, the continuance of the case, and an order of the court requiring the defendant to give bail or be committed to the custody of the sheriff, it will be presumed that the information was filed under such circumstances as warranted its filing. Greater fullness seems unnecessary. *Mix v. People*, 26 Ill. 32.

A second objection is that the warrant to the sheriff is not signed by the judge, but is signed by the clerk, and attested by the seal of the court. It is right as it is, and would not be right if it were as counsel claims it ought to have been. The order is the order of the

court, and not of the judge. The warrant is the process of the court, and should be under the seal of the court, and signed by the clerk. Gen. St. 768, § 700; Id. 770, § 716; Id. 840, § 126.

Again, it is urged that the warrant does not show where the crime was charged to have been committed, nor, indeed, does that fact appear anywhere in the petition. The information is not copied into the record, and we must therefore presume that it sufficiently and fully charged a crime of which that court had jurisdiction. The warrant might properly refer to the filing of the information, and then a mere statement of the character of the crime charged would be sufficient. It is not necessary that each paper in a criminal case show all the proceedings in a cause, or disclose the facts necessary to give the court jurisdiction. *Redmond v. State*. 12 Kan. *172.

A fourth objection is that the instrument sued on is in form a *91 penal bond, rather than a recognizance. This ques*tion has already been settled in this court. *Ingram v. State*, 10 Kan. *630. It was admitted by the county attorney that the recognizance had not, at the time of the forfeiture, been filed or recorded, as required by section 144, Crim. Code, (Gen. St. 842.) This omission did not invalidate the instrument. It is an irregularity merely,—one which under section 154 of the Criminal Code would clearly not affect the right of recovery.

Again, it is objected that the recognizance is void because of a misdescription of the court. It is described as “the Twelfth judicial district court, sitting in and for the county of Cloud.” The only possible objection we can see to this description is that it is unnecessarily full. It describes the court correctly, though it would probably be sufficient to call it “the district court of Cloud county.”

There are some other points urged by counsel, but we think, under the liberal rule prescribed by section 154 above cited, none of them are sufficient to defeat a recovery upon this recognizance. Counsel for plaintiffs in error has been very diligent, and collected numerous authorities, and presented his points with clearness and force, and under the old rules which obtained prior to the enactment of said section 154 might properly have expected a different decision from this court. But language could hardly be more sweeping and comprehensive than that of section 154. It has at one blow swept away, so far as this state is concerned, nearly the entire accumulation of authorities on the matter of recognizances. It has, as we think, introduced a truer and better rule, and one which will tend to promote the interests of justice.

The judgment will be affirmed.

(All the justices concurring.)

*92 *J. W. H. GOLDEN and another v. ROBERT J. ELLIOTT and others.

January Term, 1874.

Mandamus: When Refused: Discretion of Court. Where, in a county lately opened to settlement, and into which population has been recently and rapidly flowing, an application to the district court for a *mandamus* to compel the county officers to remove their offices from one town to another is overruled; and where the only facts disclosed in the application are that, at a county-seat election, held more than two years before, the returns showed that the latter place had received a majority of the votes, without any explanation of the delay in the application; and where it also appears that immediately after such election, and before any canvass of the votes, the district court had, in a proper proceeding, issued a restraining order enjoining the canvass, the proclamation of the result, and the removal of the county offices, on the ground that such apparent majority was the result of fraudulent votes; and that such restraining order remains unreversed and in full force: *held*, that this court will not reverse the ruling of the district court refusing the writ of *mandamus*.¹

Error from Labette district court.

Golden and four others, electors and tax-payers of Labette city, on the fourth of April, 1873, filed their petition for a *mandamus* to compel Elliott and the other county officers to remove their offices, records, etc., from Oswego to Labette city, alleging that the county-seat of Labette county had been located at Labette city at an election held February 28, 1871. The record shows that at said election there were 2,508 votes cast, of which 1,200 were cast in favor of Oswego, and 1,308 in favor of Labette city; that on the third of March, 1871, in action instituted by J. Q. Cowell and others, electors and tax-payers of Oswego, against W. H. Carpenter and others, county commissioners, the district judge had granted an injunction restraining the board of county commissioners from canvassing the votes cast at said election of February 28, and proclaiming the result thereof, on the ground that a large number of fraudulent votes had been cast in favor of Labette city at said election, and that a majority of the legal votes of said county had not been given in favor of removing the county-seat to said Labette city. Said injunction does

*93 not *appear to have been vacated, modified, dissolved, or reversed. The district court, at the March term, 1873, refused to award the *mandamus*.

W. P. Lamb, for plaintiffs.

The petition in this case is sufficient. All the facts are stated in the petition to authorize an alternative writ of *mandamus* to issue.

¹See *State v. Anderson Co.*, 28 Kan. 70. Also, *Evans v. Thomas*, 33 Kan. 469; S. C. 4 Pac. Rep. 888. When *mandamus* will or will not lie. See *Hussey v. Hamilton*, 5 Kan. 278, and note; *State v. Stockwell*, 7 Kan. 64, and note.

Gen. St. 1868, p. 298, c. 26; Laws 1871, p. 191, c. 79. The court erred in refusing the alternative writ of *mandamus*.

H. G. Webb and W. C. Webb, for defendants.

The petition in this case purports to be a petition for a *mandamus*, brought by Golden and others as plaintiffs, against Elliott and others as defendants; but it contains as an exhibit a transcript of the record of a proceeding in an action for an *injunction*, wherein Cowell and others were plaintiffs, and Carpenter and others were defendants. If this transcript shows or proves anything, it proves that the election under which Golden and others claim was fraudulent and void, and, because it was fraudulent and void, the board of county commissioners had been enjoined from canvassing the votes and declaring the result. No appeal was taken from the order of the district court granting said *injunction*, and said *injunction* has not been dissolved. To award a *mandamus* in this proceeding is, in effect, to reverse or vacate said *injunction* in a collateral proceeding, and without notice to either party to the *injunction* suit.

More than this: Said election was held February 28, and the canvass thereof was enjoined March 3, 1871. This application for a *mandamus* was not instituted until April, 1873,—more than two years afterwards. The *injunction* remains; no canvass of the votes has been made; and the plaintiffs here, and all others, must be deemed to have acquiesced in the decision in the *injunction* case. The *94 plaintiffs have slept *upon their rights too long. *People v. Seneca C. P.*, 2 Wend. 264; *Fish v. Weatherwax*, 2 Johns. Cas. 217, note 14; *King v. Stainforth & K. C. Co.*, 1 Maule & S. 32; *King v. Commissioners*, 1 Barn. & Adol. 378, 380.

Error does not lie from the order refusing a *mandamus*. The writ of *mandamus* is essentially a prerogative writ. Applications therefor are addressed to the discretion of the court, and, whether allowed or denied, the order of the court is not reviewable. *State v. Marston*, 6 Kan. *537; *Briggs v. Vandenburg*, 22 N. Y. 467; *Commercial Bank v. Canal Com'rs*, 10 Wend. 30; *Ex parte Fitzgerald*, 23 Wend. 648; *Fish v. Weatherwax*, 2 Johns. Cas. 217, note 63; *People v. Rensselaer C. P.*, 3 How. Pr. 165; *Griffin v. Griffin*, 28 How. Pr. 189, 191.

The affidavit on which the application for the writ was made was entitled and should not have been read or considered. *People v. Tioga C. P.*, 1 Wend. 291; *Haight v. Turner*, 2 Johns. 371; *People v. Sage*, 2 How. Pr. 60; 3 Dew. 54, 55. The practice is still the same, notwithstanding the Code. *People v. Dikeman*, 7 How. Pr. 124.

The petition does not show that the plaintiffs are entitled to the relief claimed, but shows affirmatively they are not. It shows that the vote was not canvassed, nor proclamation of result made. The county officers have twenty days after "such proclamation" for prep-

aration and removal. This proclamation of the result of the canvass is the test and evidence of duty and authority to remove, and is akin to the ordinary certificate of election. Gen. St. 298, §§ 8, 9; Jones v. State, 1 Kan. *273, *280.

BREWER, J. On the fifteenth of February, 1871, a county-seat election was held in Labette county. No place received a majority of all the votes, and on February 28, 1871, a second election was held to decide between the two places having the highest number of votes. At such election the returns showed a majority in favor of Labette city. On the third of March, 1871, the judge of the district court issued a restraining order against the commissioners of said county, restraining them from canvassing the votes, proclaiming the result, or removing the county offices to Labette city. The petition therefor alleged fraudulent voting in favor of Labette city at both *95 elections. Such restraining order yet remains *undisturbed and in full force. In April, 1873, certain electors of Labette city presented to the district court of said county a petition for a writ of *mandamus* to compel the different county officers to remove their offices to Labette city. Such petition simply alleged the two elections, the result of the votes, and the failure of the commissioners to canvass and declare the result. The district court refused the writ, and now plaintiffs in error seek a reversal of that order.

Several questions are discussed by counsel in their briefs. We rest our affirmance of the ruling below upon one point. The writ of *mandamus*, originally a prerogative writ, and solely within the discretion of the court, still so far partakes of its original nature that the court may exercise a considerable degree of discretion in granting or refusing it. State v. Marston, 6 Kan. *537. Can we say that the district court abused its discretion in refusing this writ? Immediately after a county-seat election an injunction is issued restraining any canvass of the votes, and any removal of the county offices, on account of the fraudulent manner of the election, and the fraudulent voting in favor of the apparently successful place. For more than two years the whole community seems content with that decision. Even the citizens of the place apparently successful claim no rights by virtue of such election. This seems very strange, considering the eagerness with which ordinarily a county-seat is sought, and the vehemence of the efforts made to secure or retain it. The records of this court abundantly show how important this question is considered. Such remarkable indifference argues either a consciousness of the truth of the charges, or a conviction that the changes of population, or of the facilities of travel, render it for the best interests of the county, as a whole, that the county-seat remain where it is. We do not mean to assert that this lapse of time has operated like a statute of limitations, and absolutely cut off all rights; nor that a

similar lapse of time in an older and more permanently settled community ought to have the same influence upon the discretion *96 of a court. It must be remembered that *this county has been but lately opened to settlement, and that population has recently and rapidly been flowing into it. Less than two years may have materially altered the centers of population and wealth, as well as the means and facilities of communication, and it may well be that the community generally prefer that the county-seat remain undisturbed. At any rate, when the local court, familiar with the condition of the county, refuses a writ of *mandamus* to remove the county offices, and nothing but the naked facts of the election appear in the application therefor, without explanation of the delay, and the restraining order appears undisturbed, we cannot hold that there was an abuse of discretion in refusing the writ.

(All the justices concurring.)

EVANDER LIGHT v. D. W. POWERS and others.

January Term, 1874.

1. **Bills and Notes: Contract to Accept Draft: Pleading.** A petition which states a contract to accept drafts, and a breach of such contract, states a cause of action, and a demurrer to it should be overruled.
2. **Contract: Bills of Exchange.** Such a contract is valid though not in writing.

Error from Saline district court.

Action brought by Light against Powers and two others, as partners. Defendants demurred to the petition, and the district court, at the May term, 1873, sustained the demurrer.

Mohler & Garver, for plaintiff in error.

The petition in this case is, perhaps, capable of two different *97 constructions: One, that the first cause of action is *founded upon the promise of defendants to pay the costs and expenses necessary in filling certain government contracts,—to pay them by accepting and paying drafts that might be drawn upon them for that purpose. The other construction is that the promise of defendants was simply to accept and pay drafts, checks, etc., that might be drawn on them. The petition alleges a breach by defendants of their agreement, (whichever it is,) and the consequent damages to plaintiff. Without any particular violence to the grammatical or legal construction of the petition, we think either meaning can be drawn from it, and in such cases the rule is that, where a pleading is capable of different meanings, that should be taken which will support the plead-

ing, and not the other which would defeat it. 1 Chit. Pl. 237. If the first meaning is drawn from the petition, there is no doubt that it states facts sufficient to show a good cause of action; and that, with the second meaning, there is a good cause of action stated, we think equally clear. The statute provides (section 8, c. 14, Gen. St.) that "no person within this state shall be charged as an acceptor of a bill of exchange unless his acceptance shall be in writing, signed by himself or his lawful agent;" yet it is not necessary for the petition to allege that *the promise to accept* was in writing,—that is matter of evidence only. 1 Chit. Pl. 303, 304, 221; Elting v. Vanderlyn, 4 Johns. 237; Nelson v. Dubois, 13 Johns. 177. Even though the petition had alleged that the promise was not in writing, still it would state facts sufficient to sustain an action for damages under section 12 of the chapter before referred to.

The facts stated in the second cause of action are amply sufficient to sustain an action against the defendants. There is alleged a simple contract, by which the plaintiff agrees to do certain things, and the defendants promise to pay certain moneys in consideration of it. The plaintiff performs his part of the contract, and the defendants refuse to perform theirs, by which plaintiff is damaged. The demurrer is to the petition as a whole,—to both causes of action considered together. If either is good, the demurrer should have been
 *98 *overruled. 1 Chit. Pl. 664; Martin v. Williams, 13 Johns. 264; Monell v. Colden, Id. 396, 402; People v. Enoch, 13 Wend. 169.

BREWER, J. The error alleged in this case is the sustaining of a demurrer to the petition. The petition contains two counts. The demurrer is general to the whole petition, so that if either count be good it ought to have been overruled. The first count is for damages for failing to accept and pay certain drafts drawn by plaintiff upon defendants. It alleges that defendants, "for a good and valuable consideration, promised plaintiff to accept and pay all drafts drawn by him on them on account of certain government contracts in which they were interested, and the costs and expenses of which they had promised to pay by accepting and paying plaintiff's drafts as above;" that he drew certain drafts, describing them, on account of and for said costs and expenses; that the same were not accepted or paid by said defendants, and he was compelled to pay the several payees thereof the amounts of the drafts, with costs of protest and damages; of all of which defendants had notice, and, though often requested, had failed to repay plaintiff. This, it will be perceived, is not an action on the drafts, nor an attempt to charge the defendants as acceptors by virtue of a previous promise to accept. It seeks to make them responsible for damages for breach of a contract to accept. The distinction between the two is obvious, and is well pointed out in the case of Boyce v. Edwards, 4 Pet. 111. See, also, Carnegie v. Mor-

rison, 2 Metc. 381. For breach of such a contract a party would be entitled to at least nominal damages, and more, if more were alleged and proved. It follows, therefore, that a petition stating such a contract, and the breach of it, states a cause of action, and a demurrer to it should be overruled. There is nothing in the statute nor in the law-merchant that requires such a contract to be in writing. Our statute, by implication, plainly recognizes such a cause of action.

Gen. St. 116, § 12.

*99 The judgment of the district court will be reversed, and *the case remanded for further proceedings in conformity with the views herein expressed.

(All the justices concurring.)

GEORGE BARTLETT and others v. STATE OF KANSAS.

January Term, 1874.

1. **Quo Warranto: Parties.** Where an action in the nature of a *quo warranto* has been commenced by the county attorney, in the name of the state of Kansas, for the purpose of ousting from office certain persons who have unlawfully usurped certain offices, there is no defect of parties plaintiff. [State v. Marion Co., 21 Kan. 432.]
2. —: **City Officers: Action in Name of State.** In such a case, when the offices into which said persons have unlawfully intruded are the offices of mayor, police judge, and city council of a city of a third class, the state has such an interest in the subject-matter of the action that the action may be prosecuted in the name of the state as plaintiff.
3. —: **Who may Prosecute.** And in such a case, where the action is prosecuted in the name of the state, the county attorney may commence and prosecute the action for the state.

Error from Cloud district court.

Quo warranto, instituted by the county attorney of Cloud county. The title of the action was, "The State of Kansas, Plaintiff, against George Bartlett, Peter McCrea, Frank McNulty, S. M. Ransopher, Harry Dobbs, A. W. Campbell, and Moses Heller, Defendants." The petition set forth and alleged "that the city of Clyde, in said county and state, is a city of the third class, under and by virtue of the general laws of said state; that by the same laws there has been created and exists in said city, for the purpose of good government thereof, and for the purpose of promoting the general welfare of the inhabitants thereof, the offices of mayor, five councilmen, and police
 *100 judge; that on or about the third of April, 1873, at and *within said city, and within the jurisdiction of this court, the said defendant Bartlett did unlawfully usurp and intrude himself into the

said office of mayor of said city of Clyde, the said defendants McNulty, Ransopher, Dobbs, Campbell, and Heller did then and there unlawfully usurp and intrude themselves into the said offices of councilmen, and the said McCrea did then and there unlawfully usurp and intrude himself into the said office of police judge; and each and every of said defendants from thence hitherto have continued unlawfully to hold and exercise the said offices respectively so as aforesaid usurped by them respectively, the said offices then and there being public offices under and by virtue of the laws of said state, the said defendants from the date last aforesaid to the present time having unlawfully usurped the city government of said city; and that said defendants, from the date last aforesaid to the present time, have respectively continued, and still continue, unlawfully to hold and exercise the said offices so as aforesaid respectively unlawfully intruded into by them; and the plaintiff further shows that no other person or persons is or are by law entitled to hold or exercise any of said offices. Wherefore the plaintiff demands judgment that the said defendants be ousted from said offices so by them respectively unlawfully held and occupied." To this petition the defendants demurred. The district court, at the August term, 1873, overruled the demurrer.

E. J. Jenkins, for plaintiffs in error, submits:

The county attorney can only commence an action in the nature of *quo warranto* of his own motion in cases:—*First*, when directed to do so by competent authority; *second*, when the defendant, as a public officer, or an officer *de jure*, has done, or suffered any act to be done, or omitted to perform some duty, which by the provisions of law works a forfeiture of his office, when he has been elected or appointed as such officer; *third*, against a corporation illegally incorporated; *fourth*, against a corporation or association for abuse of power, or any act that amounts to a surrender or forfeiture of their rights and privileges. Laws 1871, pp. 276, 277, §§ 1, 2.

*101 The county attorney was not authorized by any competent authority, and the state and county had no interest in the offices in the city of Clyde; and this being a civil action, should have been commenced in the name of the real party in interest. Code, § 26; *People v. Cook*, 8 N. Y. 71. The state can only be made a party when the action is brought against an officer or a corporation for doing some act, or refusing to perform some duty, that amounts to a forfeiture of the office, or the rights and privileges of the corporation; but the state cannot be made a party when the action is brought against a party for *usurping* or *intruding* into an office created by law. Laws 1871, p. 277, § 2; *State v. Cobb*, 2 Kan. *32.

The county attorney cannot legally, of his own motion, commence the action against a defendant for usurping an office without bringing the action in the name of the party entitled to the office. If an office has been usurped by the defendant, some other person is entitled to hold or occupy that office, and the action must be commenced in the

name of that party. Laws 1871, p. 277, § 2. The petition alleges that Clyde is a city of the third class, and as such city there have been created and exist in said city the offices mentioned in the petition; and the city is certainly entitled to have the offices occupied and held by some persons. The plaintiff is therefore estopped from alleging that no persons are entitled to hold said offices, and if said offices were usurped by the defendants below, the persons entitled to hold said offices should have been made parties plaintiff. There is, then, a defect of parties plaintiff. The petition is inconsistent, and does not state facts sufficient to constitute a cause of action.

H. A. Hunter, Co. Atty., for defendant in error.

VALENTINE, J. This was an action in the nature of *quo warranto*, brought by the county attorney of Cloud county in the name of "The State of Kansas," to have determined by what authority certain persons were attempting to exercise *the functions of certain city offices of the city of Clyde, Cloud county. The city of Clyde is a city of the third class. Said persons were attempting to exercise the functions of the offices of mayor, police judge, and city council of said city. These facts, together with others, were set out in full in the petition filed by the county attorney. The defendants demurred to this petition on the following grounds, to-wit: (1) There is a defect of parties plaintiff; (2) the petition does not state facts sufficient to constitute a cause of action in favor of said plaintiff and against said defendants. The court overruled said demurrer, and the defendants below, plaintiffs in error, now assign that ruling for error.

1. Whenever any person usurps an office, and attempts to hold it wrongfully and without any legal authority, as the county attorney alleges that the defendants have done and are doing in this particular case, then we suppose that not only the state, but also any individual who may be entitled to hold the office, may maintain an action in the nature of *quo warranto* to oust such usurper from such office. But each has a separate action, and the two together do not have a joint action. Neither is a necessary party when the other commences the action. Hence, although the state is the only plaintiff in this case, and the persons entitled to hold the different offices are not made parties thereto, still there is no defect of parties plaintiff. But, as we shall state more fully hereafter, the petition shows that no person is entitled to hold any one of said offices.

2. It is claimed that the petition below does not state facts sufficient to constitute a cause of action, and the only reason given therefor is that the action is not prosecuted in the name of the real party in interest. Now, as we have before stated, any individual in this state entitled to hold an office has such an interest therein that he may maintain an action in the nature of *quo warranto* to oust any

intruder therefrom, and he may maintain the action in his own name, and not in the name of the state. Laws 1871, p. 277, § 2.

*103 But this right of action on the part of *the individual does not oust the state from its right of action. Their separate rights of action are founded upon separate and distinct interests. The individual may prosecute the action because he is interested in the emoluments of the office, and entitled to receive the same. The state may prosecute the action because it is interested in the good government and general welfare of all its citizens. It is the duty of the state to see that no intruder shall usurp and hold an office that should be legally filled by some other person; and the protecting care of the state extends to cities of the third class, as well as to any other portions of its territory. In this particular case, however, it is not shown that any person is entitled to hold any one of said offices. On the contrary, the petition shows that no one is entitled to hold or to exercise the functions of any one of said offices. Why this is so, is not stated. Perhaps the persons elected to fill said offices have refused to qualify, or have died, or resigned, or removed from the city. But whatever may be the reason, and whether the reason is sufficient or not, still the power of the state to remove intruders from office is ample. Where there is some person entitled to hold the office, the county attorney may commence the action in the name of the state, but in such a case "he shall set forth in the petition the name of the person rightfully entitled to the office, and his right or title thereto." Laws 1871, § 2. But where no person is entitled to hold the office, he may still commence the action in the name of the state, but simply stating, as the county attorney has done in this case, that no person is entitled to hold the office. We suppose it will hardly be claimed that where there is no individual who can commence an action to oust an intruder from office that the state is also powerless in the matter; we suppose it will hardly be claimed that where there is no individual who is competent to bring the action, the people of a city may be governed by usurpers and intruders without any legal means for relief.

3. It is claimed that the county attorney has no right to com-
 *104 mence or prosecute this action. We think he has. Sec*tion 136 of the act relating to counties and county officers provides that "it shall be the duty of the county attorneys to appear in the several courts of their respective counties, and prosecute or defend, on behalf of the people, all suits, applications, or motions, civil or criminal, arising under the laws of this state, in which the state or their county is a party, or interested." Gen. St. 284. And section 654 of the Civil Code provides that "when the action [in the nature of *quo warranto*] is brought by the attorney general or the county attorney of any county, of his own motion, or when directed to do so by competent authority, it shall be prosecuted in the name of the state," etc. Laws 1871, p. 277, § 2. The county attorney in a case

like this may prosecute the action upon his own motion. If he cannot do so, who is there to authorize him to do so?

Of course, we know nothing of the facts of this case except as they are stated in the petition of the county attorney, and, for the purposes of this case, such statements must be taken as true.

The judgment of the court below is affirmed.

(All the justices concurring.)

JOHN F. HOUSER and another v. D. J. S. PEARCE.

January Term, 1874.

Damages: Measure of: Breach of Contract: Instructions. In an action to recover damages for the breach of a contract to harvest oats, where the petition alleges that by reason of such breach the oats were entirely lost and destroyed, and where none of the evidence is preserved, this court cannot say that there was any error in refusing to instruct the jury that the measure of damages was the difference between the contract price and what it would have cost to have had the work done by others, and in instructing them that if the plaintiff took all reasonable precaution, and still lost the oats through the defendants' failure to perform their contract, he might recover the value of the oats lost.¹

*105 *Error from Crawford district court.

Action by Pearce against Houser and another to recover damages for an alleged breach of contract. Verdict and judgment for plaintiff, at the September term, 1873, of the district court.

John T. Voss, for plaintiffs in error.

The petition simply calls for simple damages, without setting out any special damages whatever. Now, we contend that under this pleading (and we asked the court to so instruct the jury) that all the plaintiff below could possibly recover would be the difference between the contract price for cutting the grain and what it would cost to employ other and necessary means to do the work. This is the true measure of damages under the pleadings, and no other damages ought to be allowed. *Field v. Kinnear*, 4 Kan. *476; also *McCubbin v. Graham*, Id. 397. It nowhere appears by the allegations of the petition that the parties to the contract, at the time thereof, had in view the entire value of the oat crop; yet the trial court absolutely instructed the jury that the measure of damages was the full value of the oat crop, less the expense of cutting. See *Johnson v. Matthews*, 5 Kan. *113; *Walker v. Stetson*, 14 Ohio St. 100. The court will presume, in the absence of a showing to the contrary, that all the proof and instructions were given to sustain the material al-

¹See *Johnson v. Mathews*, 5 Kan. 70, and note.

legations of a pleading, but nothing more. The court squarely told the jury that the defendants agreed to pay plaintiff for his oat crop unless they harvested it. This is not what plaintiff tells us in his petition. We asked the court to tell the jury that if defendants had made a contract, and failed to perform it, the immediate and proximate damages resulting therefrom would be the proper damages; but the court refused to do this, and for such error we ask a reversal of the judgment.

*106 *BREWER, J. Defendant in error recovered a judgment in the district court of Crawford county for damages for breach of a contract to cut, bind, and stack certain oats. This judgment plaintiffs in error now seek to reverse. The testimony is not preserved, and but a single question is presented, and that upon the refusal of an instruction as to the measure of damages. Plaintiffs in error asked the court to charge that the measure of damages was the difference between the contract price and what it would have cost to have gotten the same work done by other parties. This the court refused, and charged that the plaintiff was entitled to recover such damages as he actually sustained by reason of the failure, provided he did what he could to protect himself from loss; that if he, relying upon the contract with the defendants, made no other provision for cutting the grain, and did not become aware that defendants would fail in their contract until it became so late that he could not get these oats harvested by others until they were ripened and destroyed, he was entitled to recover the value of the oats so lost and destroyed as they stood in the field. While the instruction refused states what perhaps would be the ordinary rule for the measure of damages, still we think that given states the rule as applicable to some cases. If the plaintiff, after using all reasonable precautions, lost his crop by reason solely of the failure of defendants to perform their contract, he was clearly entitled to recover the amount of such loss; and to that extent the instruction goes, and no further. We must presume that the evidence, it not being before us, warranted the instruction. The petition clearly does, for it alleges specifically that, by reason of the breach, the oats were entirely destroyed and lost to the plaintiff.

The judgment will be affirmed.

(All the justices concurring.)

*107 *ROBERT T. FURROW and another v. SALLY M. CHAPIN.

January Term, 1874.

1. **Supreme Court: Question not Made in Trial Court.** Where the parties to an action of replevin file a full set of pleadings, and go to trial upon the merits of the action, and a verdict and judgment are rendered for the plaintiff, the supreme court will not entertain a question raised for the first time in the supreme court that no affidavit for the order of replevin was ever made.
2. **Replevin: Officer: Party: Judgment: Costs.** In an action of replevin against an officer for property seized by him on execution, the plaintiff in the execution is afterwards made a party defendant, but not in lieu of nor substituted for the officer, and the petition is not amended so as to allege anything against said new party, and said new party does not in his answer set up any ground for nor ask any affirmative relief. *Held*, that a judgment rendered jointly against said officer and said new party for \$225, and costs, is erroneous against said new party. [Palmer v. Meiners, 17 Kan. 479.]
3. **Execution: Husband and Wife.** An officer who holds an execution against the property of the husband has no authority by virtue of the execution to seize the property of the wife.
4. **Married Women: Action.** A married woman may maintain an action in this state in her own name. [Miner v. Pearson, 16 Kan. 27; Dickson v. Randal, 19 Kan. 214.]
5. **Witnesses: Competency of Wife.** Where a married woman replevies property, she may testify in the case, although the defendant may claim that he, as an officer, seized and now holds the property as the property of her husband, and that he seized the same by virtue of an execution issued against the property of her husband.
6. **Sales: Presumption: Place of Purchase.** Where a purchase of property is made, but the evidence does not show where, it will be presumed that the purchase was made under laws similar to our own.¹
7. **Married Women: Separate Property.** A married woman may purchase horses with her own money if she chooses to do so.

Error from Nemaha district court.

Replevin brought by Sally M. Chapin against Furrow, to recover the possession of two horses. Furrow gave a bond, and retained possession of the property. Furrow's answer was a general denial. Afterwards William P. McCubbin petitioned for leave to be joined as a co-defendant, alleging that he was the real party in interest. He was so joined by order of the court. Trial at the April term, 1873, *108 of the district *court. Verdict and judgment for plaintiff for \$225.

Joseph Sharpe, for plaintiffs in error.

The petition in the court below was filed on the fifteenth of April, 1871, without the said Sally M. Chapin, or any one as her agent, first

¹In the absence of anything showing the contrary, we presume that the laws of other states are substantially the same as our own. VALENTINE, J., Dodge v. Coffin, 15 Kan. 285. Same principle, applied. Kansas Pac. Ry. Co. v. Cutler, 16 Kan. 570; Heithaus v. Farris, 24 Kan. 766; Baughman v. Baughman, 29 Kan. 284.

having filed with the clerk of said district court an affidavit as required by section 177 of the Civil Code. This is manifestly erroneous, and the whole proceedings were without jurisdiction, and void.

On the twenty-seventh of April, 1872, William P. McCubbin was permitted, by order of the court, to come in and defend the said action as a party in interest. He first demurred to said petition, and the demurrer was overruled. This was error, as the petition nowhere mentions the name of the defendant McCubbin; nor is there in it a single allegation that the said Sally had suffered any wrong by the said McCubbin, or had any claim of any sort or nature against him. McCubbin then answered, showing that the property was taken by Furrow on an execution in favor of McCubbin against the husband of said Sally.

The district court should have set aside the verdict and granted a new trial, because it appeared, after all the evidence was in, and from the pleadings, that the defendant Furrow was a *deputy-sheriff*, and as such was not liable to be sued in this action. The action should have been brought against the *sheriff* of said county. The acts of the deputy as such are the acts of the sheriff, and he alone is answerable in law for the acts of his deputy. *Pond v. Leman*, 45 Barb. 154; *Curtis v. Fay*, 37 Barb. 64. No joint or several judgment could legally be entered up against Furrow for wrongfully detaining the horses as deputy-sheriff; and certainly none against McCubbin without some allegation of wrong against him.

Could Sally M. Chapin bring this action in her own name, admitting she had a separate property in the horses sued for? The authorities say she could not. *Willis v. Underhill*, 6 How. Pr. 396;

Woods v. Thompson, 11 How. Pr. 184. This objection can be *109 taken at any stage of *the proceeding, and was urged on the motion to set the verdict aside, and for new trial.

The deposition of said plaintiff, Sally M. Chapin, was offered and admitted in evidence against the objections of the defendants. Section 1, c. 165, Laws 1872, enacts that husband and wife shall be incompetent to testify for or against each other. The testimony and pleadings show that Sally M. Chapin is the wife of D. M. Chapin, and that the horses claimed in this suit by the said Sally, and which she swears in her deposition are hers, were levied upon by Furrow as the property of her husband, and sold by said Furrow as deputy-sheriff to pay the debt that said D. M. Chapin owed to McCubbin. That being so, was she not giving evidence in favor of, or against the direct interest of, her said husband?

But admit the deposition of Sally M. Chapin, and it does not show that she is the legal owner of the horses claimed by her. She deposes that she purchased said horses in some place not in the state of Kansas, as she *sent them to Kansas* about three years before the making of the deposition, and after her marriage with D. M. Chapin. There is no evidence that the laws of the state or country where she so purchased the horses gave a married woman during coverture the

right to purchase personal estate, and hold it as her separate estate from her husband. In the absence of such proof, the rule of law is that the common law must be in force in the state or country where such purchase was made. If the common law was in force, she could not buy or hold the horses claimed here as her separate estate; but in the purchase she would be held to be the agent of her husband, and the title would immediately vest in him, and they might have been taken in execution immediately to pay the debts of her husband, even had she purchased them with her own money that she had earned in any business. Story, Conf. Laws, c. 8, p. 322; *Savage v. O'Neil*, 42 Barb. 378.

Section 1, c. 62, Gen. St., commonly called the "Married Women's Act," does not contemplate that a wife during coverture shall *110 turn out horse-trader, and buy and sell horses, *etc., but has carefully set down what shall be the separate estate of a wife. Said section 1 defines that all the property a woman may have before her marriage,—all property that may come to her by *devise, descent, or bequest*, or by the *gift* of any person other than her husband,—may be and remain her separate property, and hold the same separate from her husband. This is the only way that a married woman can acquire or hold property as her separate estate from her husband in this state. It can scarcely be claimed that Sally M. Chapin came by the horses she now claims in this action by any of the methods pointed out in the above statute. On the contrary, she expressly deposes that she purchased them and paid for them, and they were no gift.

J. E. Taylor, for defendant in error.

McCubbin was made a party defendant on his own motion, long after Furrow had given a bond to retain the property, and he and McCubbin had sold the same. Furrow was a proper party defendant, as he was the party in possession, and detained it from defendant in error. Besides, his giving a bond and selling the property admitted the fact. The bond took the place of the property. No question as to parties was raised in the court below. McCubbin never set up by answers any interest in the property.

Mrs. Chapin, and not her husband, was the owner of this property, under the laws of Kansas. The law of Illinois on the question of the property of married women is similar to ours.

The clerk below may have failed to copy the affidavit. No question as to it came before that court. Furrow could not claim that he was prejudiced after giving his bond and selling the property. McCubbin was the real party in interest. A judgment against one or both would be good.

VALENTINE, J. This was an action of replevin. Full plead-
*111 ings were filed in the court below, to-wit, a petition, an *an-
swer, and a reply. A trial was had before a jury upon the
merits of the action. A verdict was rendered for the plaintiff below,

defendant in error, and judgment was rendered accordingly. The defendants below now bring the case to this court, and ask a reversal of said judgment. No affidavit for the order of replevin is copied into the record brought to this court; and the question is now raised for the first time that no such affidavit was ever made. The plaintiffs in error are too late in raising the question. If no such affidavit was in fact made, they should have raised the question in the court below, and before they went to trial on the merits of the action. The court below never heard nor decided the question, and of course could not have erred in any ruling thereon.

2. The property replevied was taken from the plaintiff by the defendant below Furrow, as deputy-sheriff, on an execution issued against the property of D. M. Chapin, the husband of the plaintiff below. The defendant McCubbin, who was plaintiff in the execution, afterwards came in, and was made a party defendant. The petition, however, was not amended; and it at no time stated any cause of action against McCubbin. Indeed, it did not even mention his name. McCubbin answered, but he did not state in his answer any ground for affirmative relief,—asked for none. He simply denied “each and every allegation in said petition alleged against him,” which really amounted to nothing, as nothing was alleged against him. His answer also alleged “that the property in the goods and chattels was not in the said plaintiff, but was in one D. M. Chapin, and taken in execution of his property by the said defendant, R. P. Furrow, deputy-sheriff of said Nemaha county, before the commencement of this suit, and was sold by the said deputy-sheriff at sheriff’s sale to the highest bidder long before the commencement of this suit.” This was the whole of McCubbin’s answer. The judgment was rendered jointly against Furrow and McCubbin for \$225 and costs.

This, we think, was erroneous. Such a judgment should not *112 have been rendered *against McCubbin. No issue was made up between the plaintiff and McCubbin, as might have been done under section 42 of the Code. McCubbin was not made a defendant *in lieu* of Furrow, as he might have been under sections 43 and 44 of the Code; nor was McCubbin *substituted* for Furrow, as he might have been under section 45 of the Code. Gen. St. 637, 638. McCubbin was simply a supernumerary defendant, as the pleadings were made up, and there was nothing to try as between him and the plaintiff. The judgment should also have been rendered in the alternative. *Hall v. Jenness*, 6 Kan. *357, *365; *Copeland v. Majors*, 9 Kan. *104, *106; *Wilson v. Fuller*, 9 Kan. *177, *193. But as no question has been raised in this court with reference thereto, we shall say nothing more concerning it.

3. The defendant Furrow is unquestionably liable in this action. The execution against the property of D. M. Chapin did not authorize him to seize the property of Sally M. Chapin.

4. A married woman may maintain an action in this state in her

own name. "A woman may, while married, sue and be sued in the same manner as if she were unmarried." Gen. St. 563, § 3; Id. 636, § 29. It seems strange that counsel should raise such questions as the last two. (We are now following the brief of counsel for plaintiffs in error.) Some of the questions which we shall hereafter notice have but little better foundation than the two last mentioned.

5. Where a married woman replevies property, she may testify in the case, although the defendant may claim that he, as an officer, seized and now holds the property as the property of her husband, and that he seized the same by virtue of an execution issued against the property of her husband. In the present case the defendant did not testify orally; but a deposition of hers was read on the trial. When the deposition was offered to be read on the trial the defendants objected. But they gave no reason why they objected, (*Simpson v. Kimberlin*, 12 Kan. *579; *Luke v. Johnnycake*, 9 Kan. *511, *113 *518;) and when the objection was overruled, as it *was, by the court, the defendants did not except to the ruling of the court, (*Small v. Douthitt*, 1 Kan. *335, *338.)

6. The plaintiff purchased said property with her own money. This is shown beyond all controversy. But she purchased it after she was married, and it is claimed by the plaintiffs in error that she purchased it outside of Kansas, and that we must presume that the common law prevailed where she purchased it, and that the property became at once the property of her husband. Now, in the first place, the evidence does not show *where* she purchased the property; secondly, we are not bound to presume that the common law prevails everywhere or anywhere outside of Kansas, but, in the absence of proof, we should presume that laws similar to our own exist everywhere throughout the civilized world; and, thirdly, even if we should presume that the common law was in force where the plaintiff purchased said property, still we should also presume that the rules of equity were also in force, and when the property was brought to this state the courts, under their equitable jurisdiction, would protect the wife's equitable rights. See *Going v. Orns*, 8 Kan. *85, *88, *89. This property was probably purchased by the plaintiff in Illinois, where their statutes are similar to our own. See *Gross*, St. Ill. 439; *Emerson v. Clayton*, 32 Ill. 493. In the present case we shall presume that the purchase was made under laws similar to our own.

7. A married woman may purchase horses with her own money if she chooses to do so. Gen. St. 563, §§ 2, 4.

This cause will be remanded, with the order that the judgment of the court below be modified in accordance with the views expressed in this opinion.

(All the justices concurring.)

*114

*C. H. GRAHAM v. HENRY E. COWGILL.¹

January Term, 1874.

1. **County Treasurer: Removal.** In the absence of any judgment against a county treasurer on his official bond, the board of county commissioners cannot remove such county treasurer from office, and fill his place by the appointment of some other person.²
2. ———: **How Office Vacated.** Where a county treasurer has, by acts and omissions, forfeited his right to further hold the office of county treasurer, (within the meaning of section 180 of the act relating to counties and county officers,) the office does not thereby become vacant, but becomes vacant only by the judgment of a court of competent jurisdiction, in an action in the nature of *quo warranto*, instituted for the purpose of effecting the removal of such county treasurer from office.

Original proceedings in *quo warranto*.

The case is stated in the opinion.

Ruggles & Sterry, for plaintiff.*Allison & McConnell*, for defendant.

VALENTINE, J. This is an action in the nature of *quo warranto*, brought originally in this court by C. H. Graham as plaintiff, against Henry E. Cowgill, to have determined their respective claims to the office of county treasurer of Coffey county. The material facts are, in brief, substantially as follows: On the fifteenth of November, 1873, the plaintiff was the duly elected, qualified, and acting county treasurer of said Coffey county. On that day the board of county commissioners of said county declared said office vacant. On the seventeenth of November, 1873, said board appointed Henry E. Cowgill treasurer of said county to fill said supposed vacancy. Said Cowgill gave bond, duly qualified, and on the twenty-first of November,

*115 ber, 1873, took possession of said office. Upon these *facts, who is entitled to the said office of county treasurer? We think that the plaintiff is unquestionably entitled to the office. The county board had no right in such a case to declare said office vacant. They can do so only where a judgment has been rendered against the treasurer on his official bond. Gen. St. 294, § 179, sub. 8. No such judgment was ever rendered in this case; nor is it claimed that any judgment of any kind has ever been rendered against treasurer. It is not claimed that said office had become vacant under section 179 of the act relating to counties and county officers, (Gen. St. 294;) nor is it claimed that it became vacant under any other law except section 180 of said act, (Gen. St. 294.) That sec-

¹See, in connection with this case, *State v. Graham*, *post*, *136.

²Failure of county treasurer to qualify, vacancy in office, election for unexpired term, etc., see *State v. Conn*, 14 Kan. 217. See, also, *State v. Wilson*, 30 Kan. 635; S. O. 2 Pac. Rep. 828; *State v. Graham*, *post*, *136.

tion provides that "if any * * * county officer shall neglect or refuse to perform any act which it is his duty to perform, or shall corruptly or oppressively perform any such duty, he shall forfeit his office, and shall be removed therefrom by civil action, in the manner provided in the Code of Civil Procedure."

Now, for the purposes of this case, we shall assume that the plaintiff neglected and refused to perform certain acts, and that he corruptly and oppressively performed certain other acts, whereby he forfeited his said office. But the office did not thereby become vacant. He simply forfeited his right to further hold said office; and the state (and no one else) had a right, by a civil action under the Code, in the nature of *quo warranto*, to remove him therefrom, (Gen. St. 759, 760, 761; Laws 1871, pp. 276, 277;) and until he should be removed therefrom by such civil action no vacancy would occur. The vacancy occurs only by the judgment of some court of competent jurisdiction. A county officer cannot be ousted from his office for any supposed neglect of duty until after he has had a fair trial, before some court of competent jurisdiction, and judgment has been rendered against him.

Judgment in this case will be entered in favor of the plaintiff.

(All the justices concurring.)

*116 *CHARLES W. WOLF v. SAMUEL W. FOSTER.

January Term, 1874.

1. **Payment: Pleading and Evidence.** Under an answer alleging generally payment to the plaintiff, it is not error to admit proof of payment to an agent of the plaintiff.
2. ———: **Receipt: Parol Evidence.** Parol evidence of the actual payment of money due may be received, although it appears that at the time of payment a receipt was given, which is not produced, and whose loss or destruction is not so accounted for as to admit secondary evidence of its contents. [Stainbrook v. Drawyer, 25 Kan. 385.]¹
3. **Instructions: Repetition.** The court is under no obligation to repeat the law as given in the general charge, in the special instructions asked by counsel.

Error from Neosho district court.

Action brought by Wolf to recover \$186.12 for certain goods sold by him to Foster in 1868. At the time of the sale Wolf was doing

¹See *American Bridge Co. v. Murphy*, ante, 86; *Stout v. Hyatt*, post, *243, and notes.

business at Milwaukee, Wisconsin, and Foster was residing at Wabasha, Minnesota. The answer was payment, defendant alleging that he "had paid said plaintiff the full amount of said demand before the commencement of this action." Reply, general denial. On the trial, at the April term, 1873, Foster testified that all his business transactions with plaintiff "were had with the agent and traveling salesman of said plaintiff, one Jake Weinberg." He further testified: "I had a settlement in full with said plaintiff through his man Weinberg some time either in February or March, 1869, and I paid to Weinberg all I owed to plaintiff, and took a receipt in full." Verdict and judgment for defendant.

Stillwell & Baylies, for plaintiff in error.

There is no allegation contained in the answer of any transaction whatever by defendant with Weinberg as agent of plaintiff, or otherwise. Under the established rule of pleading, under the Code, as well as at common law, a party to an action must, in some sufficiently legal form, plead or give notice, or suggest upon the record, *117 the substantive facts he *will offer to establish by evidence at the trial, else be barred of making proof, on the trial, of any facts not so stated. It was not competent for defendant, who assumed the affirmative of the issue at the trial, to give proof of any facts *dehors* the record, or which were not put in issue by the pleadings. A substantial reason for that rule is to avoid surprise to the adverse party.

The court also erred in its ruling that defendant might establish the fact of payment by *parol* evidence, independent of the written receipt.

The plaintiff requested the court to specially instruct the jury as follows: "The burden of proof is upon the defendant to satisfy you by a *preponderance* of the evidence that he had actually paid for the goods before the commencement of this action; and, unless he has so satisfied you of the fact of such payment by such preponderance of evidence, it is your duty to find for the plaintiff." This instruction was refused. The general instructions upon this point were loaded down with qualifications and additions, and it was error to refuse the instruction as asked by plaintiff.

J. R. Woodsworth, for defendant in error.

The Code does not, nor did the common law, require that pleadings should contain evidence of the facts and legal circumstances which the parties intend to prove. The pleadings are only a statement of the *facts* constituting the cause of action or defense, in plain and concise language, and without repetition. Civil Code, § 87. "Payment to plaintiff" was alleged. Payment to the agent is payment to the principal. Proof of payment to the agent sustained the answer.

It was not necessary to plead the receipt; nor to produce it on the trial. *Payment* being the *fact* alleged as the defense to the action of the plaintiff, it is competent to establish such fact by oral evidence.

A receipt but admits payment, and is no better evidence than direct oral evidence of the same fact.

*118 *BREWSTER, J. Plaintiff in error, as plaintiff below, brought his action on an account for goods sold. Defendant filed an answer alleging that before the commencement of the action he "had paid said plaintiff the full amount of said demand." A reply was filed denying payment, and upon these pleadings the case went to trial.

One ground of error is that, under the allegation in the answer of payment to the plaintiff, defendant was permitted to prove payment to an agent of the plaintiff, the one from whom he made the purchase of the goods specified in the petition. We see no error in this. Payment to an agent is in legal effect payment to the principal. And it is enough to allege payment to the principal, without specifying the particular party or agent who received the money.

A second alleged error is that after it had appeared in evidence that at the time of payment a receipt therefor was given, which was not produced, and whose loss or destruction was not so accounted for as to permit secondary evidence of its contents, the court permitted the defendant to give parol testimony as to the fact of payment. This was right. The receipt is good as an admission of payment, but it is only at best *prima facie* evidence, and susceptible of explanation or contradiction. The fact of payment can always be shown, independent of any admission by receipt or otherwise.

The third objection is that the court refused certain instructions asked. In the general charge the court laid down the law substantially as asked, and was therefore under no obligations to repeat it. It is true this addition or modification was made: "You are the exclusive judges of all the facts in the case, and you will carefully consider all the evidence submitted, giving such weight to the same as it is entitled to, taking into account all the surrounding

*119 circumstances, and thus determine where the preponderance lies, and decide accordingly;" but as this is a correct statement of the law, the plaintiff has no cause of complaint.

We see no error in the record as presented. The question in the case was simply one of payment,—one of fact for the determination of the jury, and not for the examination of this court.

The judgment will be affirmed.

(All the justices concurring.)

STATE OF KANSAS v. HILLIARD MORROW.

January Term, 1874.

Homicide: Verdict: Weight of Evidence. Where a criminal prosecution for murder in the first degree has been tried by a jury, and the jury has found the defendant guilty of murder in the first degree, and the court trying the cause has sustained the verdict, and where the evidence introduced on the trial is conflicting and contradictory, but where the evidence tending to show the defendant's guilt is sufficient if it were not contradicted by other evidence, and if it were allowed to have its full force and effect, to prove beyond all reasonable doubt every material fact necessary to be proved in the case, and every essential element of murder in the first degree, the verdict will not be disturbed by the supreme court merely upon the ground that it is not sustained by sufficient evidence.

Appeal from Davis district court.

Morrow was charged with murder in the first degree, for the alleged killing of Buck Overbee, in June, 1873. He was tried at the June term, 1873, of the district court, and found guilty as charged, and sentenced to imprisonment and death. From such conviction and sentence Morrow appeals to this court, alleging that the verdict is not sustained by the evidence.

McClure & Humphrey, for appellant.

H. H. Snyder and J. H. Austin, for the State.

*120 *VALENTINE, J. This was a criminal prosecution for murder in the first degree. The defendant was found guilty, and sentenced to be imprisoned in the penitentiary, and then to be executed in accordance with the present law. Laws 1872, pp. 336, 337. From this sentence the defendant now appeals. The only question raised in this court by the defendant is whether the verdict of the jury in the court below is sustained by sufficient evidence. Indeed, the only substantial question is whether the evidence sufficiently shows that there was such deliberate and premeditated design on the part of the defendant to kill the deceased as will constitute the killing murder in the first degree. The evidence was conflicting and contradictory; and while it is possible that the jury may have erred in weighing it, while it is possible that they may not have given to every portion of the evidence its due weight, while it is possible that they may have erred in finding from said evidence that every element of murder in the first degree was proved beyond all reasonable doubt, yet still there was evidence to sustain every material fact necessary to be proved in the case, and evidence to prove every essential element of murder in the first degree. That the defendant killed the deceased, that he did it in the manner and form charged in the information, and that he did it willfully and maliciously, we suppose

there can be scarcely any doubt. The only question is whether he did it deliberately and premeditatedly. The jury has found that he did; the court below has sustained and approved that verdict; and it is not now our province to retry the case upon its merits. It is not our province to weigh the conflicting and contradictory evidence, and determine the force and value of each portion thereof. Nor is it our province to determine from the whole of the evidence whether the defendant's guilt is shown beyond all reasonable doubt. The only question that we are to determine is whether there is sufficient evidence, if it were uncontradicted by other evidence, and if

*121 it were allowed to have its full force and effect, to prove beyond all reasonable doubt that the defendant is guilty of the offense charged against him.

The following facts, as shown by some of the evidence, tend to prove that the offense was committed deliberately and premeditatedly, and therefore that the offense was murder in the first degree: The wife of the deceased was and is the aunt of the defendant. A child of the deceased and a sister of the defendant (both children) had a fight. The wife of the deceased chastised the sister of the defendant therefor. This was the exciting cause of all the trouble that afterwards ensued. The defendant was on that day sawing wood at the post-office. He quit sawing wood about 2 or 3 o'clock in the afternoon, and went to the house of Mrs. Fox, where his sister-in-law lived, and got his revolver. He told his sister-in-law he wanted to sell it. He told Mrs. Fox he wanted to ship it. He went out of the back door of the house, through the alley near the Hale House, and to the house of the deceased. He met the wife of the deceased in the street, and immediately commenced to quarrel with her. He wished to know why she had whipped his sister. The deceased came out of the house, and entered into the quarrel. He found that the defendant had a pistol, and then he went back into the house and got his, and then came out again, but at the request of his wife went back into the house again and put up his pistol. He then returned without weapons, in his shirt-sleeves, and his hands open. The defendant all the time kept his hands in his pockets, and his right hand probably on his pistol. At one time he partly drew his pistol out of his pocket, and then put it back again. "He said he came for revenge." "He said he would shoot who he damn pleased." "He said he had been mad some time, and was going to have his revenge, and might as well have it that day as any other." He shot the deceased at a time when the deceased had no weapons, was in his shirt-sleeves, and had his hands open. The deceased then caught the defendant and threw him down. One witness says: "I think defendant was trying to fire again." There were three loads

*122 in the defendant's revolver at the time the shooting was done, but who put them in, or when they were put in, the evidence does not show. One witness says of the defendant: "I heard

him say, after the shooting, that he had got his revenge, and was going to give himself up." The defendant had a friend who lived with him, who was sawing wood with him, who followed him to the house of Mrs. Fox, who then followed him from the house at a convenient distance until the shooting was done, and then joined the defendant near by. His friend says that they quit sawing wood about 2½ o'clock p. m. Mrs. Fox says that the defendant was at her house between 3 and 4 o'clock p. m., and that the shooting was done about 15 minutes afterwards. All this transpired on June 12, 1878. There are some other suspicious circumstances. For instance, the defendant testified that when he said he would have his revenge he meant he would have the deceased arrested by the city marshal. This was all done in Junction City. Several other attempted explanations of the defendant's conduct rather tended to cast suspicion upon it, and to show his guilt.

The jury undoubtedly believed that the defendant intended, when he got his pistol, to have a row, and to kill any person who might interfere with him, and particularly the deceased. It can hardly be supposed that he got his pistol merely to sell it, or to ship it, or to defend himself from a supposed assault to be made by his aunt. He was a full-grown man, and she was a woman. And, besides, if he had stayed away from his aunt, she would not have molested him. In fact, it can hardly be supposed that he got his pistol merely for the purpose of killing his aunt, for men seldom kill women. He must have got it with the intention of having a row, and of killing his uncle if he interfered. There is another circumstance which we had almost overlooked, and which tends to show ill feeling between the two families. One witness testifies that during the quarrel the wife of the deceased said to the defendant: "Your wife went up to my house and whipped my boy."

We think there is sufficient evidence to sustain the verdict of the jury. The judgment of the court below is affirmed.

(All the justices concurring.)

*123 *AMOS BOBB v. HARVEY BANCROFT and others.

January Term, 1874.

1. **Contract: Agreement between Debtors and Creditors: Construction of.** A firm composed of four members was indebted to several parties. The creditors signed an agreement, which commenced with a recitation that they made, with the members of the partnership, "the arrangement following for the settlement of their claims, respectively, against said partnership and its members." It then provided that the partners should at once transfer to a trustee named certain specified prop-

erty in trust for said creditors; that the trustee should proceed without delay to convert the same into money, and, after paying the expenses of the trust, pay the same *pro rata* to the creditors "until the satisfaction of their claims," and the residue return to the partners; also that one of the firm should execute a mortgage on certain specified property to said trustee in trust for the creditors, conditioned that he would, in three equal annual payments, pay said creditors, or said trustee for said creditors, "any balance of their said claims which the said other property and assets and the proceeds thereof should be insufficient to pay," and then closed with this stipulation: "The foregoing conditions being complied with, we agree to extend the time of payment of our claims one-third in one year, one-third in two years, and one-third in three years." *Held*, that the firm, having performed all the conditions prescribed on its part, was entitled to claim from the creditors *simply an extension of the time of payment of its indebtedness*, and that there was no agreement, express or implied, on the part of the creditors to release any of the firm, or to look first to the property in the hands of the trustee, and secondly only to the mortgage security for the satisfaction of their claims; and, further, that three years having elapsed from the date of the agreement any creditor could maintain his action against the firm for the unpaid portion of his claim.

2. **Contract: Rules of Construction.** Where a contract is clear and unambiguous in its terms, it is the best evidence of the intention and agreement of the parties, and an allegation in a pleading thereon that the parties by that agreement intended something different from the plain import of its language, may, at least when there is no claim of mistake, fraud, or imposition, be disregarded.
5. **Pleading: Bills and Notes: Sufficiency of Answer.** A defense in an answer to an action on a promissory note, which alleges that the plaintiff has received from a certain trustee large sums of money in part payment of the note, and in excess of the amounts credited, and that the amount thus paid is unknown to defendants, and known only to the trustee and the plaintiff, should be held good on demurrer, although no amount thus paid is specified.
4. **Bills and Notes: Action on.** A party holding the note of a firm, for whose payment and security such provision has been made as specified
- *124 *in the agreement heretofore described, may maintain an action thereon, without first returning the money received from the trustee, and not credited on the note, or releasing, assigning, and returning all right, title, and interest he may have in the property transferred to such trustee.
5. —: **Defenses.** The fact that the property conveyed to such trustee was and is of value sufficient to pay all the expenses of the trust, as well as all the indebtedness of the firm, constitutes no defense to an action on such indebtedness.

Error from Lyon district court.

Amos Bobb, as plaintiff, brought suit against Harvey Bancroft, Carlos N. Bancroft, Robert E. Sheldon, and Robert D. McCarter, partners as Bancroft Bros. & Co., as defendants, declaring against the defendants on a promissory note executed by the defendants in their partnership name, "Bancroft Bros. & Co." Harvey Bancroft

and McCarter alone were served, and they answered, setting up nine defenses. Judgment was given for defendants, at the September term, 1873, of the district court. Another action was brought by Isaac M. Bobb, as plaintiff, against the same defendants, and involving the same questions. The two actions were heard and decided in this court together.

Orrin Miller, for plaintiff.

R. M. Ruggles, for defendants.

BREWER, J. Plaintiff in error (plaintiff below) brought his action against the defendants upon a promissory note. The petition was in the ordinary short form. The defendants, or rather the two of them who were served, filed an answer with several defenses. To these a demurrer was filed, which was overruled as to the second, third, fourth, sixth, and seventh defenses. To reverse this ruling on the demurrer plaintiff brings this proceeding in error.

*125 *The second defense, which presents the substantial merits of the controversy, is as follows. It appears from the petition, it should first be stated, that the defendants were partners under the firm name of Bancroft Bros. & Co.; that the note sued on was a partnership note, dated December 28, 1868, and due in one year. Now, the second defense in the answer alleges that this note was the only indebtedness of the defendants to the plaintiff; that in March, 1870, the firm entered into an agreement with all their creditors, including the plaintiff, which agreement is then recited in full. It is this in substance: The creditors make with the members of the partnership "the arrangement following for the settlement of their claims, respectively, against said partnership and its members:" The partners shall at once transfer to a trustee certain specified property in trust for said creditors. The trustee shall proceed without delay to convert the same into money, and, after paying the expenses of the trust, pay the same *pro rata* to the creditors, "until the satisfaction of their claims," and the residue return to the partners. Harvey Bancroft, one of the firm, shall also at once execute a mortgage on certain specified property to said trustee in trust for said creditors, conditioned that he will in three equal annual payments pay said creditors, or said trustees for said creditors, "any balance of their said claims which the said other property and assets, and the proceeds thereof, shall be insufficient to pay;" and then follows this stipulation: "The foregoing conditions being complied with, we agree to extend the time of the payment of our claims, one-third in one year, one-third in two years, and one-third in three years,"—which agreement was signed by all the creditors. The defense also alleges that defendants conveyed the property to the trustee as required; that the trustee received the property and accepted the trust; and that Harvey Bancroft executed the mortgage as stipulated in the agreement. The question then arises as to the effect of this agree-

ment. Was it simply an extension of time by the creditors, or did it change the form of the debt, and the person of the debtor?

*126 Counsel for defendant in error claim that the intention of the parties, as expressed by the instrument, was "(1) that the defendants should convey certain property, specifically described in the instrument, to the trustee therein named; (2) that the defendant Harvey Bancroft and his wife should make and deliver to this trustee a mortgage upon certain property mentioned and described, which was to be conditioned that the defendant Harvey Bancroft should pay *all* of the indebtedness of the partnership which the property transferred to the trustee should be insufficient to pay; (3) that the creditors (including plaintiff in error) *would thereupon release their several claims against the defendants, respectively, and look only to the trust fund in the hands of the trustee for the payment of their several claims, and to Harvey Bancroft for any balance that might be due to them on their claims after the trust fund had been exhausted in the payment of their claims;* (4) that the trustee should dispose of the property thus to be transferred to him without delay, and apply the proceeds *pro rata* to the payment of the various claims of their creditors until such claims should be satisfied; (5) that in case this trust fund should be insufficient to pay the full amount due to each creditor out of it, the creditors should postpone the payment of this deficiency so that Harvey Bancroft would be obliged only to pay one-third of it in one year, one-third in two years, and the remaining third in three years." Counsel also alleges in this second defense that such was the understanding and agreement of the parties.

The contract speaks for itself. The parties have reduced their agreement to writing, and that writing is the best evidence of their agreement. True, if the contract is fairly susceptible of more than one construction, that which is alleged to be the true construction and the intention of the parties will be taken to be correct when the question arises on demurrer. *Craft v. Bent*, 8 Kan. *328. But this rule does not apply when the contract is clear and unequivocal. Then an allegation that so and so was the intention and understanding of the parties will be held for naught, as against the obvious import of the language. Now, we fail to see in this contract anything

*127 *which directly or by implication contains any such stipulation as appears in the third paragraph of the quotation from counsel's brief. There is certainly no express stipulation to release any one, or to look to any particular fund or funds for payment. On the contrary, the simple agreement of the creditors is to give an extension of one, two, and three years. That which the debtors were to do is plainly stated, and then as plainly is it said: "The foregoing conditions being complied with, we agree to extend the time of the payment of our claims," etc. That which each party was to do appears as clearly and plainly as language can make it. The one was to secure, the other extend.

Counsel lays some stress on the use of the word "settlement" in the first clause of the agreement, which is as follows: "The undersigned, creditors of the late copartnership of Bancroft Bros. & Co., of Columbus, Ohio, make with the members of said partnership the arrangement following for the *settlement* of their claims, respectively, against said partnership and its said members;" and argues that, as it could not mean arrangement of accounts so as to ascertain the balance due, it must mean payment in full. The word "settlement" is not necessarily used with either signification. There would be no impropriety in its use in reference to just such a transaction as is disclosed here. The creditor extends time and obtains security. He may properly say he has thus settled his claim. He has made a new arrangement in reference to it. But whatever force the word "settlement" might have, standing by itself, it is here qualified by preceding language. The creditors make "the *arrangement following* for the settlement," etc. This refers us to the stipulations following to ascertain what kind of a settlement they did make. It is to them we must look to determine the nature of the agreement and the rights of the parties.

Counsel claims that such a construction makes the contract strange, harsh, and inequitable. It does not seem so. The defendants were in debt. Some of those debts were due. As to the others we *128 are not advised. They had some property *which was liable for those debts. It was their duty to pay them, and to use their property therefor. To convert property into money by judicial proceedings always involves considerable waste. They surrendered certain property absolutely, and gave other as security,—whether adequate or not we are not advised,—and obtained a considerable extension of the time of payment. This is certainly no small consideration to men in business. The contract might or might not be a generous one on the part of the creditors. If the value of the property surrendered and mortgaged was but a small per cent. of the indebtedness, then the contract was a very liberal one; if greater than the indebtedness, not so much so. But it is useless to speculate as to which party profited by the agreement. It is enough for us that both parties entered into it, and are bound by its terms.

We think the contract clear and unambiguous; that the claim sued on was not extinguished or released as to any of the debtors; that the only stipulation of the creditors was to grant an extension; and, as this action was not commenced until more than three years after the date of the agreement, nothing in this second defense discloses any defense, and the demurrer to it should have been sustained.

In the third defense of the defendants' answer they set up that, by the terms of the written agreement set out in the second defense of their answer, all of the creditors of the defendants, including the plaintiff, Amos Bobb, expressly agreed with defendants that upon

defendants' complying with the terms of said agreement that the creditors (parties to said agreement) would thereupon cause William Jamison, the trustee mentioned in said agreement, to sell and dispose of all the property, notes, and accounts, and all the merchandise assigned to him, and to pay the proceeds thereof *pro rata* to all of said creditors, including the plaintiff; and that the plaintiff and the other creditors agreed to accept and receive any and all such *pro rata* payments, and apply the same as a *full payment* to the amount of such *pro rata* payments; and that said creditors, including the plaintiff, would in no event *and under no circumstances attempt to enforce the payment or collection of their claims until after Jamison should have sold *all* of the assets transferred to him, and applied the proceeds of such sales *pro rata* to the payment of all said creditors; and that the said creditors, including the plaintiff, have "failed, neglected, and refused to have or compel the said Jamison to sell and dispose" of the assigned property, or collect the bills and accounts, and apply the proceeds thereof *pro rata* to the payment of said claims, and that said Jamison has wholly failed, neglected, and refused to convert said property into money, and apply the proceeds upon said claims, and all this without any fault on the part of the defendants, or either of them. This, it will be seen, simply sets up another statement of the intention of the parties to the agreement previously recited,—an intention of which we fail to gather any intimation from the agreement itself. Surely we search in vain to find in that instrument any *express* agreement to wait till the trustee has fully executed his trust, or to supervise his conduct and compel him to execute the trust, or even to be responsible for his negligence, delay, or misconduct. Whatever implications there might be, there is nothing expressed. The demurrer was improperly overruled.

In their fourth defense the defendants allege that the plaintiff has received from Jamison large sums of money as *pro rata* payments on the note, in addition to the amounts for which the plaintiff has given credit to the defendants, and that the plaintiff has neglected and refused to credit such payments upon the note. The plea further alleges that the amounts of such payments are wholly and solely within the knowledge of the plaintiff and Jamison. We see no objection to this defense, at least none that can be considered on a demurrer. It alleges partial payments in excess of those admitted, and, if true, reduces the amount to be recovered. Because the defendants are ignorant of the amount actually paid they are not thereby deprived of the benefit of such payments, or the right to prove as large an amount as possible. The demurrer to this count was properly overruled.

*130 *The sixth defense in the defendants' answer alleges that the plaintiff must *first* deliver and return to the defendants all of the money that he has received from Jamison, and not credited upon the note, and also *release, assign, or return* to the defendants all

right, title, and claim or interest the plaintiff may have in or to any of the property assigned by the defendants to Jamison on the eleventh of March, 1870; or, in other words, the claim is that a creditor, having a note which is secured, must, before he can maintain an action at law on the note, release and return the security. We do not so understand the law. The creditor may ignore the security altogether, and sue upon his note. Of course, whatever money has been realized from the security is a credit on the note; and if after the note, or the judgment rendered thereon, has been fully paid, the creditor still holds any security, he may be compelled to release and return it. Perhaps, also, in some cases, equity might interfere and compel restitution before or at the time of payment, but we doubt whether equity would ever make the release of the security the prerequisite to an action on the debt. The demurrer was improperly overruled.

The seventh plea of the defendants alleges that the property transferred and delivered by the defendants to Jamison was and is sufficient in *value* to have paid any and all of the indebtedness of the firm of Bancroft Bros. & Co., and also the expenses of carrying out the terms and conditions of the assignment. We need hardly comment upon this defense. For reasons already fully suggested it was insufficient, and the demurrer to it ought to have been sustained.

The judgment of the district court in overruling the demurrer to the second, third, sixth, and seventh defenses set up in the answer will be reversed; and in overruling the demurrer to the fourth defense will be affirmed. The costs of this court will be divided.

It is understood that the same questions are in the succeeding case of Israel M. Bobb against same defendants, and the same order will be made in that as in this.

(All the justices concurring.)

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*STATE OF KANSAS v. ABRAM CUTLER.

January Term, 1874.

1. **Injunction: Jurisdiction of Judge at Chambers.** An injunction may be granted by the judge of the district court at chambers, and a charge for the violation of such injunction may be heard and determined by such judge at chambers.
2. **Contempts: Trial for.** Where such a charge is tried by the judge of the district court at chambers, and no jury is asked for, and no objection is made nor exception taken to the action of the judge in trying the case without a jury, *held*, that such judge does not commit error in trying said

charge without a jury. And, *semble*, (but not decided,) that a party charged with contempt is not entitled to a trial by jury in any case.¹

3. **Injunction: Contempt: Who Liable for.** Where an injunction is issued against a railway company, its assigns, agents, employes, and any one acting by its authority or in its behalf, but not against the present defendant by name; and the present defendant is the president of the railway company and owns a majority of its stock, and has by contract with the railway company full control of all the property, franchises, and privileges of the railway company; and where the present defendant afterwards, with notice of said injunction, does what the company is prohibited from doing: *held*, that he may be prosecuted for a violation of said injunction.
4. ———: **Proceeding.** The proceeding for the violation of an injunction is a summary proceeding, and the charge may be tried upon the original affidavit filed in such proceeding, and not upon any formal pleadings.

¹ See Peyton's Appeal, 12 Kan. *405; In re Pryor, 18 Kan. 72; In re Abeles, 12 Kan. 451. Imprisonment exceeding five days, as a punishment for contempt, is illegal, but, etc., Ex parte Sweeney, 1 Pac. Rep. 879; appeal will not lie from judgment for contempt, and no stay of proceedings will be granted, but if the power of court is tyrannically exercised, the case may generally be remedied by *habeas corpus* or *certiorari*, Tyler v. Connolly, 2 Pac. Rep. 414; attorney may be disbarred for insulting a judge outside of court, when, People v. Green, 3 Pac. Rep. 65; power of clerk to pay jury fees out of the county treasury upon mere neglect or failure of losing party to pay them—not liable to imprisonment for not doing so after order of the court, Ex parte Makinney, 3 Pac. Rep. 258; attorney—depriving of license—vile epithets applied to court, In re Brown, 4 Pac. Rep. 1085; contempt not in court's presence—requisite affidavit, Strait v. Williams, 4 Pac. Rep. 1088; injunction—corporation, Morton v. Superior Ct. Tulare Co., 4 Pac. Rep. 489; appeals and punishments, Teller v. People, 4 Pac. Rep. 48; constructive contempt—failure of party to appeal—release, In re Dill, 5 Pac. Rep. 89; order of court—fine and imprisonment—Utah *habeas corpus* act, § 487, Ex parte Harris, 5 Pac. Rep. 129; execution debtor who does not obey injunction in supplementary proceedings is guilty of, Nienwaukamp v. Ullman, 2 N. W. Rep. 181; wrongfully punished for refusal to answer interrogatories, State v. Lonsdale, 4 N. W. Rep. 890; inability to comply—not guilty of contempt, Hogue v. Hayes, 5 N. W. Rep. 541; city attorney was not guilty of contempt in obtaining an injunctive order, Wisconsin Cent. R. Co. v. Smith, 8 N. W. Rep. 618; a justice cannot commit for failure to pay fine, unless imprisonment upon such failure is part of the original judgment, Lanpher v. Dewell, 9 N. W. Rep. 101; board of supervisors cannot arrest witnesses for contempt in refusing to appear, In re Blue, 9 N. W. Rep. 441; for refusing to allow ministers to use a church, State v. Baldwin, 10 N. W. Rep. 645; contempt for corrupting witnesses, Gandy v. State, 14 N. W. Rep. 148; defense on merits for violating restraining order, Koehler v. Dobberpuhl, 14 N. W. Rep. 631; judgment for, may be reviewed on error in supreme court, Gandy v. State, 14 N. W. Rep. 148; method of proceeding, when not committed in presence of court, *Id.*; *mandamus* must point out the very thing to be done, and obedience be compelled by process therefor, Diamond Match Co. v. Powers, 16 N. W. Rep. 814; order of court putting defendant in contempt for disobeying previous orders will not be reversed, when, Froman v. Froman, 19 N. W. Rep. 193; refusal to make affidavit, Code Iowa, §§ 8892, 8893, Robb v. McDonald, 29 Iowa, 380; State v. Seaton, 61 Iowa, 564; S. C. 16 N. W. Rep. 786; Dudley v. McCord, 22 N. W. Rep. 920, neglecting to plead, Perrin v. Oliver, 1 Minn. 203, (Gil. 176); reading affidavit charging judge with prejudice, Ex parte Curtis, 8 Minn. 274, (Gil. 188); failure from inability to obey order, Register v. State, 8 Minn. 214, (Gil. 185); party not entitled to jury, State v. Becht, 23 Minn. 411; insane—fees of judge upon commitment—county treasurer not guilty of contempt for refusal to pay, State v. Wilcox, 24 Minn. 148; municipal corporation not capable of contempt, Bass v. City of Shakopee, 27 Minn. 250; S. C. 4 N. W. Rep. 619, and 6 N. W. Rep. 776; jurisdictional requisites of a warrant issued on a charge of contempt, Papke v. Papke, 30 Minn. 260; S. C. 15 N. W. Rep. 117.

Error from Saline district court.

On the twenty-first of July, 1873, in action then pending in the Saline county district court, wherein Catherine Warry was plaintiff and Republican, Salina & Arkansas Valley Railway Company was defendant, the judge of said district court, at chambers, granted "an injunction against the Republican, Salina & Arkansas Valley Railway Company, restraining said county, its assigns, employes, agents, or any one acting in behalf of said company, from entering upon, converting to its own use, cutting, excavating, digging, or in any way injuring the lands of the said Catherine Warry." Abram Cutler owned a majority of the stock of said railway company, and was the president of said corporation. On the ninth of September, *132 1873, *(said injunction not being dissolved, but remaining in full force,) an affidavit was made and presented to said judge by the agent of said Catherine Warry, alleging that, "in violation of said injunction and order, the said company, by and through the directions of one Abram Cutler, and under his full control, with its employes and workmen, came upon the said lands of the said plaintiff in her petition for injunction above mentioned described, on the morning of September 9, 1873, and did cut, excavate, dig, and otherwise do great injury to the plaintiff's said lands;" and praying that the parties violating said injunction might be arrested for the contempt and violation of said order of injunction. Said judge issued an order to the sheriff, commanding him to arrest said Cutler and to bring him before said judge forthwith, "to answer unto the state of Kansas for a certain contempt alleged against him," etc. Cutler was arrested on said warrant, and taken before the judge at chambers, on the tenth of September. He demurred to the jurisdiction of the judge to try him and render judgment against him for such alleged contempt, at chambers, which demurrer was overruled, and an exception taken. He then moved to be discharged on the grounds that no injunction had been issued against him, and none had been served on him, and that the affidavit for said attachment did not state facts sufficient to constitute a breach of the injunction, which motion was overruled, and an exception taken. And thereupon said judge, without any plea or answer being asked for or entered by Cutler, heard the evidence, tried the case, and adjudged that Cutler pay a fine of \$100, and costs.

John Foster, for appellant.

A breach of an injunction is a public offense. Section 2, Crim. Code; section 247, Civil Code. A person *charged* therewith is proceeded against under the Criminal Code, unless the act is committed in the presence of the court, or judge sitting at chambers, (section 6, Crim. Code;) and he is tried by a jury, *(section 197, Crim. Code; Const. §§ 5, 10, Bill of Rights.) The judge at chambers had no jurisdiction to proceed to a final determination of the cause. Section 247, Civil Code; section 2, c. 28, Gen. St.

There was no injunction against Cutler. It was against the railway company. In the action of Warry against the railway company, Abram Cutler, on his own application, after the order of injunction was granted, was made a defendant. He then moved to dissolve the injunction, but the district judge held that he (Cutler) had no such interest as entitled him to the granting of a motion to dissolve. His arrest for violating said injunction was illegal, and he should have been discharged. *Whipple v. Hutchinson*, 4 Blatchf. 190; *People v. Albany & V. R. Co.*, 20 How. Pr. 358; *Weeks v. Smith*, 3 Abb. Pr. 211.

The affidavit on which the arrest was made, which is the only pleading in this case, is insufficient. It sets forth that the injunction was granted by the *district judge*, and does not allege any injunction against Cutler, or the service of any order of injunction on him. The motion for a new trial should have been granted.

Illegal testimony was admitted. The judgment is not sustained by sufficient evidence. It does not appear that Cutler was even acting for said railway corporation, or that he had anything to do with the act complained of.

Henry Logan and H. G. Sheldon, for the State.

A breach of an injunction is an offense against the dignity of the court or judge issuing the same, to be punished as a contempt exclusively by the same authority, and not to be tried by a jury. Section 247, Civil Code.

The voluntary appearance of a defendant is equivalent to service. Section 67, Civil Code; St. 1868, p. 642. And having thus made his appearance in the civil action, and being made a party, Cutler is as much bound as though originally served with summons.

The injunction of a court of competent jurisdiction must be *134 obeyed, so long as it exists, by all parties upon whom it *has been served. *Miller v. Scherder*, 2 N. Y. 266; *McCardel v. Peck*, 28 How. Pr. 120. And even though it has not been served, if the defendant have actual knowledge or information that it has been granted, he is bound to obey it. *City of New York v. Conover*, 5 Abb. Pr. 251; *People v. Sturtevant*, 9 N. Y. 278; *Thomp. Prov. Rem.* 330, § 6. Cutler was connected with and interested in the railway company, and was as much bound by the injunction as his principal. *Smith v. Reno*, 6 How. Pr. 124; *Edmonston v. McLoud*, 19 Barb. 361; *Davis v. City of New York*, 1 Duer, 451; *People v. Sturtevant*, 9 N. Y. 263; *Higbie v. Edgerton*, 3 Paige, 253; *Sullivan v. Judah*, 4 Paige, 444; *Rogers v. Paterson*, Id. 450.

VALENTINE, J. The defendant, Abram Cutler, was charged with violating an order of injunction. The injunction was granted by the judge of the district court at chambers, and the trial was had before said judge at chambers. The first question raised in this case is with regard to the jurisdiction of the said district judge to hear and determine said charge. The constitution of this state provides that

"the several justices and judges of the courts of record in this state shall have such jurisdiction at chambers as may be provided by law." Const. art. 3, § 16. The law provides that the several judges of the district court may, at chambers, grant injunctions, (Gen. St. 675, § 239;) and the law also provides that the several judges of the district courts may, at chambers, punish as for a contempt any person for disobedience of an injunction order, (Gen. St. 676, § 247; Id. 304, § 2.)

But it is claimed that the trial should have been by jury. Now, in the first place, the defendant did not ask for a jury, and he made no objection and took no exception to the action of the judge in trying the case without a jury; and, secondly, we hardly think that the constitution or laws ever contemplated that a jury should be impaneled in a case like this. It is true that this kind of a proceeding is in the nature of a criminal prosecution, and perhaps might come within the words of section 10 of the bill of rights, and section 197 of the Code of Criminal Procedure; but still it can hardly be possible that it was ever intended that a case like this, or any case for *135 contempt, should be tried by a jury. Such a thing *has never been done that we are aware of. We have never heard or read of a judge impaneling a jury to try a proceeding at chambers; and it was never the right of a party to demand a jury to try a charge for disobedience to an injunction order. If a party has a right to demand a jury in this case, then every trial for contempt must be by jury, if a jury should be demanded. We do not now, however, choose to decide that a defendant in a case like this is not entitled to a jury if he should demand it; for the defendant in this case did not demand a jury. All that we now decide is that the judge, under the facts and circumstances of this particular case, did not err in trying the case himself, and without a jury. The proceeding was regularly tried under section 247 of the Code of Civil Procedure. Gen. St. 676.

The injunction was allowed and issued against the Republican, Salina & Arkansas Valley Railway Company, "its assigns, its agents, its employes, and any one acting by its authority or in its behalf," and not against Abram Cutler by name. In fact, he was not a party to the suit when the injunction was granted; but afterwards he became a party thereto on his own motion, and was a party to the suit at the time of the alleged breach of said injunction order. Evidence was introduced showing that he owned a majority of the stock in said railway company; that he was president of the company; that he had leased the road from the company for ninety-nine years; that he had and was to have the full control and management of the same for that period of time; and that he "was to survey and locate the line of road of the said Republican, Salina & Arkansas Valley Railway, and obtain the right of way and depot grounds of and for said railway in the name of the Republican, Salina & Arkansas Valley

Railway Company, but under his own full direction and control, and at his own expense." The injunction was granted to restrain the railway company, its assigns, etc., from constructing its road into or through the farm of Catherine Warry. The road was afterwards so constructed, and we think the evidence shows that it was so
 *136 constructed with the *approbation, the approval, and even by order, and under the direction, of the defendant. The evidence also shows that the defendant had notice of the injunction. The question now arising is whether the defendant, under these facts, can be held guilty of a violation of said injunction, the injunction not having been issued against him personally. We think it can. Persons may often be held liable for the breach of an injunction although not personally named in the injunction, nor even parties to the suit. Thomp. Prov. Rem. 331; High, Inj. §§ 859, 863; and see cases cited in brief for the state in this case.

The proceeding for the violation of an injunction is a summary proceeding, and the charge may be tried upon the original affidavit filed in such proceeding, and not upon any formal pleadings. Civil Code, § 247.

The "illegal testimony" complained of by defendant is not very specifically pointed out; and we have failed to discover any illegal testimony, duly excepted to, prejudicial to the defendant. We think there is sufficient evidence to sustain the finding of the judge of the court below.

There may be some other questions in this case not raised by counsel's briefs, but we do not wish to be understood as deciding anything not specifically mentioned in this opinion.

The judgment of the judge of the court below is affirmed.

(All the justices concurring.)

STATE OF KANSAS v. C. H. GRAHAM.

January Term, 1874.

Quo Warranto: County Officer: Forfeiture: Abandonment. Where a person has been duly elected to the office of county treasurer, and has duly qualified and taken possession of the office, and has, while in possession of the office, committed certain acts, and neglected and refused to do certain other acts, which work a forfeiture of his right to further hold the office if the state should choose to proceed against him, and where he then, without resigning, and without any judgment having been rendered against him, but with his right to hold the office still complete, abandons the office, *held*, that an action in the nature of **quo warranto* instituted by the county attorney in the name of the state, to terminate his right to further hold the office, may be maintained, notwithstanding his said abandonment of the office.¹

¹See *State v. Wilson*, 30 Kan. 665; S. C. 2 Pac. Rep. 828; *Graham v. Cowgill*, ante, *114.

Original proceedings in *quo warranto*.

Quo warranto, brought in this court in the name of "the state of Kansas, upon the relation of A. M. F. Randolph, county attorney of Coffey county, against C. H. Graham, county treasurer of said Coffey county," to obtain a judgment of ouster against said Graham, removing him from his said office. [The petition was filed December 24, 1873, and while the action of *Graham v. Gowgill*, *ante*, *114, was pending and undetermined.] By a stipulation between the parties, the plaintiff was in any event to have judgment against defendant on the disclaimer set up in the second defense, which judgment was to take effect April 1, 1874. A determination of the questions raised by said demurrer, as to the sufficiency of the first defense to the action, was necessary to fix the liability for the costs of this proceeding.

A. M. F. Randolph and A. L. Williams, for the State.

The respondent, Graham, admits that on the seventh of November, 1871, he was duly elected to the office of county treasurer of the said county of Coffey for the term of two years, to commence on the first Tuesday in July, 1872, and that subsequently he duly qualified for said office. But he shows to the court that at the time of the commencement of this action, and prior thereto, and ever since said time, he has neither been in the possession of said office, nor of any of the rights, franchises, or emoluments appertaining to said office, and that during all the time last aforesaid he has not exercised, nor attempted to use or exercise, any of the functions or rights belonging thereto.

Because of the foregoing admissions, and inasmuch as the respondent does, from and after the first day *of April, 1874, (instead of from and since the commencement of the term of two years, for which he admits that he was duly elected and qualified,) abandon, relinquish, and disclaim all and every right, title, or interest which he may have had or possessed in and to said office, it may safely and very fairly be concluded and taken as a fact to be considered in this cause that during some part of the time from and since the first Tuesday in July, 1872, until the time of the commencement of this action, (December 24, 1873,) the respondent was in actual possession of said office, and in the full use and enjoyment of all the rights, franchises, and emoluments, and in the discharge of the duties thereof.

Has the state a right to remove a county officer from an office to which he has been duly elected and qualified, for a term which has not yet expired, when, at the time of the commencement of the action for that purpose, such officer was not in actual possession of the office, nor of any of its franchises, and was not then exercising, nor attempting to exercise, any of the rights and powers with which the law had invested him, and was not then performing, nor attempting to perform, any of the duties by law imposed upon him, and when said officer had not resigned? We say, of course, that under such circumstances, an action will lie,—particularly when, as in the present case, the respondent seems to have been put by the pleadings into

the predicament of having fallen still-born into said office wherein he has ever since remained quiescent. While the state admits that it is not sufficient in a petition to allege merely that the respondent claims to use or exercise an office or franchise, and that in such a case a plea denying the user is sufficient, yet the facts stated in the defense demurred to show something more substantial than a mere claim on the part of the respondent. Said first defense shows, in substance, that he was duly elected to and qualified for the office of county treasurer of said county for the term of two years, to commence on the first Tuesday in July, 1872, and that he now is lawfully and rightfully such officer for said term, which has not yet expired; *but he confesses generally that he has neglected and refused duly to exercise the rights and powers which the law and his official bond and oath had made it obligatory upon him to use and exercise, and that he has neglected and refused to discharge each and all the duties imposed upon him by law. He confesses his total and complete neglect and abandonment of said office at the time of the filing of relator's petition prior thereto, and ever since said time. Being still the incumbent *de jure* of said office, he pleads nothing whatever to explain, excuse, or justify his said abandonment, neglect, and non-action in said office, but by his admissions brings himself precisely within the operation of section 180, c. 25, Gen. St., and the second subdivision of section 1, c. 116, Laws 1871. It is a familiar principle that offices, like franchises, may be forfeited by non-user, as well as by misuser. *State v. Allen*, 21 Ind. 516-522; *Page v. Hardin*, 8 B. Mon. 666.

R. M. Ruggles, for defendant.

The only question, of course, is, has the state a right to commence an action to remove a county officer from an office when, at the time of the commencement of the action, the officer is not in the use of the office, or any of its franchises, nor attempting to exercise any of the franchises of said office? We, of course, say that under such circumstances the action will not lie. If an officer is not acting as an officer, nor attempting to act as an officer, what is there to remove him from? If the petition disclosed that respondent was not in the possession of the office, and was not using or claiming to use any of its franchises, would it not have been bad on general demurrer? Is it not one of the necessary ingredients, in a petition in the nature of *quo warranto*, to allege an actual user and occupation? If this is so, is it not necessary to prove the allegations? Is not this a possessory action, brought by the state to recover possession of an office which the defendant is alleged to have forfeited by reason of certain acts? If this is so, is it not necessary to show possession in fact at the time of commencing the action? Is there any other result to be accomplished by this action than that of removing the officer from the office? If not, can he be removed from that of which he is not either in the actual or constructive possession or occupation? Has not the defendant, by his own acts in not using or occupying,

quires the judgment of a court of competent jurisdiction to do so. *Graham v. Cowgill*, ante, *114. Now, as the plaintiff is entitled to the office, and may take possession of it at any time that he may choose, and as it does not seem from the pleadings that any one else is in possession of the office, is he not constructively in possession of the same? We know, from another case in this court, that another person is in fact in possession of the office; but, as that person has possession of the office illegally, we do not think it would affect our decision of this case even if the fact of such possession had been stated in the pleadings in this case.

Section 180 of the act relating to counties and county officers provides that "if any * * * county officer shall neglect or refuse to perform any act which it is his duty to perform, or shall corruptly or oppressively perform any such duty, he shall forfeit his office, and shall be removed therefrom by civil action in the manner provided in the Code of Civil Procedure." Gen. St. 294. The Code of Civil Procedure provides that "such action may be brought in the supreme court or in the district court, in the following cases: * * * *Second*, whenever any public officer shall have done or suffered any act which, by the provisions of law, work a forfeiture of his office; * * * *fifth*, for any other cause for which a remedy might have been heretofore obtained by writ of *quo warranto*, or information in the nature of *quo warranto*." Gen. St. 760, § 653, subds. 2, 5; Laws 1871, p. 276, § 1, subds. 2, 6. Sir William Blackstone says that "a writ of *quo warranto* is in the nature of a writ of right for the king against him who *claims* or usurps any office, franchise, or liberty, to inquire by what authority he supports his *claim*, in order to determine the right." 3 Bl. Comm. 262. Sir John Comyn says that "a *quo warranto* is in the nature of a writ of right for the king, against him who usurps or *claims* any franchises or liberties, to say by what authority he *144 claims them." Com. *Dig. "Quo Warranto," A. Mr. Stephen, in speaking of the causes for which an information in the nature of *quo warranto* will and will not be granted, says: "But that which constitutes a sufficient user depends upon the nature of the office or franchise claimed. Thus, where it appeared, in the case of a freeman or free burgess of a corporation, that he had been sworn in, though no act or claim be stated to have been done or made by the defendant, the information was granted; and, though a mere claim to be sworn in is no usurpation, yet a swearing in, though defective in law, may be; and where a defendant had taken the oath in such a way as he thought to be sufficient at the time to make him a free burgess, it was considered to be an user." 3 Steph. N. P. 2441.

In the present case the defendant does not merely claim the office, but he has a present and existing right thereto, and a right to take immediate possession thereof. Although he has in fact forfeited his right to further hold the office, yet that forfeiture has never been judicially declared, and until it is so declared he has a right to hold the

office. And no one but the state has any right to ever ask that such forfeiture shall be declared. If the state should never have asked that the forfeiture should be declared, he could rightfully and legally hold his office until the expiration of his term. It is purely in the discretion of the state whether it will press the forfeiture or not. The user is certainly sufficiently shown. The defendant gave bond, was sworn in, took possession of the office, and exercised the functions thereof for more than sixteen months, and still claims to be legally entitled to the office, although he is not attempting to exercise its functions.

The demurrer to the first defense in said answer will be sustained. The judgment will be rendered in favor of the plaintiff, and against the defendant, in accordance with the stipulation of the parties.

KINGMAN, C. J., concurring.

*145 *GEORGE SHEARER v. COMMISSIONERS OF DOUGLAS CO.

January Term, 1874.

1. **Eminent Domain: Public Use: Compensation: Waiver.** The legislature, in providing for the taking of private property for public uses, may also prescribe the manner in which compensation therefor shall be made, and if such manner be free from any unreasonable requirements, may provide that a failure to seek compensation in that manner shall be deemed an absolute waiver of all claims therefor.
2. ———. Where, on the day of the meeting of the viewers in proceedings to lay out a public highway, the mother of the owner of one of the tracts through which the proposed highway runs, was taken suddenly sick, and in consequence thereof such owner failed to attend the meeting of the viewers, or present any claim for damages, *held*, that such failure was a waiver of all claims for damages.

Error from Douglas district court.

This case was tried in the district court at the August term, 1873. On the trial it was admitted that the road had been legally laid out over plaintiff's land; that his claim for damages was presented to defendants before they acted on the report of the viewers; that no damages had been allowed plaintiff; and that his damages by reason of said road were \$500. Finding and judgment in favor of the defendants.

Thacher & Stephens, for plaintiff.

It is conceded that the power to take private property for public uses is confided to certain tribunals, and that the road in question was a public necessity. This was found through constitutional modes. It will also be conceded that the public cannot take private property

without compensation; but it will be claimed, and it is not denied, that this claim for compensation must be made in the manner prescribed by law. Yet it will also be conceded that the law does *146 not demand *an impossible or unreasonable thing, and that, where necessity interposes between a person and the assertion of his claim for compensation, he does not thereby lose his right if he seeks the first opportunity to assert it. The real question, therefore, which the record opens for settlement here is whether any circumstances will waive the requirements of section 5, c. 89, Gen. St., respecting the presentation, by the owner, of a written claim to the viewers for damages to his land by reason of the road; and, if so, whether those detailed in this case are sufficient. We suppose it will hardly be claimed that in case of clear, positive inability of a party, without negligence, to be present at the meeting of the viewers, though duly notified to be present, a total denial of all compensation for damages follows. Equity would always interfere against so unconscionable a result. But the case in question is in no way inferior to the one supposed. The duty of a son to a sick and dying mother presents full as strong an impossibility—at least it ought to—as personal disability. Had plaintiff left his sick mother under the circumstances unfolded in the record, he would have met and deserved the scorn and execration of all right-minded persons. It will be observed that the county board, notwithstanding any report of the viewers, have full control of the question of damages. It is provided in section 7 of the road act: "All allowance for damages as provided in this act shall be subject to revision by said board of county commissioners." It provides further for an appeal from *their* "award of damages." Were it not for this right of appeal from their award to a court of record with a jury, the act would be unconstitutional. *Lamb v. Lane*, 4 Ohio St. 167. There is a recent decision in Ohio, (*Reckner v. Warner*, 22 Ohio St. 275,) which we think fairly, by its reasoning, disposes of this case.

Barker & Summerfield, for defendants.

The real question in this case is, had the plaintiff any standing *147 before the county commissioners? We submit that *he had nothing to complain of there. The commissioners had nothing before them to act upon. The plaintiff has had his day in court. He had due notice that a part of his land would be appropriated for public purposes, and that the viewers would meet on a certain day to take into consideration his application for damages. He failed to appear, either in person, by agent, or attorney. He did not send his application to the viewers, as he could have done in case he was prevented from presenting it in person. He has waived his right to compensation. "All applications for damages shall be barred unless they are presented as provided in this act." Gen. St. 899, § 5. The plaintiff claims that he was prevented by an unavoidable casualty from presenting his claim in time. But the question of unavoidable

casualty does not arise in this case. Was it necessary for plaintiff to wait until the last moment to present his claim to the viewers? The viewers were appointed on the eleventh of July, and met on the ninth of August following. The plaintiff's mother was taken sick only on the day the viewers were to meet and did meet. He was not compelled to wait till the last day to prepare his application. He had nearly a month to do it in, and, if he had prepared it in time, how easy it would have been for him to send it to the viewers by some one, even on the last day. He had nearly a month's notice of the appointment of the viewers, and of the time ordered for their meeting, though this notice may have been only constructive; but he had, as he admits, six days' actual notice, which the law (section 4 of the road act) entitles him to, and he could have filed his written application, in accordance with section 5, on any one of those six days. It is not a question of casualty, but of laches.

BREWER, J. This action in the district court was an appeal from the decision of the commissioners of Douglas county, refusing to grant to the plaintiff any damages on account of the laying *148 out and opening of a road through his *farm. The facts are as follows: The proceedings were all regularly had. The plaintiff was a resident of the county, and was duly notified of the time and place of the meeting of the viewers, as required by section 4 of the road act. An agreed statement of facts shows that, "on the morning of the day appointed, the plaintiff, who lived about five miles from where the viewers were to meet, prepared his claim for damages, had his horse saddled, and at the door, to carry him to the place of meeting of the viewers in time to have met the viewers, and present his said claim, and intended so to do; that his mother, a resident of his family, was taken suddenly and dangerously ill with a congestive chill, which in a few days terminated in death; that plaintiff was called upon and stopped from meeting with said viewers to be with his mother in her illness, was with her at her bedside attending upon her, and that had it not been for his mother's illness, as stated, he would have presented his claim for damages to the said viewers, and said viewers would have allowed plaintiff his damages, and reported favorably on laying out said road; that plaintiff appeared before the defendants, before they had acted on the report of the said viewers, and presented his claim for damages in writing, and made known to them the above facts," etc. We have made this lengthy statement from the admitted statement of facts, that the case may be clearly presented. It is not questioned by counsel for plaintiff but that defendants were entitled to judgment unless the circumstances as detailed above were sufficient to waive the requirements of section 5 of the road act respecting the presentation by the owner to the viewers of a written claim for damages to his land by reason of the road. The section declares that "all applications for damages shall be barred unless they are presented as provided in this act." Gen. St. 899, § 5.

The application was not presented as provided, and hence, by the plain language of the statute, was barred. No exception is named in the statute. No authority is given to the courts to declare one. And

while it cannot be denied that the facts of this case present a *149 strong appeal,—show a case, indeed, which of *right there should be an exception,—still we do not feel authorized to interpolate into the statute a proviso or exception which the legislature has seen fit to omit. The power to take private property for public uses is clear. The power to name the tribunal to award compensation for the property taken, and to prescribe the manner in which claims therefor shall be made is equally clear; and, if the manner prescribed is free from any unreasonable requirements, it seems to us also clear that the legislature may provide that a failure to make the claim for compensation in such manner shall be deemed an absolute waiver thereof, and that, having made such provision, the waiver is not in any given instance avoided by proof that the claimant failed to pursue the prescribed remedy in obedience to the dictates of friendship, or the obligations of filial or social duty.

We do not think the case of *Reckner v. Warner*, 22 Ohio St. 275, conflicts with the views herein expressed.

Regretting that our views of the law do not enable us to give to the plaintiff the relief he asks, we are constrained to order an affirmance of the judgment.

(All the justices concurring.)

COMMISSIONERS OF JEFFERSON CO. v. J. B. McCLEARY.

January Term, 1874.

County Superintendent: Salary: Cities. The amount of the salary of each county superintendent of public instruction is to be determined from the number of children of school ages within his county; but all incorporated cities, including cities of the third class, are to be excluded in taking the enumeration of the school children for such a purpose.

Error from Jefferson district court.

• McCleary presented to the county board of Jefferson county
 • *150 his claim for balance of *salary claimed to be due as county superintendent, to the amount of four hundred dollars, which claim was disallowed by the county board, from whose decision he appealed to the district court. The county board claimed that McCleary was entitled to only \$1,200 per year, and had been paid in full at that rate. He claimed \$1,500, and this action was for the difference between these sums for sixteen months. The district court, at the May term, 1873, gave judgment in favor of McCleary.

Henry Keeler, Co. Atty., for plaintiff in error.
J. B. Johnson, for defendant in error.

VALENTINE, J. Counsel for defendant in error (plaintiff below) says that "there are but two questions in this case: *First*, what salary is the county superintendent of public instruction entitled to in Jefferson county from September 1, 1871, to January 1, 1878? *Second*, was the claim presented by defendant in error to the county board 'for all his dues in full,' and, if so, can the verbal agreement of plaintiff and defendant that it should not be in full be offered in evidence?"

1. The defendant in error was county superintendent of public instruction for Jefferson county from September 1, 1871, to January 1, 1878, and for that time the county board paid him as salary \$1,600, or at the rate of \$1,200 per annum. The county board claims that this was all that the defendant in error was entitled to receive, but he claims that he was entitled to receive a salary at the rate of \$1,500 per annum. The statute provides that "county superintendents of public instruction of counties reporting three thousand and less *151 than five thousand children over the age of five, and *under the age of twenty-one, years, shall receive a salary of twelve hundred dollars per annum; and county superintendents of public instruction of counties reporting five thousand children and over, of school ages, shall receive a salary of fifteen hundred dollars per annum: provided, that in the above enumeration incorporated cities shall be excluded." Laws 1869, p. 174. It seems to be admitted that, under the above proviso, cities of the first class and cities of the second class are to be excluded from the enumeration in determining the salaries of county superintendents; but it is claimed that cities of the third class are not to be so excluded. The reasons for this claim seem to be as follows: (1) There were no cities of the third class when the act fixing the salaries for county superintendents was passed and took effect; (2) when cities of the third class were organized, they still remained under the superintendency of county superintendents.

If cities of the third class are to be excluded from said enumeration, then the defendant in error is entitled to receive only \$1,200 salary per annum; but if such cities are to be included in the enumeration, then he is entitled to receive \$1,500 salary per annum. We think they are to be excluded. The salary act provides that all "incorporated cities shall be excluded." Now, cities of the third class are unquestionably "incorporated cities." They are as much so as any other class of cities. They are not only so by virtue of the powers, privileges, franchises, and immunities granted to them, but they are so by virtue of positive and specific enactment. The act incorporating them provides that "each city governed by the provisions of this act shall be a body corporate and politic." Laws 1869, p. 80, § 4; Laws 1871, p. 122, § 13. The first act incorporating cities of the third class was passed by the same legislature that passed the act

fixing the salaries of county superintendents; and it was passed three days earlier. Hence the legislature must have known, at the time they passed the act fixing the salaries of county superintendents, that "incorporated cities" of the third class would soon come *152 into existence; *and hence, as they used language in said proviso broad enough to exclude all incorporated cities, they must have intended to exclude cities of the third class, as well as other cities, from said enumeration. It can hardly be supposed that the legislature, when they used said language excluding all incorporated cities, had forgotten what they had done only three days before that time. We suppose it will hardly be urged seriously that said proviso had relation to such cities only as were in existence at the time when the act in which said proviso is found was passed; for, if such construction should be put upon said proviso, then all cities of the second class organized since the passage of said act would have to be included in the enumeration in determining the amount of the salary of county superintendents. Besides, upon general principles of construction said proviso could not be so construed. It does not purport to have been passed for the present only. Its operation is not limited by the language in which it is couched to things as they existed at the time of its passage. On the contrary, it was clearly enacted for the future. It was clearly intended to operate upon things as they should exist when its operation could be called practically into effect; and laws are generally passed for a future state of things, and not for the present merely. If the salaries of the county superintendents of some of the western counties of this state were to be determined by the number of school children within their respective counties at the time said act was passed, instead of at the present time, their salaries would certainly not be very large. But such a construction cannot be put upon said act.

We suppose it is hardly necessary to consider the other question raised in this case. The defendant in error having been paid in full for his services as county superintendent, we suppose it will make but little difference whether he and the county board had a verbal understanding or not that he was not paid in full.

The judgment of the court below is reversed, and cause remanded for further proceedings.

(All the justices concurring.)

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*LUMON H. REED v. JOSEPH C. WILSON.

January Term, 1874.

New Trial: Unavoidable Casualty and Misfortune. An averment, in a petition to vacate a judgment, that certain glaring errors occurred at the trial, that the trial closed on the third and the term of court on the fifth of the same month, and that, owing to their press of business, these errors were accidentally omitted by counsel from the motion for a new trial, does not disclose any "unavoidable casualty or misfortune," within the meaning of the statute.

Error from Labette district court.

Reed filed a petition in the district court, under section 568 of the Civil Code, to vacate a judgment previously given by said court against him and in favor of Wilson, and for a new trial of said action, on the alleged ground that "by reason of unavoidable misfortune" Reed was "prevented from properly defending" said action. To this petition Wilson demurred; and at the July term, 1873, the district court sustained the demurrer.

Ayres & Fox, for plaintiff in error.

F. A. Bettis, for defendant in error.

BREWER, J. The defendant in error was sheriff of Labette county, and had seized certain cattle upon execution. Plaintiff in error claimed that the cattle belonged to him, and not to the defendant in the execution. He brought an action of replevin, and was beaten.

A motion for a new trial was made and overruled, and judgment rendered against him for \$1,000, the value of the property as found by the jury. Thereafter he filed a petition to vacate such judgment. A demurrer thereto was sustained, and of this ruling he now complains. We think the ruling of the district court was correct. The authority for this mode of procedure is found in section 568 of the Code, (Gen. St. 742,) and the particular clause under which this petition was filed is the seventh, "for unavoidable casualty or misfortune, preventing the party from prosecuting or defending." Now, we think the petition comes far short of showing any "unavoidable casualty or misfortune." It alleges that upon the trial the court admitted certain evidence of the continuance of a partnership, which his counsel had advised him was not admissible, and which he was not therefore fully prepared to rebut, and that there was no sufficient evidence of the value as found by the jury; that the trial closed on the third, and the term of court on the fifth, of April, and that owing to their press of business these points were accidentally omitted by his counsel in the motion filed for a new trial. Clearly this does not show "unavoidable casualty or misfortune," within the meaning of the statute. It is for the interest of the public, as well

as of the parties, that there be a speedy end of any litigation. After trial and verdict, motion for a new trial, and judgment, the proceedings should not be disturbed, and the litigation reopened, except upon a clear showing that the rights of the defeated party have been lost by unavoidable casualty or misfortune.

The judgment of the district court will be affirmed.
(All the justices concurring.)

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*C. C. FOOTE and others v. D. V. SPRAGUE.

January Term, 1874.

1. **Amendments: Not Error to Refuse.** Where an action is brought upon a promissory note indorsed by the payee thereof to H. and then indorsed by H. to the plaintiff, and, after the case is called for trial upon the issues made by the petition, answer, and reply, the defendants ask leave of the court to allow them to amend their answer by verifying the same so as to put in issue the indorsements on said note, but said defendants do not make any showing of diligence or merits, nor, indeed, any showing, *held*, not error for the court to refuse to allow said amendment.¹
2. **Principal and Surety: Bills and Notes: Makers.** In an action on a promissory note against two persons who executed the note apparently as joint principals, but who were in fact, one a principal, and the other his surety, and where the pleadings show this fact, and the petition asks for a judgment against the surety only as a surety, and no issue is made upon the subject, and the surety does not ask the court to render a judgment against himself only as a surety, and it does not seem that the attention of the court was ever called to the fact that the surety was only a surety, *held*, not error for the court to render judgment against the makers of the note as though they were both principals.²

¹ Generally, *Foreman v. Carter*, 9 Kan. 458; of appeal-bond, *Gates v. Sanders*, *post*, *411; construction of section 139 of the Code, *Kansas Pac. Ry. Co. v. Salmon*, 14 Kan. 521; of date, *Kansas Pac. Ry. Co. v. Kunkel*, 17 Kan. 145; discretion of court, *Davis v. Wilson*, 11 Kan. *74; *Hobson v. Ogden*, 16 Kan. 388; error to allow, *Beyer v. Reed*, 18 Kan. 86; error to refuse, *Wright v. Bacheller*, 16 Kan. 259; correcting name, *Dewey v. McLain*, 7 Kan. 83; *Cavanaugh v. Fuller*, 9 Kan. 160; *Henderson v. Sletter*, 31 Kan. 56, S. C. 2 Pac. Rep. 849; notice of, *Haight v. Schuck*, 6 Kan. 118; *Leavenworth, L. & G. R. Co. v. Van Riper*, 19 Kan. 317; *St. Louis & S. F. Ry. Co. v. McReynolds*, 24 Kan. 368; of pleadings, *Fitzpatrick v. Gebhart*, 7 Kan. 28, and note; change of name of corporation, *Paola T. Co. v. Krutz*, 22 Kan. 727; considered as made, *Sanford v. Willets*, 29 Kan. 647; *Bank v. Ober*, 31 Kan. 599; S. C. 3 Pac. Rep. 327; without leave, *Pierce v. Myers*, 28 Kan. 364; *Quinlan v. Danford*, Id. 507; of officers' return, *Rapp v. Kyle*, 26 Kan. 89; *Kirkwood v. Reedy*, 10 Kan. 341; *Wilkins v. Tourtellott*, 28 Kan. 825; of bill of particulars, *School-district v. Dudley*, 28 Kan. 160; *Kansas City, Ft. S. & G. R. Co. v. Hays*, 29 Kan. 198; *Reed v. Cooper*, 30 Kan. 574; S. C. 1 Pac. Rep. 822; *Teberg v. Swenson*, 32 Kan. 224; S. C. 4 Pac. Rep. 88; of value, *Neifert v. Ames*, 26 Kan. 515; of proof of publication, *Hammerslough v. Hockett*, 30 Kan. 57; S. C. 1 Pac. Rep. 41; terms of, *Perry v. Jones*, 18 Kan. 552; *Wands v. School-district*, 19 Kan. 204.

² See full notes on principal and surety, *Rose v. Williams*, 5 Kan. 292; *Turner v. Hall*, 8 Kan. 36; *Ray v. Brenner*, 12 Kan. *106.

3. Mortgages: Foreclosure: Amending Petition: Personal Judgment.

In an action on a promissory note, and to foreclose a mortgage given to secure said note, it is not error for the court to render a personal judgment against a defendant who is both a party to the note and mortgage, although the petition merely asks that the mortgage be foreclosed, and the mortgaged property sold to pay the debt, costs, etc., and that execution issue for the balance. Where the prayer of the petition is no more defective than this, it may be amended at any time, without costs, so as to make it formal; and upon petition in error it will be considered as so amended.

4. ———: **Liquidated Damages: Attorney's Fees.** Where a mortgage contains a stipulation that the mortgagor shall pay, not only the debt secured by the mortgage, and interest thereon, but also, in case of foreclosure, the costs, "and fifty dollars as liquidated damages for the foreclosure of the mortgage," *held*, that the stipulation for the payment of said fifty dollars as liquidated damages is void, and that a judgment rendered under such a stipulation for fifty dollars as attorney's fees is erroneous. [Dorman v. Crozier, 14 Kan. 227.]

Error from Pottawatomie district court.

Action by Sprague against C. C. Foote, Susan Foote, and Samuel Cooper, to foreclose a mortgage. The mortgage was executed *156 by C. C. Foote, and Susan, his wife, to secure a *note given by said C. C. Foote and said Cooper. A personal judgment was rendered on the note against the makers thereof, at the August term, 1873, of the district court, and a decree of foreclosure and for the sale of the mortgaged premises was entered against Foote and wife.

R. S. Hick, for plaintiffs in error.

The district court erred in refusing leave to the defendants below to amend their answer by verifying the second paragraph thereof, denying the indorsement of the note. Had such leave been granted, it would have thrown the burden upon the plaintiff below of proving the alleged indorsement by Lewis to Hafer. The defendants were permitted to introduce evidence touching the indorsement for the purpose of letting in the plea of usury, and Lewis and Hafer were examined as witnesses by defendants on that point. But if the burden of proving the indorsement had been thrown upon the *plaintiff*, (as it would have been by the amendment,) these witnesses must have been made his, instead of the defendants', and the defendants would have had a right to cross-examine them, to discredit their testimony by proving contradictory statements, etc.,—advantages which they did not and could not have when compelled to make them their own witnesses.

The court erred in rendering judgment against Cooper as a principal debtor. The defendant in error alleges in his petition that Cooper signed the note as surety, and prays for a judgment against him as surety only.

The court erred in rendering a personal judgment against C. C. Foote. No judgment was prayed for against him in the petition.

The petition recites the conditions of the mortgage, and it does not appear that any attorney's fee was stipulated for therein; yet the court rendered judgment against C. C. Foote and Cooper *157 for \$50 as an attorney's fee. This, also, was error. *If it be claimed that the attorney's fee was provided for in the stipulation for "liquidated damages," the answer is that "liquidated damages" are not attorney's fees. No judgment was asked for "liquidated damages," and none rendered, and none could rightfully have been rendered had it been prayed for. The evidence shows clearly that more than 12 per cent. interest was contracted for, without including any damages, "liquidated" or unliquidated. *Kurtz v. Sponable*, 6 Kan.*395. But whether it was error not to render judgment against Foote for an attorney's fee, it certainly was to render such judgment against Cooper, who was not a party to the mortgage.

Case & Putnam, for defendant in error.

VALENTINE, J. This was an action on a note and mortgage brought by the defendant in error, as plaintiff below, against the plaintiffs in error. Judgment was rendered in favor of the plaintiff below. The plaintiffs in error say, in their brief, that "the district court erred in refusing leave to the defendants below to amend their answer by verifying the second paragraph thereof denying the indorsement of the note." Said paragraph does not deny said indorsements. It simply denies that the indorsements were made "for value received," as stated in the petition, and then admits the indorsements in the following language, to-wit: "But the said alleged indorsements and assignments were made by the said John Augustus Lewis and W. B. Hafer without consideration, and only for the purpose and with the intent to prevent the defendants from setting up and maintaining their defense to any action that might be brought on said note or mortgage, or either of them, as the plaintiff at the time well knew." John Augustus Lewis was the payee of the note, and the mortgagee. He indorsed the note and assigned the mortgage to W. B. Hafer; and W. B. Hafer indorsed the note and assigned the mortgage to D. V. Sprague, the plaintiff below, (defendant in error.) *158 The defendants set up the defenses that *the plaintiff below was not the real party in interest, and that the note was given in part for usurious interest. Upon the trial the defendants attempted to prove these defenses; but it was not only shown by the evidence that Lewis and Hafer indorsed said note as alleged in the plaintiff's petition, but that each did it for a full and sufficient consideration; that Hafer and Sprague were *bona fide* purchasers of the note, without any knowledge on their part that it was tainted with usury, and that Hafer purchased the note of Lewis before the same became due. But even if the defendants had in said paragraph denied said indorsements, still the district court would not have erred in overruling the application of the defendants below for

leave to amend their answer. It seems to be admitted that the answer was filed within the time prescribed by law. But said application to amend the answer by verifying said paragraph was not made until long after the proper time for filing the answer had elapsed; and, indeed, it was not then made until the case was called peremptorily for trial upon the issues made by the petition, answer, and reply. And when it was made it was not founded upon any showing of diligence or merits. There was no attempt made to show why the defendants did not verify their answer, when they could have done so without leave of the court, or why they did not make their application for amendment sooner, or why they did not give to the plaintiff notice that they would make such an application. We suppose that it is well known that defendants have no absolute right to amend their answers whenever they may choose to do so. We suppose that it is well known that they can amend only upon leave of the court, and upon such terms as may be just, and that the court may refuse to allow any amendment of a pleading unless it is first shown by proper evidence that it would work injustice to do so.

2. The defendants Cooper and C. C. Foote executed said note as though they were both principals, and neither of them as a surety for the other. But the pleadings show that Cooper was in fact *159 only a surety for C. C. Foote; and *plaintiff, in the prayer of his petition, asks for judgment against Cooper only as a surety. No issue, however, was ever made on this subject. Cooper never asked the court to render judgment against himself only as a surety. Indeed, it does not seem that the attention of the court was ever called to the fact that Cooper was only a surety. And hence the court rendered judgment against Cooper, as well as against Foote, as though they were both principals. In this we do not think the court erred. The court was not bound to render the judgment against Cooper, merely as a surety unless Cooper himself first asked that it should be done.

3. The plaintiffs in error also complain that the court below rendered a personal judgment against the defendant C. C. Foote, although it is claimed that the petition below does not ask for such a judgment. Now, if the petition does not ask for such a judgment, we think it comes very near doing so. It asks that the mortgage shall be foreclosed; that the mortgaged property shall be sold to pay the debt evidenced by the note, and to pay the costs, attorney's fees, etc.; and that execution shall be issued for the balance. And, besides, this is the kind of judgment that the law requires shall be rendered in such cases as this. Laws 1870, p. 175, § 13. We think the court did not commit any substantial error in this respect. Where the prayer of the petition is no more defective than the one in this case, we think it may be amended at any time, without costs, so as to make it formal; and upon petition in error we will consider it as so amended.

4. The petition recites the conditions of the mortgage, which show that the mortgagors agreed to pay, not only the principal of the debt secured by the mortgage, and interest thereon, but also, in case of foreclosure of the mortgage, costs, "and fifty dollars as liquidated damages for the foreclosure." The petition then prays for a judgment that the mortgaged property be "ordered to be sold, and the proceeds applied to the payment of said debt, costs, attorney's *160 fees, etc." The court rendered a "judgment for fifty dollars as attorney's fees for the foreclosure of the mortgage, in addition to the debt, interest, and costs. This the plaintiffs in error claim was erroneous. Upon this question we are inclined to think the plaintiffs in error are correct. The case seems to fall within the decision made in the case of *Kurtz v. Sponable*, 6 Kan. *395. The stipulation in the mortgage in this case, as it was in that, is for a certain sum to be paid by the debtor as liquidated damages over and above the debt and interest and all legitimate costs. Now, what was the term "liquidated damages," in this mortgage, designed to cover? If it was designed to cover attorney's fees, why did not the parties say so in the mortgage? If it was designed to cover any legitimate charge or expense, why did they not say so? Why did not the parties state precisely and definitely just what it was designed to cover,—just what the damages were intended to be for,—so that the courts could see whether the damages were such as could be allowed by law or not? If the damages were for usurious interest, then, of course, they could not be allowed. And would it be proper to allow an issue to be framed, and a trial had, to determine whether these "liquidated damages" were intended to cover some legitimate charge or expense, or to cover usurious interest? The two cases of *Kurtz v. Sponable*, *supra*, and *Tholen v. Duffy*, 7 Kan. *405, show nearly what the opinion of the court is upon this question. If the stipulation in the mortgage is for the payment of something which the court can see is legal, and a valid and legitimate charge or expense, then the court will uphold the same; but if the stipulation is so indefinite that the court cannot tell whether the payment was intended to be for something legal or illegal, then the court will not uphold the stipulation. We think the stipulation is void, and therefore the mortgage is the same as though there were no such stipulation contained in it, and therefore the judgment for fifty dollars as attorney's fees is erroneous. *Stover v. Johnnycake*, 9 Kan. *367.

This disposes of all the points made in the case. The cause *161 will be remanded, with the order that the judgment of the court below be modified so as to correspond with this opinion; and, although we do not think that the court below erred in rendering judgment against said Cooper as principal instead of as surety, yet, if the said Cooper so desires it, the judgment may still be further modified so that the judgment may be against him as a surety only.

(All the justices concurring.)

C. M. ALBINSON and others v. J. ROBERTS.

January Term, 1874.

Appeal: Pleadings on. Where a judgment of a justice of the peace is taken to the district court on error, and reversed, and the case retained for trial, and no order for pleadings is entered, and the amount in controversy is less than \$100, it is not error to overrule a motion to dismiss the case for want of a petition.

Error from Cloud district court.

Roberts brought an action in a justice's court against Albinson and two others, which was removed by petition in error to the district court. The district court reversed the judgment, and retained the action for trial. At the August term, 1873, of the district court, the defendants moved that the action be dismissed because no petition had been filed, which motion was overruled, and an exception taken. A trial by the court was then had. The court found for the plaintiff, and rendered judgment in his favor for \$70.87½ and costs.

L. J. Crans, for plaintiffs in error.

The court erred in overruling the motion to dismiss for the reason that no petition had been filed.

*162 The court erred in trying the action without the inter*vention of a jury, a jury trial not having been *waived* by the plaintiffs in error or their counsel. Const. § 5, Bill of Rights; Civil Code, §§ 266, 289. There was no written consent in person or by attorney filed with the clerk, or oral consent in open court entered upon the journal conferring such right on the court. There was no issue joined, (*Tarleston v. Brily*, 3 Kan. 433; *Goff v. Russell*, Id. 212,) and until issue joined between the parties there was nothing to try, and no form of trial to waive. The filing of a justice's transcript on appeal in the district court merely gives jurisdiction without service of summons, but presents no issue whatever.

The court erred in rendering a judgment, there being no verdict or legal finding on which to found the same. When the proceedings of a justice of the peace are reversed, "the same shall be retained by the court for trial and final judgment *as in cases of appeal*." Gen. St. 742, § 566. As the Code nowhere determines what the words, "as in cases of appeal," mean, we must seek the meaning of the legislature elsewhere. This we find in section 107, c. 121, Comp. Laws 1862, p. 635, then in force regulating appeals: "The parties shall proceed in all respects in the same manner as though the action had been originally instituted in the said court." The Code provides what proceedings shall be had in the district court in actions originally instituted there. This court construed section 107 in *Tarleston v. Brily*, 3 Kan. *433. In construing statutes we are compelled to examine others in *pari materia*. Section 566 can only be explained by reference to section 107, c. 121, Comp. Laws 1862, and the latter

section is as much a part of the former as though it had been textually inserted therein. The legislature, when it passed the Civil Code, intended that error cases held for trial should be tried as appeals were according to laws then existing. It could change the mode of trial of either. It has seen fit to change the mode of trial on appeals. If section 107 had been textually inserted in section 566, the amendment of section 124 of the justices' act (Laws 1871, p. 184) could not in anywise change section 566. To give such force *163 to the amendment of said section 124 as the *district court gave, is in contravention of section 16, art. 2, of the constitution.

Noble & Gray and C. W. McDonald, for defendant in error.

It was not required that the plaintiff should file new pleadings when the cause had been placed on the docket for trial as on appeal. Laws 1870, § 7, p. 184; Civil Code, § 566.

As to a jury being waived, no error appears affirmatively on the record. The cause came on to be heard, and the defendant failed to plead, answer, or demur. It was a case on default. There is no evidence that the defendant's attorney was present at the trial. When the defendant fails to appear, it is not necessary that the record shall show that plaintiff waived a jury. Civil Code, § 289; *Cohen v. Hamill*, 8 Kan. *621.

BREWER, J. Defendant in error obtained judgment before a justice of the peace against the plaintiffs in error, which judgment was reversed on petition in error by the district court. The case was there retained for trial, and subsequently judgment again rendered in favor of the defendant in error. To reverse this second judgment this proceeding in error is instituted. The first ground of error is the overruling by the district court of the motion to dismiss for want of a petition. The Civil Code (Gen. St. 742, § 566) provides that a case reversed shall be retained for trial and final judgment "as in cases of appeal." Now, counsel claims that by the law as it stood at the time of the enactment of the Code, under the decision of this court in *Tarleston v. Brily*, 3 Kan. *433, pleadings were required in cases of appeal, and hence argues that pleadings were also essential in cases of error. Counsel has overlooked the fact that in 1867, and subsequent to the decision in *Tarleston v. Brily*, the legislature expressly declared that no pleadings should be necessary in appeal cases where the amount in controversy was less than one hundred dollars. Laws 1867, *164 p. 78, § 9. The amount in controversy *here is less than one hundred dollars. Hence, by the counsel's own argument, no pleadings were essential in this case, and the court did not err in overruling the motion to dismiss for want of a petition. We may say that independent of the line of argument pursued by counsel, and appropriated by us, we think the court did not err in overruling the motion to dismiss for want of a petition.

It is also objected that the record does not show any waiver of a jury, and that therefore a trial by the court was erroneous. The action was on a promissory note. No denial under oath was filed. The defendants were in default. They did not demand a jury. The plaintiff makes no objection to the record. We see no error.

The judgment will be affirmed.

(All the justices concurring.)

JOHN S. HOOK and others v. WILLIAM N. BIXBY.

January Term, 1874.

1. **Limitation: Rule of Construction.** Where lumber is sold on the nineteenth of February, 1870, and the debt thereby created becomes due on that day, but is not paid, the party to whom the debt is payable may bring his action therefor on the nineteenth of February, 1873.
2. ———: **Computation of Time.** In such a case the time within which the creditor may commence his action is computed by excluding the first day and including the last.
3. **Witness: Survivor of Contracting Parties.** Where certain persons purchase lumber on credit from a firm composed of three persons, and afterwards one of the members of the firm dies, and another member of the firm becomes the owner of the partnership assets, including said debt for lumber, and the last-named member of said firm sues the purchasers of said lumber for said debt, *held*, that neither of the defendants can testify in such suit in his own behalf concerning any transaction or communication had personally by such defendant with the deceased member of said firm.¹

*165 *Error from Doniphan district court.

Action by Bixby against Hook and three others, on an account originally accruing in favor of a firm composed of said Bixby and William D. Beeler and John S. Beeler. Said William D. Beeler died before the trial, which was had at the March term, 1873, of the district court. Finding and judgment in favor of the plaintiff for \$208.68.

F. M. Keith and Nathan Price, for plaintiffs in error.

Upon the facts the court should have held the action barred by the statute of limitations. The action clearly comes within the second subdivision of section 18 of the Code, and by its terms must be brought within three years from the time the right of action accrued. This right of action clearly accrued on the nineteenth of February, 1870, and by our law if the plaintiffs did not pay on that day, but

¹See the full note, by states, to the case of *Crowe v. Colbeth*, 24 N. W. Rep 480 *et seq.*, as treating the question of evidence as to transactions with deceased persons.

left defendant's mill with the lumber, he could immediately have commenced an action by attachment against them. Now, the action must be brought within three years from the time the right accrues. The term "within," as defined by Webster, means that which is *inside* of certain limits. Now, what time is within a year, bearing in mind that the law takes no cognizance of fractions of a day? Suppose this lumber had been brought by plaintiffs in error on the first day of January, 1870, when would the year expire? Certainly, on the thirty-first of December following. The year begins on the first of January and ends on December 31st, says the almanac. Then how can any other time be within the year? and can the case be altered if the right of action accrues on the nineteenth of February instead of the first of January? And we think the authorities fully sustain this view. See Ang. Lim. § 44. There are some authorities which would seem to view the law differently, but these rest upon a different state of facts; as where the party to whom the right of action accrues was not privy to the facts. Ang. Lim. §§ 47, 49; The St. Lawrence, 9 Cranch, 120.

*166 *The court erred in the exclusion of the testimony of Springer and the other witnesses as to the settlement with Beeler. The only authority for excluding this testimony is section 322 of the Civil Code. That section would exclude these witnesses if Bixby had acquired title to the cause of action immediately from Beeler, deceased; but in this case a part of this claim always was in Bixby. He only derives a third interest in it from his deceased partner. The court went beyond the letter of the law in excluding this testimony, and we do not believe that the ends of justice are promoted by courts going beyond the law to suppress the truth.

The third objection is that on the facts shown plaintiffs in error were not individually liable. Their evidence shows that there was a church organization in White Cloud, known as the Christian Church; that they were erecting a church building, and had appointed a building committee, consisting of plaintiffs in error and Beeler, the deceased partner of Bixby; that said deceased partner was the treasurer of said committee, and made the collections of the money which had been subscribed to aid in the erection of the building. Now, when this building was completed, to whom would it belong? Certainly to the Christian Church of White Cloud. If any of these plaintiffs in error the next morning after the completion of the building had been guilty of any violation of the rules of the church, could they not have been kicked out? and could any one of them claim that he had any right or interest in the church building? It certainly seems to us that in addressing a court so familiar with church discipline as this, it is useless to refer to authorities; but we would cite the court to Chase v. Cheney, 10 Amer. Law Reg. (N. S.) 295, and to Gartin v. Penick, 9 Amer. Law Reg. (N. S.) 210; Gartin v. Penick, 5 Bush, 110; Chase v. Cheney, 58 Ill. 509.

Albert Perry, for defendant in error.

Advantage was sought to be taken of the statute of limitations by a motion to dismiss. Defendant in error submits that advantage can only be taken of the statute (1) by *demurrer; (2) by answer; or (3) by an objection to the introduction of testimony under the petition, which is in fact a demurrer. Ang. Lim. § 285; *Zane v. Zane*, 5 Kan. *134. Under the earlier decisions, an action accruing on the nineteenth of February, 1870, could not be sued on the nineteenth of February, 1873; but the weight of modern authorities is that the first of these days should be excluded in the count, and the last included. See Ang. Lim. §§ 43-50, and authorities cited in notes to section 50. By our statute the first day is to be excluded in the count. Civil Code, § 722.

Upon the question of the admissibility of testimony offered by defendants below, we submit that the testimony was properly excluded. Bixby was surviving partner and assignee of the firm of W. D. Beeler & Sons, of which firm W. D. Beeler had deceased. Under section 322 of the Code the proffered testimony was properly excluded.

VALENTINE, J. This was an action on an account. It was commenced in a justice's court, appealed to the district court, and then brought on petition in error to this court. It is uncertain what questions are really presented to us for our consideration. No case was made for the supreme court, as might have been done under the statutes enacted for that purpose, (Gen. St. 737; Laws 1870, p. 169; Laws 1871, p. 274;) and hence it would seem that the whole record should have been brought to this court. But the pleadings, however, are not brought to this court. The record does not purport to contain all the evidence; and while a motion was made to set aside the findings of the court below, and for a new trial, yet the record brought to this court does not show upon what ground such motion was founded, or upon what ground the new trial was asked. The trial in the court below was before the court without a jury. The court made a general finding for the plaintiff below, defendant in error, and made no special findings; nor was the court asked to make special findings. *168 The judgment was rendered in accordance with said *general finding. Now, we cannot reverse said judgment on the ground that it is not sustained by sufficient evidence when we have not got all the evidence, and when no motion was ever made to set aside said judgment or finding on the ground that it was not sustained by sufficient evidence.

It is claimed that the cause of action was barred by the statute of limitations; but the only way in which the question was raised in the court below was by a motion made to dismiss the action. Now, if any item of the account sued on was not barred, then this motion should have been overruled. In fact, unless the plaintiff's pleading showed affirmatively upon its face that every item of the account was

barred, the motion could not be sustained. This motion was made in the district court after a trial had already been had upon the merits of the action in the justice's court; and after the motion was overruled both parties again proceeded to a trial upon the merits of the action in the district court. But the cause of action was not barred; or at most, the last items thereof were not barred. The cause of action accrued, as is claimed and admitted, on February 19, 1870, and the action was commenced on February 19, 1873. Our Code of Civil Procedure provides that "civil actions, other than for the recovery of real property, can only be brought within the following periods *after* the cause of action shall have accrued, and not afterwards: * * * *Second*, within three years, an action upon contract, not in writing, express or implied." Gen. St. 633, § 18. And the same Code provides that "the time within which an act is to be done shall be computed by excluding the first day and including the last; if the last day be Sunday, it shall be excluded." Gen. St. 771, § 722. The action in the present case was founded upon an account for lumber sold. Now, suppose the lumber to have been sold on any hour of the day of February 19, 1870, and suppose the action to have accrued on the very hour that the lumber was sold. Then, according to the letter of the statute of limitations, the plaintiff would *169 have had until the same hour of the day of February 19, 1873, within which to commence his action, for the three years could not expire sooner. If, for instance, the lumber was sold at noon of February 19, 1870, the plaintiff would have, according to the letter of the statute, until noon of February 19, 1873, within which to commence his action, for three years could not elapse before that time. Now, as the plaintiff in the case supposed has a half of the first day in which to sue, and a half of the last day in which to sue, the statute for the computation of time comes in and says that the time within which the plaintiff may sue shall be computed by excluding the whole of the first day and including the whole of the last; that is, he may have the whole of the last day within which to sue instead of the half or any other part of that day only. This is reasonable, and it is in accordance with the statutes, and it is probably in accordance with the weight of authority. See 2 Pars. Con. 662-664; Ang. Lim. §§ 42-50, and cases there cited. Any other rule would shorten the statute of limitations. But in the present case, although the lumber was sold on February 19, 1870, yet it is not very clear that the debt thereby created became due on that day. Probably, however, it did.

This action was on an account for lumber sold by William D. Beeler & Sons to the defendants. The firm of William D. Beeler & Sons was composed of William D. Beeler, John S. Beeler, and William N. Bixby. There was evidence introduced tending to show the following facts, to-wit: William D. Beeler died, and his interest in the assets of the firm, including said account, was sold at public sale

to the plaintiff below, defendant in error. It seems to be admitted that the plaintiff is now the owner of the whole of said account, but how he became the owner of the interest of John S. Beeler is not definitely shown; nor is it shown who sold the interest of William D. Beeler, deceased. We suppose, however, that the sale was all regular, as no question has been raised concerning it in this court.

After the foregoing evidence was introduced, then one of the *170 defendants was put *upon the witness-stand, and it was at-

tempted to be proved by such witness that the defendants had a settlement with said William D. Beeler in his life-time, and that according to that settlement the defendants owed only \$34 on said account, instead of \$172.47, as claimed by the plaintiff. The plaintiff objected to the evidence on the ground that it was incompetent under section 322 of the Civil Code, (Gen. St. 691,) and the court sustained the objection. The defendants claim that this ruling was erroneous. We are inclined to think, however, that the ruling was correct. Said section provides as follows:

"Sec. 322. No party shall be allowed to testify in his own behalf in respect to any transaction or communication had personally by such party with a deceased person, when the adverse party is the executor, administrator, heir at law, next of kin, surviving partner, or assignee of such deceased person, where they have acquired title to the cause of action immediately from such deceased person; nor shall the assignor of a thing in action be allowed to testify in behalf of such party concerning any transaction or communication had personally by such assignor with a deceased person in any such case; nor shall such party or assignor be competent to testify to any transaction had personally by such party or assignor with a deceased partner or joint contractor in the absence of his surviving partner or joint contractor, when such surviving partner or joint contractor is an adverse party. * * *"

The construction given to said section by the court below certainly comes within the spirit of said section, and we are inclined to think that it also comes within the letter of the section. Of course, a different construction might be given to said section, for it is manifestly ambiguous in two or three respects, but the true construction is, we think, the one given it by the court below.

The third point made in the brief of counsel for plaintiffs in error is not presented by the record brought to this court. The remarks we made at the beginning of this opinion will apply to that point, and will be a sufficient discussion thereof.

Judgment affirmed.

(All the justices concurring.)

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JULY TERM, 1874.*D. S. McINTOSH v. COMMISSIONERS OF CRAWFORD CO.**

July Term, 1874.

1. **Judgment: Bad Faith: Vacating.** Where both parties to a suit pending in the district court agree to a continuance to the subsequent term, notify the clerk of this agreement, and direct him to make a journal entry thereof; and, relying thereon, the defendant leaves the court and returns home, while the plaintiff, in his absence, and in violation of this agreement, proves up his claim and takes judgment: *held*, that there was no error in the court thereafter, and at a subsequent term, upon motion, vacating and setting aside the judgment thus obtained.
2. **Evidence: Judicial Notice: Rules of District Court.** This court does not take judicial notice of the rules of the district court.
3. **Record: Insufficient for Review.** Where a motion involving questions of fact outside of the record is made and overruled, and the "case made" or bill of exceptions shows that one affidavit was used in support thereof, but fails to show that no other affidavits or other evidence was used, and also fails to show upon what ground the district court overruled the motion, *held*, that it was impossible to affirm that the district court erred in overruling the motion.
4. **Instructions: Immaterial Error.** An error in an instruction bearing simply upon the amount that the plaintiff ought to recover, if he recover anything, and not affecting his right to a recovery, may be disregarded when the verdict is for the defendant.¹

Error from Bourbon district court.

The case is stated in the opinion.

*172 **Frank Playter and C. O. French*, for plaintiff.

Only two methods are known to our Code for vacating a judgment and granting a new trial. The one is by motion, the other by petition. No petition was filed to vacate the judgment rendered at the September term, 1871. The only attempt to vacate it was by motion, and that attempt was successful. This motion was filed February 26, 1872, and heard at the succeeding March term. Six months had elapsed, and the December term, 1871, had intervened between date of judgment and filing of the motion without any attempt to reverse or vacate the judgment. By reason of lapse of time, and intervention of a term of court, the judgment ought not to have

¹It is generally immaterial whether an instruction, which goes simply to the amount of recovery, is good or bad, when the jury upon proper instructions find against any recovery. *Wilkes v. Wolback*, 30 Kan. 375; S. C. 2 Pac. Rep. 508.

been vacated upon "motion." Under section 308 of the Code the "motion" is only allowed at the same term judgment is rendered, and in *all* cases must be within three days after judgment, except for newly-discovered material evidence, and even for this you cannot go beyond the term. If you wish to attack the judgment *after* the term, it must be by petition. Under sections 568 and 569 of the Code the "motion" is only allowed (1) "in proceedings to correct mistakes or omissions of the clerk, or irregularities in obtaining a judgment; (2) to vacate a judgment because of its rendition before the action regularly stood for trial." If the motion was sustained for either one or the other of these reasons, it was error. It ought not to have been entertained by reason of lapse of time. It does not seek to *correct* anything. It is a motion, as its title indicates, for "the vacation and setting aside the judgment heretofore rendered in the above-entitled cause." True, it says "the *173 amendment to plaintiff's bill of particulars *was never filed by the clerk, and that such amendment was permitted by the judge of said court without any notice to defendants," etc., but does *not* say that the amendment was *not deposited* in the clerk's office. A deposit in the clerk's office, with the clerk, of a paper in a case, constitutes a legal filing, although not marked "filed." Again, after appearance in the case by the defendants, and after answer filed, or, as defendants say in their motion, "after issue joined," the Code does not require notice of amendment. It is only required *before* answer filed. Code, § 136. There was no irregularity in obtaining judgment by reason of omission of clerk to enter agreement to continue the case from the September to the December term. The affidavit in support of motion does not show an agreement, either in open court or in writing, to so continue the case, while the rules of the district court provide: "No verbal agreement of counsel or parties with each other, or an officer of the court, concerning the progress or management of a cause or proceedings, will be enforced, unless made in open court." The clerk had no authority to enter the agreement spoken of upon record.

Section 569 of the Code relates only to clerical mistakes which can be amended on motion. Nash, Pl. & Pr. 699, 670. It does not reach far enough to cover this motion and affidavit. In any view of the case, the motion ought not to have been entertained. But, for the argument, suppose the case presented came within section 569, and a motion *could* be made: was there *such* notice to the adverse party or his attorney as would justify the court to act upon the motion? The notice is directed to E. M. H., who accepts a copy of same as "of counsel for pltf.," and at the same time tells the defendants' attorney that he had nothing to do with the case, or (in the language of the affidavit) "that at the time of accepting the notice he had no employment as attorney in said case, and so notified the attorney of defendants." The court might have been justified in acting

upon the motion, upon the notice as accepted by H., had there been nothing further presented; but when the case was heard upon *174 the motion, the *court had full knowledge of the facts, and it was error to sustain the motion as upon default of plaintiff. The court should have ordered a sufficient notice to the plaintiff, especially as the record showed the judgment assigned to Playter. The only remedy of defendants was by petition and summons under section 570 of Code. Hence it was both error to vacate the judgment rendered at September term, 1871, as well as to overrule the motion of plaintiff to vacate and set aside the order granting a new trial, based upon the motion and affidavit filed by defendants.

The court erred in allowing testimony of the actions and doings of the county commissioners outside of their record to be introduced in evidence.

The court erred in its instructions to the jury. The court says: "The court instructs you that the plaintiff cannot recover in this action a larger amount than the bill filed and sworn to before the county board, for the reasons mentioned in section 28, c. 25, Gen. St. 259," (which section was read by the court to the jury.) In plaintiff's amended petition, in addition to the items in the bill filed before the county board, there are charges for furnishing lamps and oil for county offices 17 months, at \$2 per month, \$34; and to furnishing fuel to county offices for 9 months, at \$5 per month, \$45. By this instruction the court virtually instructed the jury that the plaintiff could not recover for the lamps, oil, and fuel so furnished, because the items were not filed before the county board. It is true, the instruction says the plaintiff cannot recover a larger amount than filed, yet the instruction is so worded as to mislead the jury, and limit them to the items filed. The court erred in limiting them to any amount, provided they did not exceed plaintiff's demand in his amended petition. There is nothing to distinguish an appeal case from the county board to the district court from any other appeal case. In fact, section 31, c. 25, Gen. St. 1868, says: "Such appeal shall be entered, tried, and determined the same as appeals from justices' courts;" while section 124 of the justices' act provides that "the plaintiff in the court *175 below shall be *plaintiff in the district court, and the parties shall proceed in all respects in the same manner as though the action had been originally instituted in the said court." Had this suit been originally instituted in the district court, there could have been no question, after issue joined, of plaintiff's right to amend, even to claim a fabulous sum, and recover it, if proved. Such amendments, as in this case, being simply a question of costs, are in the discretion of the court.

F. Danford and A. H. Wilkinson, for defendants in error.

BREWER, J. Plaintiff in error, plaintiff below, presented an account [for \$419] to the board of county commissioners of Crawford

county for rent of offices, etc. The board disallowed the account. He appealed. By change of venue the case was transferred to the Bourbon district court. On September 19, 1871, both parties appeared in open court, and, by consent, a journal entry was made postponing the case for two days, and until September 21st. On September 21st the defendants failed to appear, and judgment was rendered in favor of the plaintiff. On January 22, 1872, the judgment was assigned by assignment on the margin of record to F. Playter. On February 26, 1872, defendants filed their motion, supported by affidavit, to vacate and set aside such judgment. Of this motion notice was served on E. M. Hulett, the attorney of record of said plaintiff, and service accepted by him as such attorney. When the motion came on to be heard neither the plaintiff nor his attorney appeared, the motion was sustained, and the judgment vacated and set aside. At a subsequent term plaintiff made his motion to set aside said order vacating and setting aside the judgment. This motion was overruled. New pleadings were filed, the case tried, and judgment rendered for defendants. To reverse this judgment plaintiff now brings this proceeding in error, and the principal question for our consideration is the action of the court in vacating and setting aside the *176 judgment of September, 1871. The application therefor was by motion. It was made under the third clause of section 568 of the Code,—the section that authorizes district courts to vacate or modify their judgments at or after the terms at which they are rendered. This third clause reads: "For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order." A subsequent action provides that an application under this clause shall be by motion. The facts, as disclosed by the motion and accompanying affidavit, are that at the September term, and prior to the taking of the judgment, the plaintiff and defendants agreed upon a continuance of the case to the subsequent term, communicated this agreement to the clerk, and instructed him to make a journal entry thereof; and that, relying upon such agreement, the defendants' attorney left the court and returned home. Judgment was, notwithstanding such agreement, and in the absence of the defendants, taken by the plaintiff. It will hardly be doubted that a court might properly set aside a judgment rendered under such circumstances. Counsel for plaintiff in error insists that there is a rule of the district court which provides that "no verbal agreement of counsel or parties with each other, or an officer of the court, concerning the progress or management of a cause or proceeding, will be enforced unless made in open court." No such rule appears in the record, and we do not take judicial notice of the rules of the district courts. Even with such a rule, it would not follow that a court was bound to tolerate so gross a breach of faith. The rules are designed to prevent injustice, not to further and accomplish it. The question is not whether the court would have erred after notice of such a parol agreement in compelling the

plaintiff to go to trial, but whether a party after making such an agreement can be allowed in a court of justice to profit by breaking it.

Counsel insists that no sufficient notice was given of this motion.

The notice was served on E. M. Hulett, who was counsel of *177 record for plaintiff, and service was accepted by *him in writing as such counsel. There was no appearance of plaintiff to the motion. Prior to the service of notice the judgment had been assigned of record to Frank Playter. Upon the motion to set aside this order vacating the judgment, the affidavit of E. M. Hulett was filed, stating that when he accepted service of notice of the prior motion he told the defendants' attorney that he was not attorney in the case, and that when the motion was called he stated to the court that he had no employment of record in the case, and would not appear to the motion. Mr. Hulett's name appears signed to the petition as attorney for the plaintiff; nor do we understand the affidavit as asserting that it was wrongfully there, or that he did not appear at the trial as the plaintiff's attorney. We understand, rather, that *since the assignment* he did not consider himself as attorney in the case, or as representing the assignee of the judgment, the real party in interest. This, it is true, is not stated in the affidavit, but seems to us the explanation most consistent with the good character of the parties concerned. It might be a question, under the statute, whether any further notice was requisite, notwithstanding Mr. Hulett's disclaimer, and whether notice to the assignee was essential. But we do not care to investigate that question. The facts may not be all before us. The record fails to show that this affidavit of Mr. Hulett was the only evidence used on the motion. It may have been clearly shown that the assignee had actual notice of the motion, or, indeed, that he appeared to the motion, or that the assignment was not *bona fide*, or for value, or that Mr. Hulett was in fact fully authorized to appear for the assignee. It is useless, however, to speculate. It is enough that we can see that there might have been at least one satisfactory answer to the facts stated in the affidavit. *Backus v. Clark*, 1 Kan. *303; *Altschiel v. Smith*, 9 Kan. *90. Subsequent to these proceedings amended pleadings were filed, both parties appeared by their counsel, a full and fair trial was had before a jury, and a verdict returned for the defendant. We are not willing to set *178 aside a judgment rendered after such a trial, in which both *parties participated, and affirm one based upon an *ex parte* hearing, unless upon a clear showing of error.

Complaint is also made of the proceedings upon the trial, of the admission of evidence, of the instructions, and that the verdict is against the evidence. None of these objections are well taken. There was no error in the admission of the testimony. The county commissioners were allowed to testify as to what oral propositions had been made to them by plaintiff. No action of the board was thus shown, but simply the statements of the plaintiff. And when-

ever any parol testimony was sought as to the action of the board upon such propositions, it was promptly ruled out. We think this amounted to nothing more than showing the statements and admissions of plaintiff, and as such was competent. It is urged that the court misdirected the jury as to the amount that the plaintiff might recover under the pleadings and testimony. As the jury found for the defendants, this error, if error it were, cannot have wrought any prejudice to the plaintiff. *Branner v. Stormont*, 9 Kan. *51. There was testimony sufficient to support the verdict.

The judgment will be affirmed.

(All the justices concurring.)

JOHN LORING v. LEWIS ROCKWOOD.

July Term, 1874.

1. **Trespass: Jurisdiction of Justice: Bill of Particulars.** A bill of particulars stated that the defendant set fire to prairie grass, and that the fire continued to burn and spread until it reached and burned the hay, posts, and rails, and growing peach trees of the defendant, and that such burning occasioned great damage to the defendant, to-wit, the amount of one hundred and sixty-one dollars and forty cents, the value thereof. *Held*, that the justice of the peace erred in dismissing the action on the ground that the cause of action stated in the bill of particulars was one for trespass on real estate, and beyond his jurisdiction.

*179 *2. **Costs: Reversing Justice's Judgment.** On reversing, upon petition in error, the judgment of a justice of the peace, it is the duty of the district court to render judgment against the defendant in error for all costs that have accrued up to that time.

Error from Howard district court.

The case is stated in the opinion.

Fay & Milton, for plaintiff in error.

The justice's transcript contains all that is shown of Rockwood's cause of action. Section 6 of the justice's act is conclusive upon the question of jurisdiction. Rockwood must affirmatively show a cause of action in which the justice had jurisdiction. It must appear in the record. Nothing will be presumed in favor of the jurisdiction of an inferior court. The district court erred in reversing the judgment of the justice unless the record affirmatively shows that the justice had jurisdiction. We submit that the record does not show such a cause of action. If the statement of the cause of action in the justice's transcript leaves it doubtful as to whether said stated cause of action is trespass to real estate, then that construction most favorable to the adverse party must be given. *Certainty* is one of the common general rules of pleading, and it requires, in setting forth the cause of

action, that every fact without which there would appear to be no cause of action, or an incomplete ground of action, should be distinctly averred in a traversable form. Growing peach trees are real property, in any ordinary sense of the language. Trees growing are in the ground, or attached to the realty,—a part of it. This is the reasonable construction. The court will not go off in search of

*180 unusual definitions where *certainty* is positively required. *If a party enters the close of another, and cuts down and carries away the trees, can an action be maintained for the damage before a justice of the peace, where *more* than \$100 is claimed? If so, then the statute limiting the jurisdiction of the justice is nugatory,—a meaningless farce. Joining a trespass to personal property with a trespass to real property, and claiming damage for *more* than \$100, is fatal to the jurisdiction of the justice.

The judgment of the district court does gross injury to plaintiff in error. As defendant before the justice he had a trial by jury, and a verdict in his favor, and a judgment thereon for costs of suit. On Rockwood's motion a new trial was granted, and then the justice dismissed the action for want of jurisdiction. But the district court adjudged Loring to pay all the costs of both trials. This is an injury which law and justice should not sanction.

A. L. Williams; for defendant in error.

The bill of particulars shows that the action is not for trespass to real estate. The trespass mentioned in section 6 of the justices' act is the common-law trespass. 3 Bl. Comm. 209. To constitute such a trespass, the wrong-doer must actually break and enter the premises of the plaintiff, and the injury done must be the immediate and not the remote result of the act complained of. The act which led to the injury must of itself have been an illegal one. The plaintiff must have been the owner and in possession of the premises. None of these things appear in this case. It does not appear, even by inference, that the property destroyed was upon the premises of the plaintiff. All of the property (except the trees) was personal property, and the trees may have been personal property also, for all that appears in the record. This action was brought, and properly too, under section 2, c. 118, Gen. St. 1122, and the justice had jurisdiction in the case. Laws 1870, p. 181.

The costs were properly taxed. Civil Code, § 566. The fact *181 that there had been a trial before a justice of the peace *resulting in favor of the plaintiff in error is immaterial. The justice had a right to grant a new trial, (section 110, Justices' Act,) and having done so, the case stood as though it had never been tried.

BREWER, J. Rockwood brought his action before a justice of the peace. The bill of particulars is stated in the record to have been, in substance, "that the said John Loring, on or about the twelfth of November, 1872, at the county of Howard and state of Kansas, did

then and there set the prairie grass on fire, and the said prairie continued to burn, and said fire continued to spread, until it reached and burned the hay, posts, and rails, and growing peach trees of the said Lewis Rockwood, which hay, posts, and rails, and growing peach trees were in said county of Howard and state of Kansas. The burning occasioned great damage to the said Lewis Rockwood, to-wit, the amount of one hundred and sixty-one dollars and forty cents, the value thereof." The justice held that this was an action of trespass on real estate, and, the damages demanded exceeding one hundred dollars, that it was beyond his jurisdiction, and dismissed it. On petition in error, the district court reversed the judgment of the justice, and retained the case for trial. Plaintiff in error now seeks to reverse the judgment of the district court. We think the district court was right. It nowhere appears that Rockwood was in possession, either personally or by tenant, of the premises upon which the property destroyed was situated, or in any position to maintain an action for trespass on real estate. The property destroyed was personal property, or at least may have been, and there is nothing to show that it was so attached to the ground as to be part of the realty. This is clearly so as to the hay, posts, and rails. As to the growing peach trees, they may have been growing in a nursery, and part of its stock. The action is for the destruction of this property, and not for the injury to the realty.

The case was tried once before the justice with a jury, and
 *182 *judgment rendered for the defendant, Loring. The justice set aside this judgment upon motion. A change of venue was then taken to another justice, by whom the case was dismissed. On reversing this judgment the district court rendered judgment against Loring for all the costs that had accrued up to that time. This was right, and in obedience to the plain direction of the statute. Gen. St. 742, § 566.

The judgment will be affirmed.
 (All the justices concurring.)

THACHER and another v. COMMISSIONERS OF JEFFERSON Co.

July Term, 1874.

Counties: Power of County Commissioners to Employ Counsel. H. G. T. commenced an action of *mandamus* in the supreme court of the state of Kansas against H. S. W., J. D. R., and H. O., the board of county commissioners of the county of Jefferson, to compel said board to submit to the qualified voters of Rock Creek township, in said county, the question whether stock should be taken in the name of said township in the Atchison, Topeka & Santa Fe Railroad Company, and the bonds of the township be issued in payment for such stock. The said county board then employed the plaintiffs in error as attorneys and counselors at law to de-

fend said suit. The plaintiffs in error performed said services, the action of H. G. T. was defeated, and this action is now brought to recover compensation for said services. *Held*, the county commissioners had power to employ the plaintiffs in error to perform said services, and therefore that this action can be maintained.¹

Error from Jefferson district court.

The case is stated in the opinion.

*183 **Thacher & Stephens*, plaintiffs, for themselves.

Sections 136, 138, c. 25, Gen. St., define the duties of the county attorney, and by neither of them is it incumbent upon him to defend the county commissioners when sued outside of the county. Was it the duty of the county board to defend itself when brought into court, or had it the right to do so? If it had the right, or it was its duty, then, of course, it must do so through attorneys, and of course its duty to pay therefor clearly follows. And we conceive the question to be solely whether the board was called upon to defend itself, and not, as is insisted on the other side, whether it was legally or properly sued. If the board was brought into court to answer for any purpose whatsoever, the lawyer who made that answer for it, at its request, is entitled to compensation therefor. In this case it appears that the board made a successful defense, and that the services of the plaintiffs for the board in that behalf were worth \$265, and that they were duly employed to render the services.

If it be said that the board were sued in the supreme court about a matter on which it had no right to defend itself, the answer is that the supreme court took another view of the case, and decided it had a right to defend itself, and on a final hearing gave judgment in its favor. If it be said that the subject-matter in the suit in the supreme court affected only one township in the county of Jefferson, and so the burden of protecting its interests should fall on it rather than the whole county, the answer is that the board is bound to defend each township's interests in matters confided to it, just as much as it is the whole county; and the decision of the supreme court was that its action in refusing to submit to that township the question whether it would burden itself with a bonded debt was right. (It is possible there may be a duty on the part of that township to reimburse the county board for its expenditures in its behalf, though it would seem that this apparent inequality of burdens is, after all, an inci-

*184 dent of the relation between the townships and their representative in these matters, the county board.) At all events, the county board were brought into the supreme court as an official body,

¹ Where the board of county commissioners of a county calls a special election in a township of the county, under the provisions of chapter 107, Laws 1876, (Dassler, Comp. Laws 1885, p. 783, § 68,) upon a proposition for the township to subscribe to the capital stock of a railroad company proposing to construct a railroad through such township, and gives notice of the election in a newspaper published in the township, held, that the township is liable for the expense of publishing the notice of the special election. *Center Tp. v. Gilmore*, 81 Kan. 673; 8 C. 3 Pac. Rep. 201.

appointed by the law to discharge specific duties, with respect, among other things, to each township in the county, and its official action was sought to be coerced in that behalf. Now, either the board should or should not have defended itself. The supreme court decided its action, which was sought to be changed, to have been correct. Therefore it had a good defense, and, in presenting it through the plaintiffs, its action was in good faith, and the plaintiffs in this action are entitled to their just reward.

If it shall be said that the board was only the agent of the township in submitting the vote for aid in issuing bonds, or refusing to do either, then for what moneys it expends for its principal it may recover of it; but there is no privity of contract between the plaintiffs and the township. Our contract was with the county board as such, and not with it as officers of a township. Moreover, in doing this business for the township, the county board in no sense changes its relations or official character. It draws pay from the county treasury for the time of its members while engaged in this business; it pays the county clerk for his work in the same behalf from the county funds; it draws money from the same general fund to pay for printing or engraving the bonds when issued; and we know of no power authorizing it to charge up these matters to the township.

That the county board is authorized to defend itself when sued can hardly be seriously disputed. But, if so, then it is liable for attorney's fees in defending the suit. *Gillespie v. Broas*, 23 Barb. 379. The county board, being liable to an action to compel their official action, would be derelict in its duty were it to fail to exhibit to the court its reasons for not performing the desired action; and if by such failure to defend its action, or failure to act, a decree should be entered against it injurious to others, why would not the individual members of the board be liable to the injured parties?

Section 6 of chapter 90 of the Laws of 1870 (this being the law *185 under *which the county board were called upon to act) expressly provides for the payment of all officers acting under the law, and subjects them to an action for non-compliance, the same as in other cases. But in all other cases the officers are paid by the county for their services. There are other cases in which the county board act for each township, and out of which litigation for or against the board may arise; as, for example, prohibiting stock from running at large at night. Now, can it be contended that the county board can be called on to act in these matters without legal advice? If the county board had the power to be sued in respect to issuing bonds for a township, it has the power to defend itself, and hence employ counsel; and having employed counsel, it is liable to pay such counsel for their services.

Henry Keeler, for defendants in error.

In the absence of any statutory requirements or authority therefore, a county cannot assume payment of costs, nor attorney's fees,

except in those cases in which the county, or some one for it, may appear in court to prosecute or defend. Now, the only kinds of cases in which such appearance may be made on behalf of the county are those mentioned in section 136, p. 287, Gen. St. It is true that this section applies only to cases within the courts of the county, but it covers, and was intended to cover, all kinds of cases in which the county can appear in court; and the people, by the election of a county attorney, are given the exclusive right to choose the attorney who shall appear for the county therein. *Clough v. Hart*, 8 Kan. *487.

In the absence of any direct statutory provision therefor, it cannot be held that a county can appear in courts outside of the county in any other or different kinds of cases than those mentioned in section 136. There is neither reason, statute, nor authority for allowing the corporate power and wealth of the county to be used as a backer for other people's lawsuits over matters in which the county has no interest. Now, in the action of *Turner v. Walsh*, the county

*186 was not a party. It was an action against the county commissioners, as public officers, to compel them to do an act affecting Rock Creek township only. Under our statute the corporate name of the county is the same as that of the tribunal transacting county and other business, and in some cases it may be necessary to look at the nature and cause of the action to determine who is sued. A similarity of names does not always constitute identity of parties. If the legislature had provided (which it might with propriety have done) that the corporate name of the county, or the name in which it might sue and be sued, should be "The County Treasurer of _____ County," it would not follow that the county would be a party whenever the county treasurer was sued for a real or assumed neglect of duty. In the case of *Turner v. Walsh* the cause of action was that Walsh and others, as county commissioners, refused to comply with a demand made by Turner that said commissioners should call an election, for local purposes, in Rock Creek township, and the nature of the action was a *mandamus* proceeding to compel those officers to comply with that demand. The county, as a corporation, had no duty to perform in that matter,—neither its decision nor its action was or could be invoked. The county board (if agent at all in the matter) was the statutory agent of the election petitioners and Rock Creek township only. County officers have various duties to perform for the benefit of different persons and corporations other than the county, and in the performance of those duties are the agents of the respective persons and corporations for whom they act, and the county is not liable, and cannot assume any liability for their acts or omissions therein. *State v. County of Leavenworth*, 2 Kan. *61. The county had no interest in the matter in dispute between Turner and Walsh. The voting or not voting of the bonds of Rock Creek township would not, in any way, affect the county as a corporation. If

the county was interested in the matter, by reason of the township being a component part of the county, then, upon the same principle, the county is interested in any action against any one of its *187 citizens, and may *assume the defense thereof. The county board, wide as its powers are, could not certainly involve the county in such lawsuits. Its powers are limited by statute to such things as were deemed by the legislature to be sufficient for the public good, and compatible with the public safety. The powers given are described, and it has no power except such as are given by the statute. The county not being a party to the action of *Turner v. Walsh*, nor interested in it in any way, the county board had no legal authority to bind the county in a contract to pay attorney's fees therein. Such contract is void, and the county is not liable for any attorney's fees or other costs or expenses in that action. *Halstead v. Mayor of N. Y.*, 3 N. Y. 430; *Brady v. Supervisors of N. Y.*, 2 Sandf. 460; *People v. Lawrence*, 6 Hill. 244; *Hodges v. City of Buffalo*, 2 Denio, 110; *Chemung Canal Bank v. Supervisors*, 5 Denio, 517; *Paine v. Spratley*, 5 Kan. *545. The fact that Walsh and others made a successful defense is totally immaterial. The county board had no more authority to bind the county to pay the expense of the winning than the losing side of a lawsuit in which the county is not a party, and has no interest. Its power to employ attorneys for the county is not at all contingent on the result of the litigation. The entire claim of Thacher & Stephens is an illegal one, and they are not entitled to recover anything thereon.

VALENTINE, J. This was an action brought by the plaintiffs in error, Thacher & Stephens, against the defendants in error, the board of county commissioners of the county of Jefferson, for services rendered by plaintiffs in error as attorneys and counselors at law. It appears from the record that one H. G. Turner commenced an action of *mandamus* in the supreme court of the state of Kansas against H. S. Walsh, J. D. Rollins, and Henry Ogle, the board of county commissioners of said county of Jefferson, to compel said board to submit to the qualified voters of Rock Creek township, in said county, the question whether stock should be taken in the name of said township in the Atchison, Topeka & Santa Fe Railroad Company, *188 and the bonds of the township be issued in payment for *such stock. The said county board employed the plaintiffs in error as attorneys and counselors at law to defend said suit. The plaintiffs in error performed said services, the action of Turner was defeated, and this action is now brought to recover compensation for said services. The case of *Turner v. County of Jefferson* is reported, and will be found, in 10 Kan. *16 *et seq.* We suppose the only question in this case is whether the county commissioners, as county commissioners, had power to employ the plaintiffs in error to defend said suit. We think they had. In this state all the powers of a

county are exercised by the board of county commissioners, (Gen. St. 254, § 3,) and the county always sues and is sued in the name of the board of county commissioners, (Gen. St. 254, § 5.) In fact, the county commissioners are the general officers or agents of the county; and whenever any duties are imposed upon the commissioners by law, it should be presumed that such duties are imposed upon the commissioners as the agents of the county, unless the contrary clearly appears. In many cases the county is by law constituted the general agent or guardian for the protection of the rights and interests of townships, and of other subdivisions of the county, and may prosecute or defend therefor. Thus, the county, through the board of county commissioners, may maintain an action against the county treasurer for a misappropriation or misapplication of the funds of a township, or school-district, etc., although the county as a corporation can have but little interest in the funds of such township or school-district. *County of Jackson v. Craft*, 6 Kan. *145. In the matter of taking stock in railroad companies for townships, and of issuing township bonds in payment of such stock, and of levying and collecting taxes for the payment of the bonds, the township officers have nothing to do. Everything is done by the county officers, and nearly everything by the county board. The petition for the election to determine whether the stock shall be subscribed is presented to the county board. Laws 1870, p. 189, § 1.

*189 The county board alone can determine whether the election shall be held, and such board alone can order the election. Id. 190, § 2. The county board canvasses the returns of the election, and declares the result. Id. §§ 3, 4; also Gen. St. 410, § 28. If the election has resulted in favor of subscribing for said stock, the county board orders the county clerk to make the subscription, and causes the bonds to be issued in payment of said stock, which bonds are "signed by the chairman of the board, and attested by the clerk under the seal of the county." Laws 1870, p. 190, § 5. The county board then annually levies the tax on said township to pay the interest on said bonds, and to create a sinking fund to pay said bonds at maturity. Id. p. 191, § 6. And with the surplus taxes levied and collected for the payment of interest, (if there should be any such surplus,) and with the sinking fund, the county board may at any time cause the treasurer to buy up the outstanding bonds at their market value, not exceeding their par value. Id. § 8. In all this the county, through the county board, seems to be the agent and guardian for the township; and if any litigation should spring up concerning any of these matters, we should think that the county, through the county board, would have ample authority to protect the rights and interests of the township. In this way the county protects the rights and interests of a portion of its own people. For all the foregoing services the county commissioners are paid by the county, (Gen. St. 256, § 14;) and we suppose there

can be but little doubt but that the county must pay for the expenses of the election, (Laws 1870, p. 190, §§ 3, 4; Gen. St. 420, 421, §§ 71-74;) and we suppose the county must also pay the expenses of issuing the bonds, etc.

Now, the litigation between Turner and the county commissioners was concerning the foregoing matters. Turner did not sue the county commissioners to compel them to do something merely as individuals, nor even to do something merely as individual commissioners. He sued them to compel them to do something which they could do only

as a "board of county commissioners." Laws 1870, p. 189, *190 § 1. *The law is explicit. It does not provide that the persons holding the offices of county commissioners shall call the election, nor merely that the county commissioners shall call the election, but it provides that "the board of county commissioners" shall call the election. Turner, of course, in effect, sued the county commissioners as a board, whether the action was in form against them as individuals or not, for he sued them to compel them to do something which they could do only as a board and as the county board; and when the commissioners are sued as the county board, beyond the limits of their own county, and where the county attorney is not bound to go, may they not then, as the county board, employ counsel to defend the action? We do not think that it is necessary to determine whether said action of Turner against the county commissioners was an action technically against the county or not; for we suppose that no one will claim that the county commissioners can employ counsel in only such cases as these, where the county is technically a party. A suit against the officers of the county is often a suit substantially against the county; and, in this very case, we think the action of Turner was substantially an action against the county as the guardian and protector of the rights and interests of Rock Creek township. And it was also substantially against the county in another respect. It was an action to compel the county commissioners to do something which would incur liabilities against the county; for instance, liability for the county commissioners' services, for the expenses of the election, etc. Suppose an action of *mandamus* should be commenced in the supreme court of the state to compel the county clerk to enter certain taxes on the tax-list to pay certain supposed liabilities against the county, could not the county commissioners then employ counsel to defend? Or suppose an action should be commenced in the United States circuit court to enjoin the treasurer from collecting a certain county tax, could not the county commissioners then employ counsel to defend? We suppose that whenever the county is interested

*191 at all in the result of a suit, either in its own behalf or in *that of some township of the county, and the suit is brought against the legal representatives of the county, and is beyond the limits of the county, the county commissioners may, if they choose, employ counsel to take care of the interests of the county. As throwing some

light upon the questions discussed in this case, we would refer to the following authorities: *Bancroft v. Lynnfield*, 18 Pick. 566; *People v. Supervisors of N. Y.*, 32 N. Y. 473; *Brady v. Supervisors of N. Y.*, 2 Sandf. 460, 472; *Gillespie v. Broas*, 23 Barb. 379. This case has been ably presented by counsel on both sides, and for additional arguments and additional authorities we would refer to counsel's briefs.

There has been no question raised as to the value of the plaintiffs' services. The parties agreed in the court below that the services were worth \$265. The judgment of the court below will be reversed, and cause remanded, with the order that judgment shall be rendered upon the facts agreed to in favor of the plaintiffs below, and against the defendants below, for the sum of \$265, and costs.

(All the justices concurring.)

*CITY OF WYANDOTTE v. HARRIET C. WHITE.

July Term, 1874.

1. **Instructions.** To determine whether an instruction be erroneous, it must be considered in reference to the facts in the case, as well as in relation to the other instructions.
2. ———: **Contributory Negligence.** In an action for damages for personal injuries in which the question of contributory negligence is presented, it is not error to give an instruction that the plaintiff's right to recover is not affected by her having contributed to the injury, unless she was at fault in so doing.
3. **Verdict: Special Question.** While under the laws of 1870 it is the duty of the court, at the request of either party, to instruct the jury, *192 *in case they returned a general verdict, to find upon particular questions of fact, the court should submit only such questions as bear upon facts material to the issues, and whose answers may in some way control or affect the general verdict.¹
4. ———. No question need be submitted at the request of one party that has been already submitted at the instance of the other.
5. **Municipal Corporations: Negligence: Damages for Personal Injury: Presenting Claim.** Where a party having sustained a personal injury for which he claims that a city is liable, presents his bill therefor to the city council for allowance, which is by such council disallowed, he may thereafter sue for and recover all the damages sustained, though such damages exceed the amount claimed in the bill, and on such judgment recover costs.²

¹Duty of court to submit questions to jury, right to revise questions presented, etc., see *Missouri Pac. Ry. Co. v. Holley*, 30 Kan. 465; S. C. 1 Pac. Rep. 130.

²See *Jansen v. Atchison*, 16 Kan. 381, reviewing the cases on the liability of cities for negligence; also, *Fort Scott v. Brothers*, 20 Kan. 455. See, also, the note to *McGinty v. Keokuk*, 24 N. W. Rep. 507.

Error from Wyandotte district court.

Mrs. White brought her action against the city of Wyandotte for personal injuries sustained by reason of a fall occasioned by defects in a bridge over which she was passing, said bridge being a portion of Third street, and a public highway in the city of Wyandotte. Trial at December term, 1872, of the district court. The third instruction to the jury, at plaintiff's request, was as follows: "(3) The plaintiff's right to recover is not affected by her having contributed to her injuries, unless she was in fault in so doing." Verdict and judgment for plaintiff.

W. J. Buchan, for plaintiff in error.

The third instruction asked by plaintiff below, and given by the court, is too sweeping in its language, and was calculated to mislead the jury. Municipal corporations are not insurers against accidents upon their highways; nor are they responsible for every misfortune that may befall travelers thereon; neither is every defect in their streets and sidewalks actionable, though it may have contributed to the injury, if some other circumstance was the immediate cause. Had the horse that frightened Mrs. White, and caused her to turn suddenly round, ran over her, and she been injured thereby, *193 although she was not in fault, it would hardly have been *contended that the city was liable. Yet the impression likely to be drawn from the third instruction as given by the court below is that unless Mrs. White was in fault herself, that the city is liable for any injury she may have received while upon the streets of the city, no matter by what means she is injured. There was no testimony going to show that that portion of the bridge where the injury is alleged to have been received was so defective as to be dangerous for persons using ordinary care.

The court erred in refusing to submit to the jury particular questions of fact at the request of the defendant. The court in this respect has no discretion. The statute is mandatory, (Laws 1870, p. 173, § 7;) and the refusal by the court to direct such special finding of facts prevented a verdict upon material issues in the case. Had the jury found that there was no defect in the Third-street bridge at or near the place of the alleged accident, how could a general verdict for the plaintiff consistently have been found? and, if found, how could it be maintained, (being clearly against the weight of evidence?) At all events, as the testimony was so conflicting, it was an important fact in the cause, and should have been presented to the jury. It will hardly be disputed that whether or not a defect existed at a particular time and place, and what is a sufficient defect to make defendant liable, are questions of fact to be submitted to the jury.

The court should have set aside the verdict on the ground that the special finding of facts was inconsistent and in conflict with the general verdict. In answer to the fourth interrogatory of defendant, the jury found the fact that the plaintiff was not in the exercise of ordi-

nary care at the time of the accident. Hence she could not recover. Their answer finds no circumstance to take this case out of the rule of the want of ordinary care on the part of the plaintiff.

Scroggs & Bartlett, for defendant in error.

The third instruction asked by plaintiff below, and given by *194 the court to the jury, on the subject of contributory negligence, was not erroneous. *Pacific R. Co. v. Houts*, 12 Kan. 328; *Atchison v. King*, 9 Kan. *551, *559; *Weisenberg v. Appleton*, 26 Wis. 56; *Kline v. Central Pac. R. Co.*, 37 Cal. 400.

The court, in its discretion, submitted the questions of fact, which were pertinent *issues in the case*, and proper questions to be answered by the jury. The court properly refused to submit the first three special findings of fact, (so called,) for the reason that they were not, nor could they by any possibility become, "issues in the case," as required by Laws 1870, p. 173. They were no more pertinent to the "issues in the case," than inquiries concerning the habits of the man in the moon.

BREWER, J. This was an action for damages for personal injuries. The facts as claimed are that defendant in error, crossing Third-street bridge, in the city of Wyandotte, was startled by a runaway horse, and, stepping quickly one side to avoid him, slipped her foot into a hole in the bridge, was thus thrown down, and injured. The jury found for the defendant in error, and assessed her damages at \$1,200.

The first error complained of is the giving of this instruction asked for by plaintiff: "The plaintiff's right to recover is not affected by her having contributed to her injuries, unless she was in fault in so doing." Counsel claims that this language is too sweeping; that the city is not an insurer against injuries upon its highways, nor responsible for every misfortune that may befall travelers thereon; and that under this instruction the jury might properly have considered the city liable for any injury Mrs. White sustained while upon its streets, no matter by what means it occurred. We do not think this criticism well founded. Every instruction must be considered in reference to the facts of the case, as well as in relation to the other instructions. Now, that Mrs. White received injuries by a fall upon the bridge is undisputed, she testifying to the fact, and

*195 *no one contradicting her. As defenses, it would seem from the testimony offered, and instructions asked, that the city claimed that all the injuries from which she was suffering were not caused by this fall; that there was no defect in the bridge, and that the fall was a mere accident; that if any defect existed, the city had had no notice of it, and had taken all reasonable precautions to keep the bridge in good repair; and also that the negligence of Mrs. White contributed directly to the injury. The jury found specifically, in answer to certain questions, that Mrs. White was injured by a fall

caused by a defect in the bridge, and that she was at the time acting in a careful and prudent manner. Even if this instruction were too sweeping, as claimed, it would seem that any error in it was avoided by these answers. But the instruction only refers to the matter of contributory negligence. It does not pretend to declare what constituted the plaintiff's right to recover, or what facts must exist to create it. It simply declared that her right to recover, upon whatever facts such right was based, was not affected by the fact that her own conduct contributed to the injury, unless some fault could be imputed to such conduct. If she was guilty of no negligence, her acts contributing to the injury did not destroy her right to recover. In other words, a party injured need not be a passive recipient of the injury in order to establish a right to recover of the wrong-doer for the injury.

Another alleged error is the refusal of the court to submit to the jury three questions of fact presented by the defendant. At the instance of the plaintiff, eight questions were submitted, and at the instance of the defendant, four. Those refused were as follows: "(1) Was the plaintiff injured, if at all, twenty steps from the north end of the bridge, and about four or five feet from the east side thereof? (2) Was there any defect in the Third-street bridge twenty steps from the north end, or thereabouts, showing carelessness or *196 negligence on the part of defendant? *(3) Was the plaintiff frightened at the time the accident complained of happened?"

Since 1870 it is the duty of the court, at the request of either party, to instruct the jury if they return a general verdict to find upon particular questions of fact, to be stated in writing, and direct a written finding thereon. Laws 1870, p. 173, § 7. But it does not follow from this that it is the duty of the court to submit to the jury every question that may be presented, and compel a finding on it. That, in some cases, and with some attorneys, would cumber the record with a fearful mass of useless stuff. Only those questions need be presented that bear upon facts material to the issues, and whose answers may in some way control or affect a general verdict. It is useless to compel a jury to answer a question whose answer, whatever it may be, can have no bearing upon the general verdict. So, also, is it useless to submit a question at the instance of one party which has already been submitted at the instance of the other. In this case the jury were asked, at the instance of the plaintiff, this question, "Was the plaintiff materially injured by falling on Third-street bridge, in the city of Wyandotte, by reason of defect in said bridge, on or about the fifth of August, 1871?" and answered, "Yes." They also answered, in reply to plaintiff's question, that the bridge was defective or unsafe at the time, and that the defect had existed long enough for notice thereof to the city.

The only point in which the questions of defendant differed from those of plaintiff was that in the former the inquiry was limited to

a single spot on the bridge, while in the latter it extended to the bridge as a whole. If the jury, having received the excluded questions, had answered them in the affirmative, of course there would be no pretense of conflict; if in the negative, nothing to disturb the general verdict, for if the plaintiff was injured by a defect in the bridge, it mattered nothing that such injury and defect were not at a particular spot thereon. It is true, the plaintiff in her testimony located the place of injury at the spot indicated by defendant's questions; but there was testimony tending to show the existence of defects elsewhere, and a party might easily be mistaken as to the exact point on the bridge at which an injury happened, while perfectly clear that such an injury did happen; so that there would be no such conflict between the testimony and the answers, and general verdict, as would compel the granting of a new trial, and no such conflict between the answers and the verdict as would in any way disturb the latter. Whether the plaintiff was frightened or no, could not affect the verdict in her favor. We think, therefore, the substantial rights of the city were not injured by the refusal to submit these questions.

Plaintiff in error claims that no judgment for costs should have been rendered against the city, because no bill duly verified had been presented to the city council for allowance before suit was brought. The petition alleges, and in answer to one of the defendant's questions the jury find, that such a bill was presented. It is true the bill presented was for only \$600, while the amount sued for was \$10,000, and the verdict and judgment \$1,200. But if the city council fail to allow the amount claimed in the bill presented, we know of nothing to prevent the claimant suing for and recovering all the damages sustained.

While the testimony was conflicting, there was enough to sustain the verdict. The judgment will be affirmed.

(All the justices concurring.)

*198 *COMMISSIONERS OF JOHNSON Co. v. FRANK R. OGG.

July Term, 1874.

County Attorney: Compensation: Ten per Cent. for Collections. A railroad company commenced an action against the county treasurer and the sheriff of Johnson county, for a perpetual injunction to restrain the collection of certain taxes. The injunction was refused, and judgment was rendered in favor of the officers, and against the railroad company, for costs. The case was then taken to the supreme court by the railroad company, and there the judgment of the court below was affirmed. The county attorney of Johnson county attended to the suit for the treasurer and sheriff as county attorney, but without being employed by any person. The railroad company then paid said taxes, but neglected to pay the 10 per cent. penalty which had at that time accrued thereon. The county attorney then filed a *præcipe* with the treasurer for a tax warrant to collect said penalty. The treasurer issued the warrant, and delivered it to the sheriff, and the sheriff, by virtue of the warrant, collected said penalty, and paid it over to the treasurer. *Held*, that said taxes and penalty were collected under the law, and not under said judgment; that said *præcipe* is unknown to the tax laws, and amounted to nothing more than an opinion of the county attorney; that the treasurer and sheriff collected said taxes and penalty, and not the county attorney; and that the county attorney is not, under the statutes, entitled to 10 per cent. of said taxes and penalty for collecting the same.¹

Error from Johnson district court.

On the twentieth of February, 1873, Ogg, who was then county attorney, presented to the board of county commissioners the following claim:

"The County of Johnson, to Frank R. Ogg, Dr.

"To \$1,318.37, the same being ten per cent. of \$13,188.73, collected June 13, 1872, and February 6, 1873, in favor of Johnson county, state of Kansas, in the case of Mo. River, Ft. Scott & Gulf R. Co. against J. Henry Blake, treasurer, and A. J. Clemmans, sheriff of said county of Johnson, and paid to the county treasurer on the day of collection."

This claim was disallowed by the county board, and Ogg appealed to the district court. Trial at the April term, 1873, of said court, and judgment in favor of Ogg, for the amount claimed.

*199 **Devenney & Green*, for plaintiff in error.

We contend that Ogg is not entitled to any compensation, independent of his salary as county attorney, for the alleged services performed. The record shows that the property of the Missouri River & Fort Scott Railway within Johnson county was subject to taxation for the year 1870; that the tax was duly levied for said year; that the proper authorities were about to collect the taxes pursuant to said

¹See *Donelson v. Howard Co.*, 28 Kan. 70; additional compensation of county attorney, *Huffman v. Greenwood Co.*, 25 Kan. 64; fees of, in criminal case, *State v. Granville*, 26 Kan. 158.

levy, when on the sixth of January, 1871, said railway company applied for and obtained an injunction against the county treasurer and sheriff, restraining them from collecting such tax. The district court, on demurrer, held that the railroad company had no cause of complaint, and this court affirmed the action of the district court. Ogg, as county attorney, appeared in behalf of the officers,—the treasurer and sheriff,—both in the district court and supreme court, assisted by private counsel employed by the plaintiff in error, to defend the interests of state and county. There was no action brought by state or county against the railroad company; there was no money judgment rendered by the district court against the railroad company; there was no money collected by the sheriff on execution against the railroad company. When this court affirmed the action of the district court, it left the matter of taxes just where it was before the injunction was obtained; and the railroad company then being delinquent, it was the duty of the treasurer to issue his warrant to the sheriff to collect the amount with penalty, without the aid or any action on the part of the county attorney. See chapter 107, § 123, Gen. St. 1868. And the sheriff was required by the same law to collect and pay over to the county treasurer the amount of the tax warrant within sixty days from its date. If the county attorney preferred to be officious, or really believed it to be his duty to file a *præcipe* with the treasurer for the issuance of a tax warrant, and that, too, after the railroad company had paid \$11,985.21 without warrant, he cannot, we submit, by any such means, impose a liability on the county *200 to pay him *therefor. A mere suggestion by the county attorney to the treasurer to issue a tax warrant in such case would clearly be embraced within his general duties as such county officer. There is no claim on the part of Ogg that the board ever employed him to look after the case in the supreme court, independent of his employment as county attorney. The alleged services were voluntary, if not performed as county attorney, and the plaintiff in error is not legally liable for what he did. *County of Huntington v. Boyle*, 9 Ind. 296.

J. L. Wines, G. W. Wilson, and F. R. Ogg, for defendant in error.

The only question presented for the consideration of the court is whether the evidence shows a "collection" as contemplated by section 139, c. 25, Gen. St. If this question is decided affirmatively, the judgment of the district court must be affirmed. What is the true definition of the word "collected," in the connection in which it is found in the statute? What the legislative intent was must be determined from what the legislature has said, if the language is free from doubt and obscurity. That the legislature has used a word in its usual and ordinary sense is clearly presumed, in the absence of some positive statutory limitation or restriction. If a word is so used by the law-making power, the necessity for interpretation and construction does not arise. We can arrive at the true definition of the

word "collected" from an examination of the words "collector" and "collect." "A 'collector' is a person appointed or elected to receive taxes; also a person appointed by a private person to collect the debts due him." 1 Bouv. Law Dict. 241. The definition of the word "collect" is "to gather money or revenue from debtors; to demand and receive; as, to collect taxes; to collect the customs; to collect accounts or debts." Webst. Dict. In view of these definitions, it will not for a moment be contended that there must be an actual, manual handling of the amount realized in order to constitute a "collection." "A 'collection' might be defined to be the payment, after suit, or by reason of the probable commencement of litigation, to any *person authorized to receive, a sum claimed to be due from one person to another, without regard to the question as to whether it was paid upon an express or an implied contract." It might also be added that in case of litigation it is entirely immaterial who is plaintiff or defendant, so the question of liability is settled.

In the case now before the court the defendant in error may not have actually handled the money collected, yet he was, in view of the above definitions, and in view of section 139, before referred to, a collector. The railroad company denied the existence of any liability in favor of the county. On the other hand, the county claimed the right to receive and collect from the railroad company a certain amount. The only question settled by the litigation between the county and the railroad was the one of liability of the one party to pay, and the right of the other party to collect, the amount claimed. In this litigation the defendant in error appeared in his official character, as he was in duty bound to do, to look after the interests of the county. The final decision was against the railroad company, and under this decision the amount claimed was paid into the county treasury. If this was not a "collection," within the meaning of section 139, it is difficult to imagine a state of facts which would constitute a collection. It is true, the action of the railroad company was not prosecuted against the county by name, but it clearly appears from the evidence that the county had a direct interest in the event of the suit, and in all such cases it is made the duty of the county attorney to appear. Section 136, c. 25, Gen. St.

It may also be urged that there was no collection as against the railroad company, so as to entitle the defendant in error to a commission on the amount received, for the reason that there was not a judgment for any given amount rendered in favor of the county. It will be observed, however, from the evidence, that the case was decided upon the demurrer filed by the county of Johnson, and in sustaining that demurrer the court dissolved the injunction, and in that manner the whole question touching the liability of the railroad company was decided. However, we think that in the case of the railroad company against the treasurer and sheriff of Johnson county there was, in the fullest sense of the word, a judg-

ment rendered. A judgment is a contract. Freem. Judgm. § 4. After the decision of this court upon the question of the liability of the railroad company to pay a certain sum to the county, a warrant was issued by the county treasurer pursuant to the order of defendant in error as county attorney. This warrant was placed in the hands of the sheriff of the county. A part of the taxes due was paid after this warrant was issued, before levy made, and the balance was collected by means of a levy and sale of property, as upon execution.

The moment the defendant in error became the county attorney of Johnson county that moment there arose, by virtue of the statute, an express contract between the parties to this proceeding that plaintiff in error should pay defendant in error a 10 per cent. commission on all moneys collected through his official interposition. It is well settled that a contract between the state or county and an individual must be construed as contracts between private parties. *Sholes v. State*, 2 Chand. 182; *Meshke v. Van Doren*, 16 Wis. 847. It has been decided in this state that a county attorney is not required to go out of his county to look after the interests of the county. If he does, he is entitled to compensation. *Commissioners of Leavenworth v. Brewer*, 9 Kan. *307.

Defendant in error, as county attorney, is paid a salary under the section of the statute referred to, for the usual, ordinary, and well-known duties of his office. In addition to this salary he is allowed a commission on all moneys collected for the state or county. This is not a certain and well-known compensation, for the reason that it depends upon the amount of a certain kind of professional work there is for him to do. It is entirely uncertain in its character. The object of the legislature, then, evidently was to provide a compensation for the prosecuting officer of the county "for such work as did not fall within the established and settled duties of his office;"

*203 *and with this view it is enacted that he should have 10 per cent. commission on such moneys as should be collected by and through his official action; and we claim that in the payment by the railroad company, and the receipt by the county, of the amount of taxes for the year 1870, paid after a protracted litigation, instituted for the express purpose of deciding the liability of the one party and the rights of the other, was a "collection," within the meaning of section 139 of chapter 25 of the General Statutes of 1868, and that defendant in error, as the county attorney of Johnson county, is entitled to a commission of 10 per cent. on the amount so collected.

VALENTINE, J. On the sixth of January, 1871, taxes were due in Johnson county, for the year 1870, from the Missouri River, Fort Scott & Gulf Railroad Company, amounting to the sum of \$11,985.21, and the proper officers of that county were about to proceed to collect the same. The railroad company, however, on that day, commenced an action against J. H. Blake, county treasurer of said county, and A.

J. Clemmans, sheriff of said county, to perpetually enjoin them from collecting said taxes; and on the seventh of January, 1871, the judge of the district court for said county granted a temporary injunction to restrain the collection of said taxes pending the litigation. Afterwards the petition of the railroad company was amended, and on the twenty-eighth of August, 1871, the defendants demurred to the amended petition. The court below sustained the demurrer, rendering judgment for costs against the railroad company, and in favor of said Blake and Clemmans, and dissolved said temporary injunction. The railroad company then brought the case to this court on petition in error, and in this court the judgment of the court below was affirmed. For a report of that case, see *Gulf R. Co. v. Blake*, 9 Kan. *489. In all the foregoing proceedings the present defendant in error, F. R. Ogg, acted, along with other counsel, as counsel for Blake and Clemmans. He was not, however, employed by Blake or Clemmans, nor by the county commissioners; but he acted in the defense of said suit in the capacity of county attorney of Johnson county. After said suit was determined in this court the railroad company paid said taxes to the treasurer of Johnson county, but neglected to pay the 10 per cent. penalty which had then accrued on said taxes. The defendant in error, Ogg, then, as county attorney, filed a *præcipe* with the county treasurer for a tax warrant to be issued for the collection of said tax penalty. The warrant was issued by the treasurer of said county to the sheriff, and the sheriff collected the said penalty from the railroad company, and paid it over to the treasurer. The 10 per cent. penalty amounted to \$1,198.52, and the taxes and penalty in the aggregate amounted to \$13,183.78. The defendant in error, Ogg, now claims that he is entitled to 10 per cent. of the whole amount, to-wit, \$1,318.37, for the said services as county attorney. He first filed his claim for that amount with the county commissioners, but they refused to allow the same, or any part thereof. He then commenced this action in the district court for that amount, and the district court, upon an agreed statement of facts, rendered judgment in favor of Ogg, and against the county, for the whole amount claimed, with costs. Is such judgment correct? This is the only question in the case. Ogg does not claim this amount as a part of his salary as county attorney; nor does he claim it under any contract made with the county commissioners. Indeed, he does not claim it under any contract made with any person or persons. He simply claims it under that provision of the statute which says: "County attorneys shall be allowed ten per cent. on all moneys collected by them in favor of the state or county," (Gen. St. 285, § 189;) and he claims this in addition to his salary as county attorney, and in addition to all other fees or compensation allowed by law. Whether all of said taxes belonged to the state and county is not shown by the record, (they may have belonged to some

other fund,) but for the purposes of this case we shall assume that they all belonged to the state and county; or, rather, we shall *205 assume that *they all belonged to the county; for if any portion of them belonged to the state, then a very serious question would arise,—whether the county is liable for the whole amount or not; that is, whether the county is liable to pay out of its own fund the 10 per cent. allowed by the statute for collecting the state fund, or whether the state fund should not bear its proportion. Then, with these assumptions, the whole question in this case depends upon whether said payment of said \$13,183.73 by the railroad company to the treasurer and the sheriff of said county was a collection of the same, or any part thereof, by the said county attorney, Ogg, within the meaning of said statute; that is, did the county attorney collect the taxes paid by the railroad company to the county treasurer, and did the county attorney collect the penalty paid by the railroad company to the sheriff? The court below decided that the county attorney collected both the taxes and the penalty. We think, however, that the county attorney did not collect either. None of the money ever passed into his hands, or through his hands, and he had no authority to receive it. But he claims that he collected said money by virtue of said injunction suit, and that he collected a portion of the same by virtue of said *præcipe*.

Now, neither the state nor the county was a party to said injunction suit. No judgment was rendered in favor of or against either the state or said county. Neither the state nor the county employed said county attorney. Indeed, he was not employed at all. The suit was between the railroad company on the one side, and said Blake and Clemmans on the other, and no judgment was rendered even in favor of Blake and Clemmans, except for costs. The judgment did not give Blake and Clemmans, or either of them, any right to collect said taxes, or to collect said penalty. It did not give, or pretend to give, them any rights which they did not have before. They could not have had an execution issued on said judgment for the collection of said taxes and penalty; and they did not even attempt to have any such execution issued. They did not collect, nor attempt to *206 collect, said taxes and penalty by virtue of said *judgment, and they had no authority to do so even if they had so attempted. The taxes and penalty were collected wholly under the statute, independently of said judgment, and were so collected in the same manner (with the exception of said *præcipe*) that they would have been collected if no such suit as said injunction suit had ever been commenced. Gen. St. 1059, § 123; Laws 1869, p. 251, § 15; Laws 1871, p. 324, § 11. The said *præcipe* filed by the county attorney with the county treasurer was a nullity; or, at most, it could be treated only as an opinion of the county attorney that a tax warrant should be issued. It is an instrument unknown to the tax laws. It gave to the county treasurer no powers. It could perform no office nor function other

than as a mere opinion of the county attorney. It did not make the tax warrant afterwards issued any better or worse than such tax warrant would have been if no such *præcipe* had ever been filed. It did not make it any more obligatory upon the treasurer to issue said tax warrant than it was before under the law. It simply left the treasurer with just the same rights and powers that he had before the *præcipe* was filed, and with just the same rights and powers that the treasurer would have had if no injunction suit had ever been commenced. It may be true that said injunction suit determined incidentally that said taxes were legal, and that the treasurer had a right to collect the same; but such a determination could only be incidental. The direct determination was that the railroad company was not entitled to an injunction in the case. This determination might have been for other reasons than that the taxes were legal. Injunction to enjoin the collection of taxes is often refused notwithstanding that the taxes, or some portions thereof, may be illegal. *Sleeper v. Bullen*, 6 Kan. *300, *306, *309; *Ottawa v. Barney*, 10 Kan. *270, *279, *280; *Gulf R. Co. v. Morris*, 7 Kan. *210, *229-*232; *City of Lawrence v. Killam*, 11 Kan. *499; *Gilmore v. Fox*, 10 Kan. *509; *Hudson v. Atchison Co.*, 12 Kan. *140. The refusal of the injunction in such a case is simply a negative judgment, and gives to the defendants no *207 affirmative *rights except to collect their costs. The refusal of an injunction to restrain the collection of taxes does not confer any right upon the officers to collect the taxes; it simply leaves the officers with just such rights as they had before.

The judgment of the court below will be reversed, and the cause remanded, with the order that judgment be rendered in favor of the defendant below, and against the plaintiff below, for costs.

(All the justices concurring.)

COMMISSIONERS OF NEOSHO Co. v. A. B. STODDART.

July Term, 1874.

Counties: Authority to Contract. Neither the district court, nor the sheriff, nor both together, have power, without the consent of the county commissioners, to contract for the county, or to create an indebtedness against the county, for cocoa matting placed, or to be placed, upon the floor of the court room. The county commissioners alone possess such power, and they alone can create such indebtedness.

Error from Neosho district court.

The case is stated in the opinion.

J. R. Woodsworth, for plaintiff in error.

The board of commissioners is the only authority which can make contracts binding upon the county. Gen. St. § 36, p. 261, c. 25; Case v. Shawnee Co., 4 Kan. 511.

The board of commissioners have the right and power to disallow any account, in whole or in part, and the allowance or disallowance of the same is a matter resting entirely in the discretion of the board.

Gen. St. c. 25, § 28.

*208 *The district judge in making the order directing the sheriff to procure the matting at the expense of the county, without the knowledge or consent of the board, acted without authority of law. If the judge could make an order whereby the county became liable for the payment of \$65, he could, with equal consistency, make a like order binding the county for as many thousand dollars. He could as well have ordered the sheriff to have erected county buildings at the expense of the county, and to furnish the same in luxuriant style, or, with equal consistency, ordered a railroad built through the county at the county's expense, under the plea that the same was necessary to the comfort and convenience of those wishing to transact business in the district court. The mere fact that the articles are necessary to the "comfort and convenience of attendants upon the court" created no right whereby the order of the district court could bind the county in the matter of expenditures, and the defendant in error, when furnishing the goods upon an order of the district court to the sheriff to procure the same, did so at his own risk.

Hutchings & O'Grady, for defendant in error.

The order of the judge is conclusive of the liability of the county. It is necessary to the very existence of courts that the judges thereof should have such power and authority in and about the arrangement and government of the rooms where they sit for the transaction of business as will enable them to conduct that business with order, convenience, and decency. There are certain powers exercised by all courts that are not expressly delegated by statute, but have been conferred by long use and inherent necessity until they have grown to be a part of the very meaning of the term "court;" and the creation of a court always carries with it, and confers upon its presiding officer, these powers. This is particularly so with reference to the control of the rooms where courts are held, the arrangement of furniture, the positions to be occupied by the jury, the bar, the clerk, the other officers of the court, suitable arrangements to pre-

*209 vent confusion and noise, *and to insure the dispatch of business. Entirely outside and beyond any statutory provision authorizing it, we confidently claim that the creation of a court carries with it the power on the part of a judge to order a proper room to be procured in which to transact business, and to require that such room be furnished with the necessary conveniences for the dispatch business; and that the authority creating, or those for whose benefit

the court is created, are liable for all reasonable expenditures so incurred. It is not claimed that an unreasonable or arbitrary order of the court could bind or involve the county in debt, but only such a reasonable and just order as comes within the rule of discipline,—a power which is vital to the very existence of courts. The order of the court in this case is conceded by all parties to be a reasonable one, the execution of which was “indispensable” to the comfort and convenience of all persons having business in the court.

The county, however, is liable on other grounds. We claim, as a general principle of law applicable as well to municipal corporations as to individuals, that where certain articles become necessary to the transaction of one's business, and such articles are furnished at the request of one's authorized agent, that there is an implied, if not an express, agreement by the principal to pay the reasonable value of such articles to the person so furnishing them. By law, (Gen. St. 279, § 106,) and by universal custom, the sheriff of the county is made the agent of the county to prepare the court-room for use, and to attend upon and keep order, prevent confusion and noise, and furnish the conveniences necessary to the transaction of business. Section 4, Gen. St. 254, requires that each organized county “shall, at its own expense, provide a suitable court-house.” Now, then, the sheriff being by law and custom the proper officer and agent of the county to attend to preparing the court-room for the use of the district court, and having procured the cocoa matting from defendant in error in order to have a “suitable court-house,” the county is liable whether it was done by order of the court or not.

*210 *VALENTINE, J. On the first of April, 1873, the district court of Neosho county made the following order, to-wit: “Whereas, the health, comfort, and convenience of those who are required to be in attendance upon the session of the district court of Neosho county demand that some suitable carpeting be placed upon the floor of the court-room, therefore it is ordered by the court that the sheriff of said county be, and he is hereby, directed to purchase 51 yards of cocoa matting, at a cost not exceeding \$1.10 per yard, and that the same be bound with tin, and placed upon the floor of the court-room on or before Wednesday, April 2, 1873, at 9 o'clock A. M.” On said second of April the sheriff of said county, in pursuance of said order, and without any other authority, purchased in the name of the county, and for the county, from the plaintiff below, defendant in error, fifty-five yards of cocoa matting, at \$1.15 per yard, amounting to \$63.25, and on the same day placed said matting on the floor of the court-room of said Neosho county. It is agreed that “said matting is indispensable to the comfort and convenience of those having business to transact in said court.” On the twenty-third of said April the plaintiff below duly presented his claim against the county for said matting to the board of county commissioners of said county. On the next

day the commissioners examined said claim, and disallowed it. On April 25, 1873, the plaintiff below appealed from the board of county commissioners to the district court. On April 26, 1873, the case was tried in the district court before the court, and without a jury, and judgment was rendered in favor of the plaintiff below, and against the county of Neosho, for \$60.50, and costs. To reverse this judgment the county now appeals to this court.

The only question which we are asked to decide by either party is whether the sheriff had the power to purchase said matting, either with or without said order of the district court, and make the county responsible therefor. We do not think he had any such power.

*211 In this state a county is a **quasi* corporation, with power to sue and be sued, to contract and be contracted with, to purchase, hold, and sell real and personal property, (Gen. St. 253, § 1,) and to build, own, provide, and keep in repair court-houses, etc., at its own expense. Gen. St. 254, § 4, and various other statutes. And the statutes also provide as follows: "The powers of a county as a body politic and corporate shall be exercised by a board of county commissioners." Gen. St. 254, § 3. "The board of county commissioners of each county shall have power at any meeting—*First*, to make such orders concerning the property belonging to the county as they may deem expedient; *second*, to examine and settle all accounts of the receipts and expenses of the county, and to examine and settle and allow all accounts chargeable against the county, and, when so settled, they may issue county orders therefor as provided by law; *third*, to purchase sites for, and to build and keep in repair, county buildings, and cause the same to be insured in the name of the county treasurer, for the benefit of the county, and in case there are no county buildings, to provide suitable rooms for county purposes; * * * *fifth*, to represent the county, and have the care of the county property, and the management of the business and concerns of the county, in all cases where no other provision is made by law," etc. Gen. St. 256, § 16. And "the boards of county commissioners of the several counties of this state shall have exclusive control of all expenditures accruing, either in the publication of delinquent tax-lists, treasurer's notices, county printing, or any other county expenditures," etc. Gen. St. 261, § 36. The board may allow or disallow any claim, in whole or in part, as the law and justice of each particular case would require. Gen. St. 259, § 28. And "in all suits or proceedings by or against a county, the name in which the county shall sue or be sued shall be 'The Board of County Commissioners of the County of ———,' " etc. Gen. St. 254, § 5. Indeed, every law upon the statute book that has any reference to the subject would seem to indicate that the county board had exclu-

*212 sive control, within the law, of all **county* expenditures; and there is no law upon the statute book that authorizes either the district court, or the sheriff, or both together, to contract for the

county, or to create any indebtedness against the county, in any case similar to the one now under consideration. The county commissioners alone possess such power, and they alone can create such indebtedness. It is the duty of the county commissioners, and their duty alone, to furnish a suitable court-room for their county; but if they do not do so, then some other remedy than the one resorted to in this case must be invoked.

The judgment of the court below is reversed, and the cause remanded for further proceedings.

(All the justices concurring.)

JOHN ATYEO v. C. E. KELSEY.

July Term, 1874.

New Trial: Conflicting Testimony; Discretion. Where a cause has been tried before a jury upon contradictory and conflicting evidence, and the court below, upon a motion for a new trial on the ground that the verdict of the jury is not sustained by sufficient evidence, sets aside the verdict, and grants a new trial, the supreme court will not reverse such order granting the new trial, unless the preponderance of the evidence sustaining the verdict is so great as to show an abuse of judicial discretion on the part of the court below making such order. [Germond v. Littleton, 22 Kan. 731; Day v. Harris, 23 Kan. 217; Eagle Chair Co. v. Kelsey, Id. 636; Brown v. Atchison, T. & S. F. R. Co., 29 Kan. 189.]

Error from Lyon district court.

Atyeo brought suit on a promissory note against T. J. Hankla and P. P. Peter as makers, and L. H. Robinson and C. E. Kelsey as indorsers. Kelsey answered that, being himself the owner and holder of said note, and being about to commence proceedings thereon against said Hankla and Peter, the makers, to enforce payment thereof, *213 the plaintiff, Atyeo, as a friend of Hankla and Peter, *and to avert a suit against them, applied to him (Kelsey) to transfer said note to plaintiff, and paid defendant the amount due on said note; that at plaintiff's request defendant then assigned said note to plaintiff by indorsement, in order to vest in plaintiff the title thereto, and the benefit of a mortgage previously given by said Hankla and Peter to secure the note; and that it was at the time understood and agreed, by both plaintiff and defendant, such assignment and indorsement to plaintiff did not and should not create any liability on the part of defendant, as indorser or otherwise. Plaintiff's reply was a general denial. On this issue the action was tried at the March term, 1873, of the district court. Verdict for plaintiff for the amount claimed.

O. Miller, for plaintiff in error.

The court erred in granting the defendant a new trial. By the issues formed by the defendant's answer the burden of proof was on the defendant to show, by a preponderance of credible testimony, that the statements therein were true. Kelsey says in his evidence that the plaintiff paid the money to liquidate the note for the makers, Hankla and Peter. The plaintiff denies the statement, and plaintiff's denial is strongly corroborated by the testimony of the witness Dougherty. Nor does the testimony of Heritage sustain Kelsey's defense. The jury passed upon the credibility of the witnesses, and upon the weight of the testimony, and it was error to set their verdict aside.

Almerin Gillett, for defendant in error.

Where a new trial has been granted, the supreme court will require a much stronger case before it will interfere and reverse than where a new trial has been refused. *Field v. Kinnear*, 5 Kan. *238, where numerous authorities are collected; *Owen v. Owen*, 9 Kan. *214 *96; *City of Ottawa v. Washabaugh*, 11 Kan. *124. *Before an order granting a new trial will be reversed, it must affirmatively appear that none of the grounds of the motion are sufficient. *McCreary v. Cockrill*, 3 Kan. *39; *Ryan v. Topeka Bridge Co.*, 7 Kan. *209.

The district court instructed the jury, in substance, that "on the pleadings, without any testimony, the plaintiff below was entitled to a judgment against defendant, Kelsey;" and that "the burden of proof is on the defendant, Kelsey." Both of these instructions are, as we believe, erroneous, for the reason that plaintiff's petition does not state facts sufficient to constitute a cause of action. The petition being upon a note indorsed after maturity, to-wit, December 26, 1872, and demand and protest not being made until January 18, 1873, nineteen days afterwards, we think the demand and notice were not in a reasonable time. The petition states no facts excusing the delay; and while there is some uncertainty in the decisions as to whether what is a reasonable time is a question of law for the court or a question of fact for the jury, yet we think the second instruction erroneous in either view of the case. If it were a question of fact for the jury, the court by its instruction forestalled any inquiry by the jury in that matter; if it were a question of law for the court, then we say that nineteen days is not within a reasonable time, as a matter of law. Seven days have been held too late, and it was said that the demand and notice should have been in one or two days at furthest. *Nash v. Harrington*, 2 Aik. (Vt.) 9; *Aldis v. Johnson*, 1 Vt. 136, 140. Two weeks held too late. *Keyes v. Fenstermaker*, 24 Cal. 329. Thirty days entirely too late. *Dumont v. Pope*, 7 Blackf. 368. Must be in a reasonable time. *Jones v. Middleton*, 29 Iowa, 188; *Kennon v. McRea*, 7 Port. (Ala.) 184; 1 Pars. Notes & Bills, 381, 382, and notes.

The bad pleading might possibly have been cured by the evidence, had any curative evidence been given; but there was none given. The whole evidence shows (and that without any contradicting) that the note was indorsed by Kelsey after maturity, on December 26, 1872, and that payment was demanded and the note protested for non-payment on January 13, 1873; so that it does not change *215 the allegation of the *petition as to the time that elapsed after the indorsement until the protest. And there is no particle of evidence showing, or tending to show, any excuse for the delay; and the parties all resided during all the time, and were doing business, in the city of Emporia, and within a stone's throw of one another. The court will also see from the evidence that defendant, Kelsey, was at the time of the said indorsement, on December 26, 1872, proposing (in the language of plaintiff, Atyeo, in his testimony) "to shave the note," and he was crowding it for collection at that time; and there is no contradiction as to this point. The court will also see from the evidence, and there is no contradiction in it, that said note was secured by a chattel mortgage on property in the possession of Hankla and Peter in the Robinson House, which house, and nearly or quite all the mortgaged property, were destroyed by fire on the third of January, 1873, by which delay (from December 26, 1872, until January 3, 1873) Kelsey lost all his security, if the plaintiff's theory is correct. The evidence does not, therefore, in anywise help out the bad pleading,—does not in anywise tend to excuse the delay in making the demand and protest; but positively, and without contradiction, shows that that delay resulted in a loss of all, or nearly all, the property mortgaged to secure said note. When his mortgage security is gone Atyeo seeks to save himself by resorting to Kelsey's indorsement. If he had expected to rely upon such indorsement, and had used due diligence in making demand and giving notice, Kelsey could have protected himself before the mortgaged property was destroyed. The court, having erred in its instructions, properly granted a new trial.

VALENTINE, J. The only ground assigned for error in this case is that the court below erred in granting a new trial. The motion for a new trial was founded upon the following grounds, to-wit: "(1)

Error in the assessment of the amount of recovery, in that it *216 is too large. *(2) That the verdict is not sustained by sufficient evidence, and is contrary to law. (3) Error of law occurring at the trial, and excepted to at the time by said defendant."

Upon which of these grounds the new trial was granted, is not shown by the record. Hence, before we could reverse the order of the court below granting the new trial, it would have to appear affirmatively to us that the new trial could not have been properly granted upon either of said grounds. This does not so appear. The question is discussed in the brief of counsel for plaintiff in error as

though the new trial was granted solely upon the ground that the verdict was not sustained by sufficient evidence. Now, the record does not show that the new trial was granted upon this ground alone; but, for the purposes of this case, we will suppose that it was, and still we do not think that we can reverse the ruling of the court below. The evidence was conflicting and contradictory, and while we think the preponderance of the evidence sustains the verdict, still we cannot reverse the ruling of the court below for that reason, (*Anthony v. Eddy*, 5 Kan. *127; *Field v. Kinnear*, Id. *233, *238; *Owen v. Owen*, 9 Kan. *91, *96;) for the preponderance is not great. Before we would reverse in such a case, the preponderance of the evidence would have to be so overwhelmingly great that it would show an abuse of judicial discretion on the part of the court below in setting aside the verdict and granting a new trial. Where a new trial has been granted, both parties have another opportunity of having a fair and impartial trial upon the merits of the action. But where a new trial has been refused, the matter is ended unless a reversal can be had. Hence new trials should be favored instead of being disfavored, wherever any question can arise as to the correctness of the verdict. As a rule, no verdict should be allowed to stand unless both the jury, and the court trying the cause, can say that they believe that the verdict is correct. While the question is before the jury they are the sole and exclusive judges of all questions of fact; but *217 when the matter comes before the court upon a motion *for a new trial, it then becomes the duty of the court to determine for itself whether the verdict is sustained by sufficient evidence or not, (*Gen. St. 687, § 306, sub. 6;*) and the decision of the trial court in such a case has almost controlling force with the appellate court. The appellate court will in such cases reverse only where the trial court has clearly abused its discretion.

The order of the court below granting the new trial must be affirmed.

(All the justices concurring.)

C. H. TAYLOR and others v. W. A. THOMAS and others.

July Term, 1874.

1. **Escrow: Bills and Notes.** A note placed in escrow takes effect the instant the conditions of the escrow are performed, even though the depositor has not formally delivered it to the payee.¹

¹A deed apparently fully executed, and acknowledged, and delivered to the grantee, to become an absolute deed upon some condition, is not an escrow. *Johnston v. Winfield*, 14 Kan. 898. A bond for a deed, deposited with a disinterested third party, to be by him held until a certain sum of money is paid, and then delivered to the obligee, is an escrow. *Roberts v. Mullenix*, 10 Kan. 26, and note.

2. ———: **Part Performance of Condition.** Where a note had been placed in escrow to be given to the payee upon the delivery of 200,000 hedge plants, there must be a delivery of the entire number of plants, or a tender and refusal to accept them, before any title to the note passes to the payee, or any action can be maintained thereon. A delivery of part of the plants gives no right of action on the note for a *pro rata* amount thereof.

Error from Sedgwick district court.

Thomas and two others, as plaintiffs, brought suit on a promissory note for \$350, dated April 9, 1873, signed by Taylor and two others, payable to the order of said Taylor, "ten days after date, at the First National Bank, in Wichita." The note was indorsed by Taylor, and by him delivered to Sol. H. Kohn, to be delivered to Thomas & Co.

when Taylor should receive 200,000 hedge plants from one *218 Morris. Trial at the September *term, 1873. Verdict and judgment for plaintiffs.

Tucker & Fisher, for plaintiffs in error.

No action could be maintained on said note, the note not having been delivered to the plaintiffs. *Furness v. Williams*, 11 Ill. 229; *Burson v. Huntington*, 21 Mich. 415; *Hunt v. Weir*, 29 Ill. 83; *Foy v. Blackstone*, 31 Ill. 538; *Hathaway v. Payne*, 34 N. Y. 105; *Bryant v. Bryant*, 42 N. Y. 11; *Fay v. Richardson*, 7 Pick. 91; *Canfield v. Ives*, 18 Pick. 253.

The court erred in the instruction given to the jury upon the question of delivery of property sold. The plants were not delivered. *O'Keefe v. Kellogg*, 15 Ill. 347; *Schneider v. Westerman*, 25 Ill. 514; 3 Kent, Comm. 496; *Dale v. Stimpson*, 21 Pick. 384; *Russell v. Minor*, 22 Wend. 659; *Rapelye v. Mackie*, 6 Cow. 250.

Sluss & Dyer, for defendants in error.

The pleadings raised an issue of fact,—whether the plaintiff below performed the conditions upon which the note was placed in escrow. If they had, they were entitled to recover, although the note had not actually been delivered to them, (*Couch v. Meeker*, 2 Conn. 302; *Foy v. Blackstone*, 31 Ill. 538; 1 Pars. Notes, 51;) and there was evidence to maintain the affirmative of the issue presented by the pleadings.

The instructions are to be taken as a whole, and were evidently so considered by the jury. The court informed the jury that, under the pleadings, if they found that the plaintiffs had delivered and the defendants received under the contract 75,000 of the plants, and refused to take the remainder, they should find for the plaintiffs. This was correct.

BREWER, J. This was an action on a promissory note. The note was originally placed in escrow, to be delivered upon certain conditions. It had never been delivered by the depository. Hence it is claimed by plaintiff in error that no action could be maintained upon it. This is an error. When the conditions of the escrow are per-

formed the title vests in the payee. The title does not hinge on the action of the depository, but upon the performance of the conditions. "Though *it was not formally delivered over by the depository to the plaintiff, yet it took effect in his hands the instant the conditions were performed, without any formal act of delivery on his part." *Swift, C. J., in Couch v. Meeker, 2 Conn. 302; 1 Pars. Notes, 51.* The note was placed in escrow, to be given to the plaintiffs on the completion of a contract to deliver 200,000 hedge plants. There was testimony showing a delivery of 75,000, and tending to show an excuse for the non-delivery of the remainder. There was no pretense that any more than the 75,000 had actually been received by the defendants. The court gave this instruction: "The defendants have set up and claimed no set-off or counter-claim against the note sued upon, but rely upon a total failure of consideration, and an utter failure on part of plaintiffs and Morris to comply with their contract to deliver the hedge plants according to their agreement; so that if, under the contract, plaintiffs and Morris have delivered 75,000 of the hedge plants, and Taylor has received them and converted the same to his own use, you must find for the plaintiffs." The jury were also told by another instruction that if they found for the plaintiffs, they must find the full amount of the note. In this instruction we think the court erred. Whatever rights of action the plaintiffs may have had upon the contract, upon delivery of 75,000 plants, they had no right to the note, and could maintain no action upon it until after a full compliance with the conditions of the escrow. Until such time, it is as though no note had ever been signed. A part performance passes no title,—gives no interest in it. The instruction contemplates the note as delivered, and the defendants as interposing defenses to it. The question for the jury was as to the delivery of the note, or that which is tantamount to a delivery. Under that instruction it was hardly possible for the jury to find otherwise than as they did,—for the plaintiffs; but under the testimony it is, to say the least, an open question as to the proper verdict. This is all that it is necessary to decide, in order to dispose of the case here.

It may, perhaps, be proper to say, in view of a future trial, *220 *and the conflicting testimony presented in this record, that before the plaintiffs can recover upon this note they must show a delivery of the 200,000 plants, or a tender of the same and a refusal to accept them; also that the defendants were entitled to live plants, in good ordinary merchantable condition, and the full number contracted for; that, in order to constitute a delivery or a tender, there must be a separation and identification of the plants, or else, in case of a tender, an absolute refusal to take any plants out of the whole mass from which the delivery was to be made.

The judgment will be reversed, and the case remanded, with instructions to grant a new trial.

(All the justices concurring.)

GEORGE W. MARTIN v. JOHN FRANCIS, State Treasurer, etc.

July Term, 1874.

Public Moneys: Legislative Appropriation. Money belonging to the state, rightfully in the state treasury, and over which the legislature has the rightful control, cannot be drawn from the state treasury except in pursuance of some act of the legislature passed for that purpose within one year prior to the attempted drawing of the money.

Original proceeding in *mandamus*.

This was an amicable action, instituted in June, 1874, at the instance and under the direction of Ed. Russell, state superintendent of insurance, as a test case. Martin was only a nominal plaintiff. Section 17 of the act creating the insurance department (chapter 93, Laws 1871) provides that insurance companies doing business in this state shall pay certain fees to the superintendent of insurance, and that "all said fees shall be paid by the superintendent into the state treasury for an *insurance fund*, and shall be used for the purpose of defraying the expenses of the insurance department, *221 and *for no other purpose whatsoever;" and section 4 of said act provides that "all the salaries, payments, and expenditures for said insurance department shall be paid by the treasurer of state, upon the certificate of the superintendent, in the same manner as other like expenses: provided, the amount so paid out shall at no time exceed that collected from the insurance companies, and paid into the state treasury, as provided in this act." Said act (sections 2, 4) provided for the payment of an annual salary to the superintendent, and to a chief clerk, authorized the appointment of other clerks as occasion might require, and authorized the superintendent to furnish suitable rooms at the capitol for the department, and to provide the necessary furniture, stationery, and other conveniences for the transaction of the business of his office. Said act did not make, nor pretend to make, any specific "appropriations" out of the "insurance fund," or otherwise, for the expenses of the department, nor were such appropriations made by any other act for 1871, nor for the year 1872; but the entire expenses for both those years were paid by the state treasurer out of the "insurance fund," upon warrants drawn by the superintendent under the authority given by section 4 of said insurance law above quoted. In 1873 (Laws 1873, p. 60) the legislature passed an appropriation bill for the expenses of the insurance department for that year. In 1874 the ways and means committee refused to report a bill making appropriations for the insurance department. An amendment making such appropriations was offered in the senate to the bill "making appropriations for the executive and judiciary departments," and was adopted, but the house refused to concur, and the senate recessed. Senate Jour. 1874,

pp. 476, 480, 481; House Jour. 911, 912. The affidavit for the *mandamus* in this case alleged that Martin was state printer; that as such officer he had done certain printing which was necessary for the transaction of the business of the insurance department; that such printing had been ordered by the superintendent of insurance, and his bill therefor had been audited and allowed by said superintendent, and that said *superintendent had issued to him a
 *222 warrant on the state treasurer for \$43, the amount of said bill, payable out of the insurance fund; that he presented said warrant to John Francis, state treasurer, for payment, on the twenty-second of June, 1874; that there was at the time of such presentation more than two thousand dollars in said state treasury belonging to the insurance fund; and that said treasurer refused to pay said warrant, assigning as a reason for such refusal that "no appropriations had been made by the legislature of 1874" for the payment of insurance warrants. The affidavit stated that the state treasurer had and made no other legal or valid excuse for refusing to pay said warrant; that no appropriation was necessary to authorize such payment; and praying for a writ of *mandamus*, etc. The attorney general appeared for the state treasurer, waived process, and demurred to the affidavit.

A. L. Williams, Atty. Gen., in support of his demurrer, and against the allowing of a writ of *mandamus*, contended: (1) That the insurance law (section 4, c. 93, Laws 1871) did not give the superintendent of insurance any legal right to issue warrants on the state treasury for the payment of money, but merely to "certify" the expenses of his department to the auditor, and that the auditor should issue the proper warrants, (section 29, c. 102, Gen. St.) (2) Section 17 of the insurance law requires the superintendent to pay "into the state treasury" all the fees, etc., collected by him; they are therefore rightfully and legally in the state treasury, and "public moneys." (3) Section 24 of article 2 of the state constitution expressly declares that "no money shall be drawn from the treasury, except in pursuance of a specific appropriation made by law." (4) If no "specific appropriation made by law" is necessary, then the plaintiff has a plain and adequate remedy at law, namely, an action against the defendant to recover
 *223 the *amount of the warrant by reason of defendant's refusal to pay it on presentation.

W. C. Webb, for plaintiff.

The "warrant" was properly issued by the superintendent of insurance. The insurance act (section 4) declares that the expenses of the department "*shall be paid by the treasurer on the certificate of the superintendent.*" The form of the paper called a "warrant" is sufficient; and whether called a "certificate" or a "warrant," its legal effect is the same, and just what the legislature prescribed. The constitution creates the office of "auditor," but does not prescribe or even designate the character of his duties. But the word "auditor," *ex vi*

termini, imports "an officer appointed and authorized to examine accounts, compare charges with vouchers, allow or reject charges, and state the balance." It is a novel feature in our legislation (section 30, c. 102, Gen. St.) which devolves upon the "auditor" the authority to issue warrants, and more novel still (section 33 of said chapter 102) to require that they be "countersigned" by the officer whose duty it is to pay them. But in the absence of constitutional inhibitions the legislature could devolve, and in some cases has devolved, on the "auditor" new and extraordinary duties not usually covered by the word "auditing." The legislature has made the secretary of state (chapter 28, § 13, Laws 1869) *the auditor* of all accounts against the state for public printing. His certificate is conclusive, and the "auditor of state" has no duty with respect to the accounts of the state printer except to "draw his warrant" for the amounts allowed (audited) by the secretary of state. So, too, the legislature has made the superintendent of insurance *the auditor* of accounts and claims on account of the insurance department; and with respect to such expenses the superintendent (and not the auditor of state) is authorized to draw warrants on the state treasurer; and the reasons are quite as strong why the particular duty of "issuing warrants" should be divided between the auditor and superintendent, as those which induced *224 the legislature to divide the proper duties *of an "auditor" between the auditor of state and the secretary of state.

"There was no appropriation made in 1874 for the payment of this class of warrants." Is an annual specific *appropriation*, by law, necessary? It is respectfully submitted that it was not necessary. The constitutional provision referred to by defendant (section 24, art. 2) does not cover any funds in the state treasury except such as are raised by "taxation;" that is, pursuant to the general laws of the state, for an annual and uniform assessment and taxation of property. Said section 24 should be read in connection with sections 1, 3, 4, art. 11, thus:

Article 11: "Sec. 1. The legislature shall provide for a uniform and equal rate of assessment and taxation. * * *

"Sec. 3. The legislature shall provide each year for raising revenue to defray the current expenses of the state.

"Sec. 4. No tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same, to which object only such tax shall be applied."

Article 2: "Sec. 24. No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and no appropriation shall be for a longer term than one year."

Reading and construing these sections together,—and, being *in pari materia*, they should be so construed, without regard to their particular location in the constitution,—and it is very clear that the "moneys" in "the treasury" which cannot be drawn except in pursuance of an annual "specific appropriation," are the general "revenues,"

raised annually as "state taxes," to defray the current expenses of the state by a uniform and equal rate of assessment and taxation of all taxable property, real and personal. Placing said section 24 in the "legislative" article, and omitting from the article on "finance and taxation," cannot give a broader scope to its language. The legislature has never but once (chapter 25, Laws 1873) deemed it necessary to make a "specific appropriation" of moneys other than that raised by taxation as general "revenue," while it has on several occasions indicated that such moneys in the state treasury may

*225 be drawn therefrom *without* "a specific appropriation made by law." In 1866 (Laws 1866, p. 142; Gen. St. 1868, p. 888) the legislature passed an act "providing for the sale of public lands to aid in the construction of certain railroads." By this act (sections 3-5) the office of "state agent" to sell said lands was created, such agent to hold his office "until all said lands shall be sold," subject to removal by the governor, and to "have a salary of \$1,500 per annum payable out of any moneys arising from the sale of said lands." The same section (section 5) which fixes the salary provides that said agent "shall deposit all moneys derived from any sale with the treasurer of state," and that his (the agent's) "salary shall be paid quarterly, upon a warrant drawn by the auditor upon the treasurer." Said section 5 has never been repealed nor amended. Said office of state agent still exists, and has had an incumbent nearly all the time for eight years past, and now has an incumbent, who has drawn his salary quarterly "upon warrants drawn by the auditor upon the state treasurer," and yet the legislature has *never* at any time made a specific appropriation, nor any "appropriation," for the payment of said salary. The insurance law does not stand alone in this respect. It requires the payment by insurance companies of certain specific "fees," (not *taxes* upon an equal and uniform assessment of *property*,) and that such fees shall be paid into the state treasury to constitute a fund for the payment of the expenses of the insurance department, "and for no other purpose." Such fees constitute no part of the "revenue" raised for the "current expenses of the state," (that is, for *all* the ordinary expenses of the government,) and is not subject to the constitutional provision requiring an annual specific appropriation to draw it from the treasury. The general revenues levied and collected as "state taxes" go into the state treasury as a "general fund," no part of which can be paid out without a specific designation of *the amount and the purpose*, (denominated an "appropriation;") as, so many dollars for salaries of the governor

*226 and other state officers, so many dollars for salaries for *the* judges of the several courts, so many dollars for *per diem* and mileage of the members of the legislature, so much to maintain one charitable or educational institution and so much for another, and so much to erect the state capitol, or a new asylum, and the like. This is what is meant by a "specific appropriation,"—a legislative enact-

ment designating from the "general fund" a particular amount for a particular purpose, to be drawn from the treasury within a year for such purpose, or not at all. The "insurance fund," like the "railroad fund," is raised in a particular and unusual manner,—the one by fees, the other by the sale of lands. It is raised for a particular object, and deposited for that particular object, "and for no other purpose;" and the expenses of that particular object are limited to the amount so raised, so as not to touch or disturb the general revenues of the state. It is "specifically appropriated" when raised, and does not require another legislative enactment to authorize its application to the payment of insurance warrants. If the insurance law had provided that the superintendent should collect the fees, pay the salaries and other expenses of the department, and deposit the surplus, if any, in the state treasury at the close of the fiscal year, and publish in his annual report a statement of the fees collected, expenses paid, and amount deposited, the validity of the law would not be questioned. To require the superintendent to pay the fees into the state treasury first, and then authorize him to draw them out on his warrants issued for salaries and expenses of the department, does not change the character of the fund, so as to subject it to the constitutional provision under consideration.

The "plain and adequate remedy in the law," suggested by the defendant, is not such a remedy as will defeat or prevent a *mandamus*. Here, the defendant is a public officer, and in his official capacity he holds moneys collected for the particular purpose of paying this warrant, and other warrants of this class. His duty to pay this warrant out of such fund results from his office, and it is a duty which he may be compelled to perform at any time. The plaintiff will not
 *227 be *driven to an action against the officer and his sureties for an omission or refusal to perform such duty, but may have his relief by a *mandamus* compelling its performance.

VALENTINE, J. This is an action of *mandamus*, brought originally in this court. There are several questions involved in the case, but for the purposes of the case we shall assume that all except one should be decided in favor of the plaintiff, and that one may be stated as follows: Can any money belonging to the state, rightfully in the state treasury, and over which the legislature has the rightful control, be drawn from the state treasury except in pursuance of some act of the legislature passed for that purpose within one year prior to the attempted drawing of the money? We must answer this question in the negative. The question arises as follows: The superintendent of insurance issued a warrant in favor of the plaintiff upon the state treasurer, which warrant reads as follows:

"INSURANCE FUND.

INSURANCE DEPARTMENT,

"No. 196.

TOPEKA, March 10, 1874.

"*Treasurer of State of Kansas:* Pay to Geo. W. Martin, or order, the sum of forty-three dollars, out of any moneys in the state treasury

belonging to the 'Insurance Fund,' as provided by chapter 93 of the Laws of 1871. [Seal.]

"\$43.00.

ED. RUSSELL,
Superintendent of Insurance."

The plaintiff presented this warrant to the state treasurer for payment; and the state treasurer refused to pay the same, and indorsed thereon the following words, to-wit:

"Presented for payment June 22, 1874. Not paid for the reason that no appropriation was made by the legislature of 1874 providing for the payment of this class of warrants.

"JOHN FRANCIS, State Treasurer."

Now, admitting that everything must be decided against the treasurer except that the legislature failed to make an appropriation for this class of warrants, and then should the treasurer have paid *228 said warrant? We think not. Section *24 of article 2 of the constitution reads as follows: "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law; and no appropriation shall be for a longer term than one year." This section would seem to be decisive of the question now under consideration. "No money shall be drawn," etc; this would seem to mean that no money that may ever rightfully be in the state treasury shall be drawn therefrom except in pursuance of an act of the legislature specifically authorizing the same to be done, passed within one year prior thereto; and it certainly does mean so, unless some other provision of the constitution may be found which would tend to limit or modify the meaning of the language used. Now, we shall not say that there is nothing in the constitution which would tend to limit or modify the meaning of said language; but we think there is nothing in the constitution that would tend in the least to limit or modify the meaning of said language so far as it has any application to this particular case. The language of said section is broad enough to cover the insurance fund as well as every other fund, and there is nothing in the constitution that we are aware of that would tend to withdraw the insurance fund from its operation. Hence the provisions of said section must apply to the insurance fund, whether they apply to every other fund or not. It seems to be admitted by all parties that said insurance fund belongs to the state, and that it is rightfully in the state treasury. Indeed, this action of *mandamus* against the state treasurer to compel him to pay a warrant drawn on the state treasurer for money in the state treasury is founded upon such a theory. It is claimed, however, by the plaintiff, that the words "no money," as used in said section 24, should be construed to mean "no money raised by taxation." But if the framers of the constitution had intended to have given to said words such a meaning, we think they would have said so in express terms; or, at least, they would have

placed said section 24 in the article on finance and taxation, (article 11,) instead of placing it where they did. The state may and *229 does receive money from various other sources than *that of taxation, and said section being isolated as it is, and broad in its terms, was undoubtedly intended to apply to all money, raised from every source, except such money as may be excepted from the provisions of said section by some other provision of the constitution. As said section 24 was not inserted in the article of the constitution concerning finance and taxation, it would certainly be as reasonable to say that it did not apply to money raised by taxation as to say that it does not apply to the insurance fund. But is not the "insurance fund" raised by a species of *taxation*?

The writ of *mandamus* will be denied, and judgment will be rendered for the defendant for costs.

(All the justices concurring.)

J. H. COSTELLO and others v. JOHN WILHELM.

July Term, 1874.

1. **Bills and Notes: Extending Payment: Parol Agreement.** In an action on a promissory note the defendants answered that by a parol agreement of the parties afterwards made the note was to be paid at maturity if convenient and practicable, but if not convenient and practicable, then that the time for the payment of the same should be extended until the defendants should receive certain moneys, which, as they alleged, they had not received when they filed this answer. But the answer did not state any sufficient consideration for said agreement, and it did not allege that it was either inconvenient or impracticable for the defendants to pay said note at the time it became due. On demurrer, *held* that said answer did not state facts sufficient to constitute a defense to the plaintiff's action.¹

- [2. **Costs: Judgment.** A judgment for "costs herein, taxed at \$——," it seems, is not a judgment for any costs.]

Error from Marion district court.

Action by Wilhelm against Costello and others on a promissory note given by defendants to plaintiff. The case was heard at the April term, 1873, of the district court. Judgment was entered as follows:

*230 *"[Title.] Now, at this day, this cause came on to be further heard, and the defendants having filed no amended answer, after leave therefor having been granted by the court, and the court having

¹ Failure of, consideration of note—defenses—burden of proof, see *French v. Gordon*, 10 Kan. 279, and note; deposit of money to pay note, see note to *First Nat. Bank v. Free*, 24 N. W. Rep. 566; gratuitous payment of note by third party, see note to *Martin v. Victor M. Co.*, 8 Pac. Rep. 171; alteration of note, see *Fraker v. Little*, 24 Kan. 598; *Horn v. Newton Bank*, 32 Kan. 518; S. C. 4 Pac. Rep. 1022; also note to *Fuller v. Green*, 24 N. W. Rep. 911.

heard the evidence in said cause, and considered the same, it is considered and adjudged by the court that the plaintiff have and recover of and from the defendants the sum of \$400, the principal of said note, and the further sum of \$21.59 as interest thereon, and his costs of collection, \$40, and his costs in his suit herein, taxed at \$ —; and hereof let execution issue."

Martin & Case and J. W. Williams, for plaintiffs in error.

No brief on file.

Peters & Case, for defendant in error.

The demurrer was properly sustained. The subsequent oral agreement was a separate and distinct contract from the written note. It must therefore stand or fall upon its own merits. It cannot derive any of its legal requisites from the written contract. Without any consideration the oral agreement is a nullity. 1 Pars. Cont. 8; *Dudley v. Reynolds*, 1 Kan.*285. No consideration is alleged or stated in the answer. The existence of a fact required by law to be proved will not be presumed. When the law presumes a fact, it need not be stated in the pleading. 1 Chit. Pl. 221. The converse of this is equally true, viz.: when the law does not presume a fact, it must be stated in the pleading.

VALENTINE, J. This was an action on a promissory note given by the plaintiffs in error, defendants below, to the defendant in error. The defendants below answered, setting forth in their answer, substantially, that, after said note was given, a parol agreement was entered into between the parties that the note should be paid at maturity if convenient and practicable, but if not convenient and *231 practicable, then that the time for the payment of the same should be extended until the defendants should receive certain moneys, which, as they allege, they had not yet received when they filed their answer. The plaintiff below demurred to said answer on the ground that it did not state facts sufficient to constitute a defense to the plaintiff's cause of action. The court below sustained said demurrer, and then granted leave to the defendants to amend their answer; but the defendants failing to so amend, the court then rendered judgment for the plaintiff, and against the defendants, for the amount of the note, with interest and costs. The defendants now bring the case to this court, and ask a reversal of said judgment. The only error that they assign in their petition in error is "that the court erred in sustaining the demurrer of the said plaintiff to the answer of the said defendants." We do not think that the court erred in sustaining said demurrer: *First*, there is no sufficient consideration alleged in said answer to uphold said agreement. *Second*, it is nowhere alleged in said answer that it was either inconvenient or impracticable for the defendants to pay said note at the time the same became due. It is true, the defendants allege that this agreement was made at a time when the plaintiff and one of the defendants

were settling up sundry matters between themselves; and it is also true that they allege that this particular defendant at the time of making the settlement paid certain moneys to the plaintiff; but there is no such connection alleged between said settlement and the payment of said moneys on the one side, and the agreement of the plaintiff to extend the time for the payment of said note on the other side, as would constitute one a consideration for the other.

We are not required in this case to determine whether the plaintiff was entitled to recover for all that he asked or not; for treating the answer as an answer, it did not state any *facts* which would defeat the plaintiff's cause of action, or any portion thereof. But if it were treated as a demurrer, then it would apply to the whole of the plaintiff's petition, which unquestionably stated a good cause of

*232 action, whether the plaintiff was entitled to recover for all that he asked or not. Therefore, in whatever way the answer may be considered, it cannot be sustained. Neither do we think that we are called upon, under the assignment of error in this case, to consider the question whether the court below erred in rendering a judgment for forty dollars, "costs of collection." No judgment for any other amount as costs seems, however, to have been rendered, and hence it would not seem that there was any error.

The judgment of the court below is affirmed.

(All the justices concurring.)

X. K. STOUT v. C. C. HYATT.

January Term, 1874.

1. **Jury Trial: Impaneling Jury.** It is not a substantial error for the district court to discharge a juror during the time the jury are being impaneled although the juror may be discharged for an insufficient reason, where an unexceptionable jury is afterwards obtained, and where the party complaining has not exhausted his peremptory challenges. [Atchison, T. & S. F. R. Co. v. Franklin, 23 Kan. 78.]¹
2. **Titles: Legal and Equitable.** A party may have both a legal and an equitable title to a piece of land. He may in fact possess the whole title, both legal and equitable, and be the entire owner of the property.
3. **Ejectment: Plaintiff's Title: Adverse Legal Title.** A party may, in an action for the recovery of real property under section 595 of the Civil Code, recover on the strength of an equitable title only, even though the

¹A trial court, in impaneling a jury to serve in a particular case, should have and has a very extensive and almost unlimited discretion in discharging a person called to serve on the jury who might, in the opinion of the court, not make the fittest or most competent person to serve on that jury; but this rule should not be applied in retaining jurors. *State v. Miller*, 29 Kan. 43. See, also, *State v. McKinney*, 31 Kan. 575; S. C. 3 Pac. Rep. 356.

adverse party may hold the legal title, provided, however, that such equitable title is paramount to and stronger than the title held by such adverse party.¹

4. ———: **Equitable Action.** Where the plaintiff seeks, under said section 595 of the Code, to recover real property on the strength of a paramount equitable title against a defendant who holds the legal title, the action is in the nature of an equitable action, and although such action is frequently called an action of ejectment, yet the final determination of the rights of the parties must be governed by the rules pertaining to equitable actions; that is, the plaintiff in such action must make out in every respect as complete a right to recover, and by the same kind of evidence, as though he had commenced his action in the form of an equitable action.
- *233 *5. ———: **Pleadings and Evidence.** Although the facts in an action for the recovery of real property under said section 595 of the Code are not usually and need not necessarily be set out in the pleadings in detail, nor with any degree of particularity, still either party under such pleadings may prove whatever would strengthen his own title or defeat his adversary's title in the same manner and to the same extent as he could do if the facts were set out with all the circumstantial minuteness and fullness of detail that they usually are in equitable actions. [Wicks v. Smith, 18 Kan. 515.]
6. **School Lands: Sales under Territorial Laws.** Since the decision in the case of *State v. Stringfellow*, 2 Kan. *263, *316 *et seq.*, there can be no question concerning the power of the territorial authorities of Kansas to sell school lands during the time that Kansas was a territory, nor concerning the validity of the laws of the territorial legislature passed for that purpose.
7. ———: **Territorial Pre-emption Law.** Pre-emption rights could be assigned under section 5 of the territorial pre-emption laws of 1855, p. 646, and this assignment could be made by a simple instrument in writing. The assignment, where the land has not been paid for, was at most only the assignment of an equitable interest. No estate was conveyed, and, of course, it was not necessary to execute a deed of conveyance. Said instrument in writing may be and must be proved in the same manner as any other simple instrument in writing.
8. ———: **Proceedings of County Board.** The proceedings of the county board under section 8 of the territorial pre-emption laws of 1855 are in the nature of judicial proceedings, and should be treated with about the same respect as the proceedings of other tribunals of special and limited jurisdiction.
9. ———. While the county board had the power under said pre-emption laws to determine whether any particular person had the right to pre-empt any particular piece of land, yet they had no power to determine

¹The plaintiff in ejectment must recover, if he recovers at all, upon the strength of his own title. In this state the plaintiff is not required to have the legal title, or all the title, or a title paramount to the title of all others, in order to enable him to recover. All that is necessary in order to enable him to recover is that he shall have some kind of estate in the property in controversy, legal or equitable; and that his title to the property shall be paramount to that of the defendant. *Atchison, T. & S. F. R. Co. v. Rockwood*, 25 Kan. 802; *Same v. Pracht*, 80 Kan. 71; *S. C. 1 Pac. Rep. 319*.

whether any such person, or any other person, had at any time paid for said land. The payment was to be made to the school treasurer, and hence the records of the county board could not be evidence of such payment.

10. ———: Receipt as Evidence. A receipt given by the school treasurer for money paid for school land under said pre-emption laws is *prima facie* evidence, and only *prima facie* evidence of the payment of said money.¹
11. Title: Purchase of Equitable, will not Defeat Prior Legal. A party purchasing a merely equitable title to land cannot be a *bona fide* purchaser of the land so as to defeat prior equities existing in favor of the person holding the legal title to the land. [Wicks v. Smith, 21 Kan. 415; Babb v. Lindley, 23 Kan. 481.]
12. School Lands: Pre-emption: Forfeiture. Under the territorial laws of Kansas, passed in 1855, for the pre-emption of school lands, the pre-emption right would be forfeited if the land was not paid for before
 *234 it was offered for sale. Under the school laws of said territory *of Kansas, passed in 1857, the school treasurer had a right to loan the money received from the sale of school lands on good security to be approved by the county commissioners. Under these laws of 1855 and 1857 a piece of school land was sold and a promissory note taken in payment therefor, which note was secured and approved by the county commissioners. If at the time of the sale and the execution of said note it was understood by all the parties, the purchaser, the school treasurer, the county commissioners, and the makers of the note, that the land was paid for, and that said note was given for money loaned by the school treasurer to the parties executing the note, and all was done in good faith, a subsequent failure to pay said note would not work a forfeiture of the purchaser's right to said land. It was not absolutely necessary in a transaction like the foregoing that the money should pass from the purchaser to the school treasurer, and then from the school treasurer to the makers of the note, in order to make the transaction valid.

Error from Doniphan district court.

Ejectment for 160 acres of school land, brought by Hyatt against Stout. Hyatt claimed as owner under an alleged purchase made in 1857 by one Reuben Middleton under the territorial pre-emption law of 1855. Stout claimed as owner in fee, holding the legal title under a patent issued by the state in 1870. On the trial Hyatt gave in evidence a receipt dated October 13, 1857, signed by the school treasurer, reciting the payment by Middleton of the purchase money. Stout claimed that instead of the payment being made a note was executed by Middleton for the purchase money, with Joel P. Blair, one of the county board, as surety, and which note was approved by said Blair and E. V. B. Rogers, another of the board, by writing upon the back of the note on the sixteenth of March, 1857; and that, in lieu of this

¹A party who has given a receipt admitting payment in full, has the right always to show, by parol evidence, that it was given by mistake, and that it was untrue. Clark v. Marbourg, 6 Pac. Rep. 548. See American B. Co. v. Murphy, ante, *41, and note.

note, another was executed afterwards, but dated the same, signed by Middleton and Bela M. Hughes. The notes were produced upon the trial. The second note had a writing upon the back showing that the same was approved by the tribunal transacting county business. An indorsement on the back of the first note showed that it had *235 been exchanged for the second note. No record is shown that the money realized from the sale had been loaned to these parties by the county board. The county treasurer testified that there was no evidence in his office that these notes, or any part of either, had been paid. Trial at the March term, 1873, of the district court. Verdict and judgment for the plaintiff.

A. Perry and X. K. Stout, for plaintiff in error.

The court erred in sustaining the challenge for cause of Nixon, a juror. The Civil Code, § 270, provides as a ground of challenge, relationship to either party. Kin is a relationship by blood. In this case there was no relationship of Nixon by consanguinity or marriage with either party to the suit.

The court erred in refusing to exclude all testimony under the petition. The averments in the petition that the plaintiff had a legal and equitable estate in the land, were repugnant and contradictory averments. If he had the legal estate, he did not have the equitable, and *vice versa*. Contradictory or inconsistent averments in a pleading destroy each other. Gould, Pl. c. 3, §§ 272, 273. Had these averments been made in separate counts the proper way to take advantage of the pleading would have been a motion to compel an election.

The plaintiff below seeks to recover upon an equitable title, and to enable him to recover he must show such a state of facts as would in a proper action compel a specific performance of the contract,—compel the conveyance to him of the legal title. To do this he must show that there have been no laches on his part; that his claim is not stale; that he has made payment of the purchase money; that the pre-emption was without fraud, or that he was an innocent purchaser, and the execution of the contract is not a fraud upon the defendant or the public generally; and that the decree would produce no injustice.

*236 *The county board in taking proof of and allowing a pre-emption, under the law of 1855, were but ministerial officers, and the record might be disproved for fraud before the issue of the patent, and even after, where the rights of innocent third persons had intervened. 2 Phil. Ev. 591. But if the record of the entry by Culbard cannot be disputed because it is a record, Culbard, by such record, had an equitable title to the land. On payment he could make conveyance. The evidence of his conveyance must be the same as in any other conveyance. If by deed, its acknowledgment carries the proof. If by simple contract, proof of execution must be made. This sale, entered upon the books of the county board, was not a proper subject of record there. It is an unauthorized record. 2 Phil. 585.

No title, legal or equitable, vested in Hyatt, or Middleton, his grantor, because no payment had been made as required by sections 6 and 7 of the statute of 1855. If all the proceedings before the county board were not a fraud, and the assignment by Culbard was in fact made, but without payment by Middleton or Hyatt, no right was conferred as against the government, and the disposing power over the lands was still in the state. *Frisbie v. Whitney*, 9 Wall. 195. But the court here came to the rescue of the plaintiff and instructed the jury that it did not matter whether there was any payment or not; that the receipt executed by the school treasurer was conclusive of payment. This was error. It was competent to contradict the receipt, as the same was only *prima facie* evidence of payment. *Bemis v. Becker*, 1 Kan. *240.

The notes given by Middleton were a nullity. They never had any validity, because executed for payment when payment should have been in money. It was but a loan of money; there had been no money paid, and there was no record produced of the approval of the security of these notes by the county board as required by section 8, p. 86, Laws 1857. Under the General Statutes of 1868, c. 94, § 16, these lands had become forfeit to the state.

*237 Another question is presented in the instructions asked *for by the defendant below: Can the plaintiff below maintain this action upon an *equitable* title against the defendant holding the *legal* title? It is true that the statute provides that it shall be sufficient to state that he has an equitable estate in the land. But can a party in all cases where he may be entitled to the possession of the land maintain ejectment upon his equitable title? He does not hold the paramount title. *State v. Stringfellow*, 2 Kan. *316.

Stout must be held to be the trustee of Hyatt if Hyatt is entitled to the land. Fraud to be proven must be plead. If the plaintiff recovers, there ought to be a lien declared upon the land for the purchase money, and the proper party in whose favor the lien should be declared was not before the court.

W. W. Guthrie and *N. B. Wood*, for defendant in error.

The court properly excused the juror Nixon, on ground of "suspicion of partiality for defendant." Code, § 270, (last clause;) *Hartford Bank v. Hart*, 3 Day, 491. But it is no error to release a juror when peremptory challenges have not been exhausted. *Wiley v. Keokuk*, 6 Kan. *104.

Plaintiff's petition was within section 595 of the Code: "He may recover on a legal or equitable title." Then, certainly, the averment of both is good. But, at the most, defendant could only have moved to have petition made more certain.

This was not an action to enforce performance, but a case where the plaintiff stood upon a record title, deduced under a statute authorizing the sale, and vesting in the county board full jurisdiction in the premises; and when the record showed full proof of purchase

and payment, standing for ten years with the approval of the authorities, yearly exacting taxation therefrom. All pretense of fraud on the part of the plaintiff is idle talk. The law existed. This land was within sound of the court-house, and its claimant, Culbard, well known to the county board. Deed after deed is put on record, tax after tax is paid, and Stout knows and informs Wood that he has ten acres of the Middleton land inclosed with his. It was in fact *238 paid for to the acceptance of the proper officials, *and the usual evidences executed. But this matters not, since the purchaser had the right to rely on the public records. The pre-emption right vested "by settlement before the survey." Then the settler had the right to purchase, and to assign that right in any stage of its existence. Nothing forfeited that right but the neglect to make payments "before the same is offered for sale," and the evidence that such payment had been made was "a receipt of the officer receiving the money, specifying the amount so paid, and the number and description of the land," and thereon *the title vested in the beneficiary of such receipt*. Sections 6, 7, p. 646, Laws 1855; Kissell v. St. Louis Public Schools, 16 Mo. 582; Stark v. Starrs, 6 Wall. 418.

The decision of the county board on questions within its jurisdiction is *res adjudicata*. Anthony v. Halderman, 7 Kan. *63; Norton v. Graham, Id. *169. The jurisdiction was exclusively in the county board. Laws 1855, p. 646, § 8. The county board act as judicial officers "in hearing and determining applications and proofs concerning rights of pre-emption under this act" of 1855. Section 8 of said act; Lewis v. Lewis, 9 Mo. 189; O'Hanlon v. Perry, Id. 807; Wilcox v. Jackson, 13 Pet. 517; Morton v. Blankenship, 5 Mo. 356. And the school treasurer's receipt was not a simple receipt subject to be contradicted by parol, but was evidence of title. The decision of the county board that Middleton held the treasurer's receipt for payment, and had complied with the law, and was entitled to receive the patent for said land, was final and conclusive, and could not be attacked collaterally. Said record imparted notice of the title under such pre-emption. Under still another rule, ("that as only a certificate could issue until payment made,") the law will presume such payment to have been made, and this presumption is conclusive, at least in lands of subsequent purchasers. Ward's Lessee v. Barrows, 2 Ohio St. 246; Coombs' Lessee v. Lane, 4 Ohio St. 148; Bank of U. S. v. Dandridge, 12 Wheat. 70; Polk v. Wendall, 9 Cranch, 98.

The note of Middleton and Blair was accepted as a loan of such money in good faith, and with the approval of the county board, and in payment for such land; and if a misappropriation of the proceeds of such sale, it would not defeat the title of the purchaser. State v. Stringfellow, 2 Kan. *321; Stauffer v. Eaton, 13 Ohio, 332. *239 Plaintiff might, in such case, be *liable for purchase money, but his legal title would not be thereby affected. But, with notice of the decision in State v. Stringfellow, the legislature ratified

all sales of school lands, and left the collection therefor to *other* remedies; and this before the act for sales of school lands took effect. Laws 1864, p. 198; Dill. Mun. Corp. § 46. It then follows that, at the time Stout purchased, the state nor county had no interest in this land, and he got nothing by his patent.

In ejectment the equitable title will prevail against the legal title. *Butler v. Kaulback*, 8 Kan. *668. But plaintiff was a purchaser from the holder of full evidence of title, and cannot be affected by any alleged defects not resulting from actual fraud. It must be conceded that, on the record made, Hughes (plaintiff's grantor) had a perfect title; then his deed conveyed such title to plaintiff. *Swayze's Lessee v. Burke*, 12 Pet. 11, 23; 12 Curt. 614.

VALENTINE, J. This was an action for the recovery of real property. Two trials were had. Verdict and judgment for the plaintiff below, defendant in error. The land in dispute is a part of section 16, township 3, range 21, in Doniphan county, and was originally school land. The records of the board of county commissioners of said county show among other things the following facts, to-wit: On February 2, 1857, the county board allowed H. Culbard to pre-empt said land, and to assign his pre-emption right to Asa K. Hubbard, and ordered a transcript of the record to be given to said Hubbard. On the same day the board appointed Ebenezer Blackstone a commissioner to secure the purchase money for school lands. On July 17, 1857, said board allowed said Hubbard to have entered on the records of the board an assignment of said pre-emption right from Hubbard to Reuben Middleton. On August 7, 1857, said board appointed said Blackstone school treasurer for Doniphan county, and on the same day he duly qualified and took possession of the office. On July 15, *240 1858, said Middleton made proof of his right *to pre-empt said land, and of payment therefor to said board, by presenting to them a receipt for the amount to be paid for said land, signed by said Blackstone, school treasurer, and the board then made the following entry, to-wit:

"It is therefore considered by the court that the said Reuben Middleton has complied with the provisions of an act of the legislative assembly of the territory of Kansas entitled 'An act to grant pre-emptions to school lands in certain cases,' and the instructions of the executive department in relation to the same, and that he is entitled to receive the patent for said land."

The receipt given by Blackstone to Middleton, and copied into the records of the board of county commissioners, reads, according to the evidence in the case, as follows:

"No. 16. Received, Troy, Oct. 13, 1857, of Reuben Middleton, the sum of two hundred dollars, it being the purchase money for the following-described quarter-section of school land, to-wit: The south-

west quarter of section sixteen, township three, of range twenty-one, in the county of Doniphan, and territory of Kansas.

"EBENEZER BLACKSTONE,

"School Treasurer for Doniphan Co., K. T."

Hubbard also executed a deed for said land to Middleton, February 16, 1857. Middleton executed a deed for the land to Hughes, September 19, 1858, and Hughes to Hyatt, the plaintiff below, May 13, 1862. This constitutes the plaintiff's title. The defendant Stout holds under a patent issued by the state of Kansas to himself on August 31, 1870. There are many other facts which we have not yet stated, but which we shall state as we proceed. The plaintiff in error, defendant below, claims that the court below committed many errors: for instance, that the court erred in impaneling a jury; that the court erred in holding that a party may have both a legal and an equitable title to land; that the court erred in allowing the plaintiff below to recover on the strength of an equitable title, as against the defendant who holds the legal title; that the court erred in admitting illegal evidence, and excluding legal evidence; that the court erred in giving improper instructions, and refusing to give proper ones, etc. ;

all of which we shall consider as we proceed. But as to many
 *241 *of said supposed errors, all that we can do will be to decide the questions involved therein without entering into any discussion of said questions.

1. It is not a substantial error for the district court to discharge a juror during the time the jury are being impaneled, although the juror may be discharged for an insufficient reason, where an unexceptionable jury is afterwards obtained, and where the party complaining has not exhausted his peremptory challenges.

2. A party may have both a legal and an equitable title to a piece of land. He may in fact possess the whole title, both legal and equitable, and be the entire owner of the property.

3. A party may, in an action for the recovery of real property under section 595 of the Civil Code, recover on the strength of an equitable title only, even though the adverse party may hold the legal title: provided, however, that such equitable title is paramount to and stronger than the title held by such adverse party.

4. Where the plaintiff seeks, under said section 595 of the Code, to recover real property on the strength of a paramount equitable title against a defendant who holds the legal title, the action is in the nature of an equitable action; and although such action is frequently called an action of ejectment, yet the final determination of the rights of the parties must be governed by the rules pertaining to equitable actions. That is, the plaintiff in such a case must make out in every respect as complete a right to recover, and by the same kind of evidence, as though he had commenced his action in the form of an equitable action.

5. Although the facts in an action for the recovery of real property, under said section 595 of the Code, are not usually and need not necessarily be set out in the pleadings in detail, nor with any degree of particularity, still either party under such pleadings may prove whatever would strengthen his own title, or defeat his adversary's title, in the same manner and to the same extent as he *242 could do if the facts were set out with *all the circumstantial minuteness and fullness of detail that they usually are in equitable actions.

6. Since the decision in the case of *State v. Stringfellow*, 2 Kan. *263, *316; we suppose there can be no question concerning the power of the territorial authorities of Kansas to sell school lands during the time that Kansas was a territory, or concerning the validity of the laws of the territorial legislature passed for that purpose.

7. Pre-emption rights could be assigned under section 5 of the territorial pre-emption laws of 1855, p. 646, and this assignment could be made by a simple instrument in writing. The assignment where the land had not been paid for was at most only the assignment of an equitable interest. No estate was conveyed, and of course it was not necessary to execute a deed of conveyance. Said instrument in writing may be and must be proved in the same manner as any other simple instrument in writing.

8. The proceedings of the county board under section 8 of the territorial pre-emption laws of 1855, p. 646, are in the nature of judicial proceedings, and should be treated with about the same respect as the proceedings of other tribunals of special and limited jurisdiction.

9. While the county board had the power under said pre-emption laws to determine whether any particular person had the right to pre-empt any particular piece of land, yet they had no power to determine whether any such person or any other person had at any time paid for said land. The payment was to be made to the school treasurer, and hence the records of the county board would not be evidence of such payment.

10. The receipt given by Blackstone, school treasurer, to Middleton, was regular upon its face, and was given by the proper officer. See the following statutes in the following order, to-wit: Laws 1855, p. 646, § 6; Laws 1857, p. 86, § 3, (took effect February 20, 1857;) Laws 1855, p. 646, § 7. And hence said receipt was *prima facie* evidence that said money therein mentioned was paid. But, *243 as *we think, it was only *prima facie* evidence of that fact.

The receipt was not intended as evidence of title, but only evidence of payment. Under the said pre-emption laws whenever payment was made for the land the title thereto immediately vested in the purchaser. Laws 1855, p. 646, § 7. It required no receipt, patent, or other instrument to vest this title. This title, however, was only an equitable title. The receipt for the money was then

given for the money paid. The purchaser then presented this receipt to the secretary of the territory. The patent for the land was then issued by the governor and secretary, and the legal title to the land passed from the territory to the purchaser. The main object in giving the receipt seems to have been to enable the purchaser to obtain his patent. In the present case the court below held that said receipt, taken in connection with the records of the board of county commissioners, was conclusive evidence of said payment. In this we think the court below erred. It is true said receipt would be conclusive as against any person except the state (then territory) or some person holding under the state, (or territory,) for no one except the state, (or territory,) or some person holding thereunder, would have any right to said land or to the money. But the defendant below holds under the state, and holds precisely the same rights to said land that the state held immediately prior to his purchase. He holds the legal title, with all the equities that the state held prior to his purchase; and therefore he may dispute the supposed payment made by the said Middleton to the same extent that the state might have done if the state had continued to hold the legal title. That receipts in general are only *prima facie* evidence of payment we suppose will not be disputed.

11. It is claimed that the plaintiff, Hyatt, is a *bona fide* purchaser of said land, without any notice of a want of payment therefor, and that, therefore, said receipt cannot be disputed. Now, it may be that the plaintiff is a *bona fide* purchaser in fact, as he claims, but we hardly think that such can be so in law. At the time the *244 plaintiff purchased *said land no patent for the same had yet been issued. The legal title to the land was therefore still in the territory of Kansas, and was not in Hughes, the plaintiff's grantor. The plaintiff could, therefore, at most, obtain only an equitable title from his grantor. And a party purchasing a merely equitable title must always take notice of all counter equities which may be outstanding in favor of the person holding the legal title. A party purchasing a merely equitable title cannot be a *bona fide* purchaser so as to defeat prior equities existing in favor of the person holding the legal title.

12. It would seem from some of the evidence that the purchase money for said land has never in fact been paid, but that a certain note was given therefor, and that the note has not yet been paid. Now this may or may not avoid the plaintiff's title. If it is to be considered that the land has not been paid for at all, we should think that the plaintiff's title had been forfeited. Laws 1855, p. 646, § 6. But if it was understood by Middleton, the school treasurer, the county commissioners, and the parties who executed said note, that the land was paid for, and that said note was given for money loaned by the school treasurer to the persons who executed said note, and that all was done in good faith, then we should think that the plain-

tiff's title should be held good. Under the school laws as they existed at the time said receipt was given, the school treasurer had a right to loan said money on good security to be approved by the county commissioners. Laws 1857, p. 86, § 3. And if the money was to be paid in by the purchaser and loaned out to the borrower on the same day, it was not necessary that the money should actually pass into the hands of the treasurer. If all the parties considered that the purchaser's debt as such was extinguished, and that the borrower's debt was created, that was sufficient. If the borrower was satisfied to look to the purchaser for the money, that was sufficient. And then if the purchaser should pay the borrower and the borrower should never pay the note, it would not defeat the purchaser's title. It may be, however, that under the peculiar *245 circumstances of this particular case *before the plaintiff should be allowed to recover (if he may recover) he should be compelled to pay to the defendant (as a trustee holding the legal title for plaintiff's benefit) what the payors of said note may now owe thereon, if, in fact, said note has never been paid; for, as we have before intimated, this is substantially an equity action. But as we have not all the facts before us we shall not comment on this matter further.

The judgment of the court below will be reversed, and cause remanded for further proceedings in accordance with this opinion.

(All the justices concurring.)

MARSHALL SMITH v. OSCAR F. ROWLAND and others.

July Term, 1874.

1. **Vendor's Lien: Contract.** A vendor's lien on real estate for unpaid purchase money may be created by the express contract of the parties at the time of the sale and conveyance of such real estate.¹
2. ———. Where the parties insert provisions in the deed of conveyance, and in the promissory note given for the unpaid purchase money, stipulating for a vendor's lien, such lien is thereby created.
3. ———: **Remedy of Vendor.** The vendor may commence an action to enforce such a lien without first exhausting his remedy against the personal estate of the vendee; and neither is the vendor bound to show that the vendee has no personal property subject to execution.

Error from Osage district court.

The case is stated in the opinion. There was judgment in the district court in favor of the defendants in error.

*246 **James Rogers*, for plaintiff.

The defendant contends that a vendor's lien at common law is not recognized in this state, and that this lien is the same as a vend-

¹See *Andrews v. Alcorn*, *post*, *380; *Greeno v. Barnard*, 18 Kan. 518. See *Pratt v. Topeka Bank*, 12 Kan. *670, and note.

or's lien at common law. While the plaintiff admits the first proposition, he claims that a lien may be reserved in a deed, and may be enforced in a court of equity in like manner as a lien created by a deed of trust, or deed of mortgage; in short, that a mortgage deed or deed of trust is nothing but an equitable lien created by contract in writing. A mortgage is defined as "a mere security creating a lien upon property, but vesting no title whatever either before or after condition broken." *Chick v. Willetts*, 2 Kan. *384. The lien reserved in this deed is precisely of this nature, and may correctly be defined as a mere security in the nature of a lien upon the deeded property. In the above case the court states that the common-law attributes of mortgages have been set aside; but for all that, the intention of the parties may still be enforced. In the case of *Simpson v. Munde*, 3 Kan. *172, it nowhere appears that a lien may not be reserved in a deed, or created by contract. It is simply asserted in that case that no liens are created by implications of law; but the case says nothing of liens arising out of the contract of the parties. The lien there spoken of is described as an "impalpable entity," a "protean quality," an "ethereal essence." This certainly is not this lien which arises out of the plain language of the conveyance, and is easily understood by any man of ordinary intelligence.

There is no force in the position of the defendant that the plaintiff must show that he has exhausted his remedy against the personal estate of his vendee, or that he has no personal estate out of which the claim can be made, even conceding this to be true in a *247 proceeding to enforce a lien at common law, which we very much doubt. *Sparks v. Hess*, 15 Cal. 186.

Ellis Lewis, for defendants.

The deed of plaintiff, Smith, to the Rowlands was made in Illinois, but the land conveyed lies in Kansas. The contract, therefore, is a Kansas contract, and governed entirely by Kansas laws. When Smith in his deed to the Rowlands reserved a vendor's lien, he attempted to reserve what the counsel for plaintiff denominates a "vendor's lien at common law;" for he must necessarily go to the adjudicated cases of other states, defining the vendor's lien and prescribing its mode of being enforced, (which this court has decided have no force or authority here,) to ascertain what rights he acquired by his reservation of a vendor's lien.

The plaintiff asks that the law of vendor's lien as administered in England and in some of the United States shall be administered here, because he has in terms reserved a vendor's lien in his conveyance to the Rowlands. We understand the decisions of this court to go to the bottom of this subject of vendor's lien, and not to the surface, as counsel for plaintiff in error contends. His construction of the decisions is that where an absolute deed on its face shows that a portion of the purchase money is unpaid, and there is no specific reservation of the vendor's lien in the deed, then the vendor acquires or

retains no such lien; but where, in addition to this, the vendor specifically reserves a vendor's lien, then that the law of vendor's lien as administered in England will be administered here to define the vendor's rights and afford him his remedy. Then, if the grantee at the time of the purchase has not sufficient personal property out of which the purchase money can be made, the land is liable to the lien. If he shall acquire a sufficiency for that purpose, then the land is freed from any liability to the lien. But if insolvency shall return then the liability returns. *Simpson v. Munde*, 3 Kan. *172. When

specifically named and reserved as a "vendor's lien," by the *248 vendor, the vendor's lien (which by this court *in 3 Kan. *184, is described as "an impalpable entity, a protean quality, an ethereal essence, which no man can graphically describe, and of which few can have anything like a clear conception") becomes a palpable entity, capable of description and conception, and the nature of the whole thing becomes changed. The plaintiff's "reservation" is void for vagueness and uncertainty; and whether he claims a vendor's lien by reason of the non-payment of the purchase money, with notice to the defendants of its non-payment, or because he has contracted for an impalpable entity, makes no difference. It was not the question in *Simpson v. Munde* whether the parties *had contracted for a vendor's lien*, but whether any such thing was recognized in this state, and whether the law of vendor's lien as administered in England would be administered in like manner in this state; whether, if a party purchased a piece of real estate free from any lien at the time of his purchase it should subsequently, by the insolvency of another party, become subject to a lien; whether the question of whether there was a lien should be a matter of secrecy, obscurity, and doubt, and metaphysical disquisition, and the transfer of real estate be impeded thereby. The general policy of our real-estate laws is to require everything concerning the title to or rights in it to be in writing. Secret trusts are discountenanced. *Simpson v. Munde*, *supra*. Do not the same evils result whether this court holds that a vendor's lien results from non-payment of purchase money with notice of non-payment to third parties, or whether parties create it by so many words? It is its vagueness, the inherent difficulty of justly enforcing a vendor's lien, its changing and secret character, its essential conflict with the policy of our real-estate laws, not that the parties had contracted for it, that led this court to decide that the law of vendor's lien as administered in England is not necessarily a part of the law of this state.

Conceding the position of plaintiff, that plaintiff reserved a vendor's lien which would be enforced, a bill filed to enforce such a lien must show that the plaintiff has exhausted his remedy against *249 the personal estate of his vendee, or that *he has no personal estate out of which the claim can be made; and judgment for a sale under the lien in the first instance, unless the record shows that the vendee has no personal property, is erroneous. In this case

there is no allegation in the petition on this point. *Scott v. Crawford*, 12 Ind. 410; *Eyler v. Crabbs*, 2 Md. 137; *Lead. Cas. Eq.* 366.

VALENTINE, J. The only questions involved in this case are as follows: *First*. Can a vendor's lien on real estate for unpaid purchase money be created by the express contract of the parties at the time of the sale and conveyance of such real estate? *Second*. And if so, was any such lien created in the present case? In the present case a deed of conveyance was executed for the land, and a promissory note was given for the unpaid purchase money. The substance of the deed, so far as it has any application to this case, was that Marshall Smith sold and conveyed to Oscar F. Rowland and John T. Rowland certain lands in Osage and Linn counties, subject to a vendor's lien for the payment of the unpaid purchase money. That portion of the deed intended to create said vendor's lien follows immediately after the description of the property conveyed, and is expressed in the following language, to-wit: "Subject, however, to a vendor's lien upon all the above-described premises, which is hereby reserved to the said Marshall Smith to secure the payment of part of the purchase money, according to the tenor of the promissory note of the parties of the second part of even date herewith, for the sum of thirteen hundred thirty-three and 33-100 dollars, payable to the said Marshall Smith, or order, five years after date, with ten per cent. interest per annum from maturity until paid." This deed was dated March 12, 1867, and was duly recorded in Osage county, June 1, 1869. The promissory note above described reads as follows:

"\$1,323.33.

JACKSONVILLE, ILLINOIS, March 12, 1867.

"Five years after date we promise to pay Marshall Smith, or *250 order, thirteen hundred and thirty-three and 33-100 dollars, value received, with ten per cent. interest per annum from maturity until paid. This secured by vendor's lien reserved in deed of date from payee and wife to us of 406 93-100 acres of land in Osage and Linn counties, Kansas.

OSCAR F. ROWLAND.

"JOHN T. ROWLAND."

We know of no reason why the vendor's lien attempted to be created by the stipulations contained in said deed and note should not be held legal, valid, and binding. It is true, under the decisions in this state, (*Simpson v. Munde*, 3 Kan. *172; *Brown v. Simpson*, 4 Kan. *76,) no vendor's lien can be created by mere operation of law, or by mere force of any rules of equity, where the deed is absolute upon its face, and apparently contradicting all idea of any supposed vendor's lien; but no decision has ever been rendered that we are aware of, in this state or elsewhere, affirming that the parties to a sale and conveyance of real estate cannot if they choose create by contract a valid vendor's lien. The vendor's lien in the present case

is no "mere creature of a court of equity." It is no "secret trust." It is not against public policy. It is not "against the general policy of our real-estate laws," or registry laws, or any other laws, either in letter or spirit. And it is no more an "impalpable entity," a "protean quality," an "ethereal essence," or an "indescribable myth," than any other mere lien upon real property. It is as tangible and as substantial as any other mere lien, and is as fair and reasonable in all its terms and conditions as any other lien founded upon a pledge of property for the payment of a debt. It was created by the parties themselves, in writing, and was placed in the deed itself that conveyed the land, so that when the deed should be recorded it would be notice to all the world, and especially to subsequent purchasers and mortgagees. Gen. St. 187, § 20. Vendors' liens have not been wholly abolished in Kansas. *Stevens v. Chadwick*, 10 Kan. *406. And neither have all equitable liens been abolished. *Seibert v. True*, 8 Kan. *52; *Seibert v. Thompson*, 8 Kan. *65, *73. And there is certainly no statute that either expressly or impliedly prohibits parties from creating vendors' liens by express contract. There-
*251 fore, *we think parties may so create vendors' liens, and that a vendor's lien has been so created in the present case. *Hutchinson v. Patrick*, 22 Tex. 318; *Stratton v. Gold*, 40 Miss. 778; *Bear v. Whisler*, 7 Watts, 144; *Carpenter v. Mitchell*, 54 Ill. 126; *Harvey v. Kelly*, 41 Miss. 490; *Dunning v. Stearns*, 9 Barb. 630.

The claim that the vendor in the present case cannot commence his action to enforce his vendor's lien until he has first exhausted his remedy against the personal estate of the vendee, is not tenable; and neither is the vendor bound to show that the vendee has no personal property subject to execution. See authorities above cited, and *Sparks v. Hess*, 15 Cal. 186, 193. Whatever may have been the rule where the lien was created merely by implication of law, and not by contract, can make no difference in this case, for in the present case the lien was created by *express contract* upon the *specific property* against which the vendor now seeks to have the lien enforced.

The judgment of the court below is reversed, and cause remanded, for further proceedings.

(All the justices concurring.)

C. T. RUCKER v. DONOVAN & FEIFERLICH.¹

July Term, 1874.

1. **Sales: Stoppage in Transitu.** In order to exercise the right of stoppage *in transitu*, no actual seizure of the goods before delivery to the vendee is essential. A demand of the carrier, notice to him to stop the goods, or a claim and endeavor to get the possession, is sufficient.
2. ———. Such demand must be made of the one in possession of the goods.
3. ———. Seizure by an officer under process in favor of another creditor will not defeat the right of stoppage.
4. ———. Stoppage *in transitu* is the enforcement of a lien, and not a rescission of the sale; hence proof of the exercise of this right of stoppage is not proof of an absolute ownership.
- *252 *5. **Replevin: Pleading and Proof; Variance.** Where a petition in replevin alleges absolute ownership, and the findings of fact show simply the right derived from a stoppage *in transitu*, and it does not appear that any objection was made to proof of this kind of interest in the property, and no motion was made for a new trial, and it does not appear that the attention of the district court was in any way called to the variance, this court will not on that account reverse a judgment sustained by the findings, notwithstanding the discrepancy between them and the petition.
6. **Common Carrier: Lien of: Substitution: Officer.** The lien of the carrier for charges for carriage of the specific articles is prior to the rights of the vendor, and the carrier may insist upon retaining possession until those charges are paid; and an officer holding process against the vendee may lawfully advance these charges to the carrier on taking possession of the goods, and, having so advanced them, is substituted to all the carrier's rights of possession as security therefor.
7. **Replevin not Maintainable: Judgment.** The action of replevin cannot be maintained against one having the right of possession. In such case, if the defendant has given bonds and kept the property, judgment should be entered in his favor for costs.

Error from Bourbon district court.

The case is sufficiently stated in the opinion.

*253 *Hulett & McCleverty, for plaintiff in error.

Before Donovan & Feiferlich could recover under their petition, they must show an absolute ownership in the coal-oil and turpentine, or some part of it. A mere right to exercise the right of stoppage *in transitu* gives no title to the property unless that right is exercised and put in operation by an actual stoppage, or demand for the property, under the law, and by virtue of the law. Notice of the con-

¹ Liability of vendor for freight when goods are not of the quality ordered—rights of vendee—liability of vendor. see *Cort v. Schwartz*, 29 Kan. 844; vendor has right any time before actual delivery. *Clapp v. Peck*, 7 N. W. Rep. 587; giving note for purchase money does not affect right of. *Clapp v. Sohmer*, 7 N. W. Rep. 639; vendor's right of stoppage not defeated by arrival of the goods at destination except when passed into actual or constructive possession of vendee. *Greve v. Dunham*, 14 N. W. Rep. 180; delivery to carrier of vendee is constructive delivery to vendee—right of vendor to retake, when goods are unpaid and vendee insolvent, before actual delivery to vendee. *Powell v. Kechnie*, 19 N. W. Rep. 410; garnishment of the carrier by creditors of vendee, no defense to action of replevin of vendor. *Chicago, B. & Q. R. Co. v. Painter*, 19 N. W. Rep. 488.

signor's claim, and purpose to execute his right, (1 Pars. Cont. 596,) is requisite to entitle the vendor to exercise this right. The finding of facts of the court below, show "that defendants in error demanded possession of the goods of Rucker while he held them, and before action brought." There is no finding of any notice of their claim or purpose to execute their right of stoppage *in transitu*. Again, the right of stoppage in transit is not a rescinding of the sale, but merely an extension of the common-law lien of the vendor, (Rowley v. Bigelow, 12 Pick. 307; Newhall v. Vargas, 15 M. 315; Rogers v. Thomas, 20 Conn. 53;) and hence until this lien is put in force and operation, the property is in the vendee, (in this case, L. E. Conner & Co. ;) Rucker, holding the same on an execution issued against Conner & Co., is rightfully in possession; and the court erred in finding for the plaintiffs below.

The sixth finding of fact by the court below is "that no payment or tender of the freight charges were made to Rucker before the bringing of this action." The seventh finding is "that said Rucker paid the freight charges on said goods, to the amount of \$13.60." Now, we submit that Rucker, being lawfully in possession of the goods under an execution against the vendees, is entitled to the same protection as the carriers of the goods from which he took them; and there is and can be no question but that the carrier would be entitled to hold the goods until their claim for freight was satisfied, even though the stoppage *in transitu* was perfected. Oppenheim v. Russell, 3 Bos. & P. 42.

*254 An action will not lie in replevin to enforce a *lien*. *Defendants in error to authorize them to recover possession of chattels by virtue of their right of stoppage *in transitu*, must give notice of their claim, and of their purpose to exercise their right. A mere demand for the possession from one lawfully holding possession is insufficient; and there can be no question but that Rucker did have right to hold the goods against all parties, until the vendors acted upon and exercised their right of stoppage *in transitu*. And Rucker, holding the chattels by virtue of a valid execution against Conner & Co., who were the owners of the same against all the world excepting the lien of the right of stoppage *in transitu* by the vendors, and having paid the freight from St. Louis to Fort Scott, was entitled in any event to repayment, or tender of payment, before delivering up the goods. He had the same rights as the carriers themselves; and it is not sufficient to say that the court allowed a diminution of the judgment rendered to the amount of the freight. Rucker was entitled to the payment to him of the freight before being subjected to a suit at law.

C. O. French, for defendants in error.

BREWER, J. This was an action of replevin brought by defendants in error in the district court of Bourbon county. The testimony is

not in the record, and the case is before us on the pleadings, the findings, and judgment. The petition alleges an absolute ownership. The findings show that the goods were in the possession of Rucker as constable by virtue of proper and legal process against the firm of L. E. Conner & Co. Plaintiff's title was based upon an attempted exercise of the right of stoppage *in transitu*. The findings are that plaintiffs, at St. Louis, sold the goods to Conner & Co., and shipped them to Fort Scott; that Conner & Co. were then insolvent, and that this insolvency was unknown to plaintiffs; that the goods never came into the possession of Conner & Co., but were taken by the constable from the carrier by virtue of his process; and that the constable paid the freight charges, and also that plaintiffs demanded possession of the goods from the constable before suit, and while they were in his possession, but did not pay or tender the freight charges. These are all the facts upon which the court based its conclusions of title and right of possession in the plaintiffs. The first finding shows a passage of the title from plaintiffs to Conner & Co.; and a reinvestment in plaintiffs of title and right of possession is claimed only by virtue of an exercise of the right of stoppage *in transitu*. Now, the mere insolvency of the vendee does not of itself amount to a stoppage *in transitu*; there must be some act on the part of the vendor indicative of his intention to repossess himself of the goods. 1 Pars. Cont. 478; 2 Kent, Comm. 548, and cases cited in notes. Actual seizure of the goods before they come into the hands of the vendee is not essential. A demand of the carrier, or notice to him to stop the goods, or a claim and endeavor to get the possession, is sufficient. No particular form of notice and demand is required. See same authorities. This right can be exercised only during the transit, and before delivery, actual or constructive, to the vendee. But a seizure by an officer under legal process in favor of some other creditor does not destroy the right. *Smith v. Goss*, 1 Camp. N. P. 282; *Buckley v. Furniss*, 15 Wend. 137; *Aguirre v. Parmelee*, 22 Conn. 473; *Wood v. Yeatman*, 15 B. Mon. 270. Demand must be made of the party in possession. It is not sufficient to make demand of the vendee. *Whitehead v. Anderson*, 9 Mees. & W. 519; *Mottram v. Heyer*, 5 Denio, 629.

Applying these rules to the facts of this case, and it appears that the transit had not ended. The goods were in possession of an officer holding legal process in favor of another creditor. Demand was made of the party in actual possession. It would seem, therefore, that the right of stoppage *in transitu* was not gone, and that the plaintiffs took the necessary steps to assert that right. But it is insisted by counsel that this stoppage *in transitu* is simply the exercise of a lien by the seller, and not a rescission of the sale; that the petition alleges absolute ownership, while the findings only show the existence of a lien,—a variance that is fatal to the action. It must be conceded that the great weight of authority supports the claim of

counsel in reference to the nature of stoppage *in transitu*, though there is far from absolute unanimity on the question. But it does not appear that any objection was made to proof of this kind of interest in the property under the general allegation of ownership. No motion for a new trial was made, nor does it appear that the attention of the district court was called to this variance, and it is one of those discrepancies which, under almost any circumstances, might properly be corrected at the trial by an amendment of the petition. As it does not appear by exception or otherwise that the findings are against the evidence, we could not order a new trial, but must direct the judgment that ought to be entered. It does not seem to us, therefore, that we ought to disturb the judgment upon that ground.

One question more remains for consideration. The constable paid the freight charges when he took possession of the goods from the carrier. These charges were neither paid nor tendered to him before this suit was commenced. Who, then, had the right of possession at that time? Clearly the officer. The lien for charges was prior to the claims of creditors, or the rights of the vendor. 2 Kent, Comm. 541; *Oppenheim v. Russell*, 3 Bos. & P. 42. The carrier's possession could not be disturbed until they were paid. The officer was justified in paying them, and, having paid them, was substituted to all the rights of the carrier. Before his possession, then, could be disturbed, he must be reimbursed the money by him thus advanced. Now, the gist of the action of replevin is the right of possession. *Town of Leroy v. McConnell*, 8 Kan. *273. Of course, questions of title may also arise, but the action can never be maintained against any one having the right of possession. The constable, having the right of possession, was entitled to judgment. He should not be subject to the expenses of a litigation which was not rightfully commenced.

*257 The law will protect the possession in him until *these charges are paid. Having retained the property, the value of this possession need not and could not properly be determined, nor could any judgment be rendered for the return of the property, or the recovery of the value thereof, or the value of the possession. All that could properly be done was to render a judgment in his favor for costs. Such a judgment, upon this ground alone, we are compelled to direct the district court to enter, and the case will be remanded for that purpose.

We have in this opinion discussed questions other than the one necessary to be considered, in order that there might be no dispute hereafter as to the matters decided and disposed of between these parties by this case.

(All the justices concurring.)

RICHARD WILLIS and another v. FRANK SPROULE and another.¹

July Term, 1874.

1. **Evidence: Objections to.** An objection to evidence should be specific, and should designate the ground upon which the objection is founded. [Long v. Kasebeer, 28 Kan. 240; Humphrey v. Collins, 23 Kan. 550.]
2. **Roads and Highways: Records of Board: Evidence.** Whenever the records and files of the board of county commissioners, purporting to establish a county road, are regular in form, and contain everything which the statutes require to be preserved and kept in such cases, such records and files will prove, *prima facie* at least, that such road has been legally established, and has a legal existence; and there is no necessity, in the first instance, to resort to evidence *aliunde* to prove the legal existence of the road.
3. ———: **Notices of Petition for, and of Viewing.** In 1870 it was not necessary that the notices required to be given under sections 3 and 4 of the road law (chapter 89, Gen. St. 1868) should be preserved, or that any record should be made of them.
4. ———: **Petitioners: Qualifications.** While it is necessary that the petition for laying out a road should be signed by at least twelve householders, yet it is not necessary, in order to make the road valid, that
 *258 the *petition itself should show upon its face that all or any of said signers are householders. The statute does not require anything of that kind. [County of Wabaunsee v. Muhlenbocker, 18 Kan. 132.]
5. ———: **Appointment of Viewers.** Where the order of the county board appointing the road viewers is substantially in compliance with the statutes, the order is sufficient.
6. ———: **Width of: Report of Viewers.** Where the viewers neglected to report upon the width of the road, as required by section 31 of the road law, (chapter 89, Gen. St.) and the road was afterwards established, *held*, that under said section 31 the road will be forty feet wide.

¹Where neither upon the papers nor the proceedings of the county board does affirmatively appear that at least twelve of the petitioners were householders, resident in the vicinity of the proposed road, and the proceedings are attacked directly by petition in error, the defect is fatal, and the proceedings must be set aside as void. When attacked collaterally, the fact that such petitioners are qualified householders may be shown by testimony *aliunde* the record. *Oliphant v. County of Atchison*, 18 Kan. 886. See *St. Louis & S. F. Ry. Co. v. Mossman*, 30 Kan. 340; *S. C. 2 Pac. Rep. 146*. The statute does not require that proof of the posting and publication of the notice prescribed in section 3, c. 108, Laws 1874, (*Dassler, Comp. Laws 1885*, p. 804, § 3,) shall be filed or entered of record on the journal of the commissioners. Therefore, if the commissioners cause a record of the notice to be entered on their journal by the county clerk in conformity with the statute, and the records and files contain everything which the statute requires to be preserved and kept in such a case, they will prove, *prima facie* at least, that the order laying out or vacating a public road is legal and valid. *Crawford v. County of Elk*, 32 Kan. 555; *S. C. 4 Pac. Rep. 1011*. The notice required by said section is so far jurisdictional, that, if not given as prescribed by the statute, the board of commissioners has no authority to vacate a road. *Troy v. County of Doniphan*, 32 Kan. 507; *S. C. 4 Pac. Rep. 1009*. See *County of Leavenworth v. Epsen*, 13 Kan. *581, and note.

7. —: **Viewers: Qualifications and Report.** The viewers made their report in writing, putting in everything required by the statute except the width of the road, and then signed the same. Immediately following their signatures are the following words, to-wit: "Qualified by James F. Foreman, County Surveyor;" and then follows the surveyor's return, which includes the map and field-notes of the survey of the proposed road. The road was afterwards established by the board of county commissioners, and the court below, upon all the evidence, rendered its decision that the road was legally established, and was valid. *Held*, that the supreme court cannot now determine from said words alone that said road was not legally established, or is invalid.
8. —: **Award of Damages.** The road viewers made no separate report of the amount of the damages which they allowed, as required by section 7 of the road law; but the report of damages was made by amending the original report, by adding the words, "and we awarded Ole Clemenson \$25 damages, no other parties claiming any;" and this amendment was made by two of the commissioners only. *Held*, that this was a great irregularity; but after the road has been established, it cannot be held invalid in a collateral proceeding merely on account of such irregularity.
9. **Officers: Officer de Facto: Evidence: Removing Obstruction in Road.** Where a person is sued for an act done by him for the doing of which he justifies as an officer, he may always, in the first instance, show, by the introduction of parol evidence, that he was at the time of the commission of the act complained of such officer *de facto*, for such evidence is *prima facie* evidence that he was such officer *de jure*. But even if it were error in this case to admit such evidence, still the error would be immaterial, for the act done was the removal of an obstruction from a road so that the road could be traveled, and this any person had a right to do, whether he was an officer or not.
10. **Roads and Highways: Records: Commissioners: Judicial Nature of Proceedings.** The greater portion of the proceedings of county commissioners in the establishment of county roads is judicial in its nature, and whenever the commissioners act in a judicial or *quasi* judicial capacity, their proceedings are entitled to about the same respect from superior courts and elsewhere as the proceedings of other tribunals of special, limited, and inferior jurisdiction. But even where their acts are ministerial, still, while superior courts should rule strictly, so as to keep them within the strict limits of their jurisdiction, yet such courts should rule liberally in other respects, so as not to invalidate their proceedings for immaterial irregularities.

Error from Doniphan District Court.

Trespass, brought by Willis and another against Frank Sproule and Thomas L. Chilton, for tearing down their fence. The defendants admitted the alleged acts of trespass, and set up in their answer that the place where the alleged trespass was committed was a public highway; that the defendant Sproule was overseer of highways; and that he took to his assistance the defendant Chilton, and removed the obstructions across said highway, which was a fence joining the farms of plaintiffs. The action was commenced before a justice of the peace; was certified to the district court, where it was tried at the March term, 1873. On the trial the plaintiffs showed their pos-

session of the land, and made proof of their damages, which were nominal only. The defendants, on their part, offered in evidence a petition on file in the office of the county clerk, signed by more than twelve persons claiming to be "legal voters," praying for a road to be laid out where these acts of alleged trespass were committed; to the introduction of which paper the plaintiffs excepted, but the same was admitted. The defendants offered in evidence the record of the county board, appointing commissioners to view and report on the practicability of the road, which record was admitted against the objections of the plaintiffs. The plaintiffs then offered in evidence the records of the county board which contained the report of the viewers, and the field-notes; also the record of the board of commissioners establishing the road,—all of which evidence was admitted against the objections of the plaintiff. Sproule also testified that he was overseer of highways in the district, and as such overseer opened the road on plaintiffs' land, where it had been fenced in 1870. Plaintiffs offered to prove in rebuttal, by one of the viewers, that there was nothing in their report when filed upon the subject of damages; and that two of the viewers, several days after the report had been *260 filed with the county clerk, added to it an *award of damages to Ole Clemenson, which offered testimony was excluded. Finding and judgment in favor of the defendants.

Albert Perry and N. B. Wood, for plaintiffs.

The court erred in admitting the petition for a road, because it does not purport to be signed by *householders*, as required by section 1, c. 89, Gen. St. 897. No proof was made that the signers were householders; without such proof, the paper was inadmissible. *Williams v. Holmes*, 2 Wis. 129; *Harrington v. People*, 6 Barb. 607; *Daveiss v. County Court*, 1 Bibb, 514.

The record appointing the viewers was inadmissible because it did not direct the viewers to view and lay out the road, and report as required by section 6 of the road law, but to report whether the ground was fit for a road,—*"practicable."* The report of the viewers was also inadmissible because it did not report upon the question of the utility of the road,—the public necessity. They were a jury to determine the necessity of the road. Section 6, Road Law. There must have been such necessity before the property of the plaintiffs could be taken for the highway. *County of Leavenworth v. Miller*, 7 Kan. *527; *In re Wells Co. Road*, 7 Ohio St. 21; *Daveiss v. County Court*, 1 Bibb, 514; *Winston v. Waggoner*, 5 J. J. Marsh, 41. It was also inadmissible because the viewers did not determine and report the width, as required by section 31 of the road law; and without such determination the proceedings are void. *Shamokin Road*, 6 Bin. 36; *Road Case*, 4 Watts & S. 39; *Beardslee v. French*, 7 Conn. 125; *Taylor v. Lucas*, 8 Blackf. 289; *In re Road in Norriton*, 4 Pa. St. 337; *Com. v. Coombs*, 2 Mass. 491; *Christ's Church v. Woodward*, 26 Me. 178, 181. An order could not be made to open a road

until its width had been established. Middle Creek Road, 9 Pa. St. 69.

The report of the viewers was a nullity because the viewers did not take an oath as required by section 5 of the road law. The report says that they were "qualified by James Foreman, county surveyor;" but he was not authorized to administer an oath to them. The statute authorizes him to administer an oath to a chain-carrier, (Gen. St. 289, §§ 157, 167,) and it nowhere authorized to administer oaths generally. The viewers, then, were not sworn. Without being sworn, *their proceedings were void. Fisher v. Allen, 8 *261 N. J. Law, 301; Bryson's Road, 2 Pen. & W. 207; State v. Barnes, 13 N. J. Law, 268; Keenan v. Commissioners' Court, 26 Ala. 568; Fisher v. Smith, 5 Leigh, 611; Hoagland v. Culvert, 20 N. J. Law, 387; Colvert v. Whittington, 11 Ired. 278; In re Road in Norriton, 4 Pa. St. 337; Winston v. Waggoner, 5 J. J. Marsh, 41; In re Wells Co. Road, 7 Ohio St. 21; Com. v. Coombs, 2 Mass. 491; Pollard v. Ferguson, 1 Litt. 197; Daveiss v. County Court, 1 Bibb, 514; Breckenridge v. Ward, 1 T. B. Mon. 58.

There was no separate report made upon the question of damages, as required by the road law; at least the plaintiffs offered to show such to be the fact. Gen. St. 900, § 7.

No notice was given of the presentation of the petition to the county board or of the meeting of the viewers. Section 3, Road Law. Without such notice the proceedings are void. Case v. Myers, 6 Dana, 330; State v. Van Geison, 15 N. J. Law, 339; Manning v. Williams, 2 Mich. 106; Com. v. Coombs, 2 Mass. 492; Harlow v. Pike, 3 Me. 438.

To constitute this a highway there must have been, according to the weight of authorities, a strict compliance with the statute, or, according to other authorities, a substantial compliance with the statute. There was neither. Hull v. County of Marshall, 12 Iowa, 155; County of Shawnee v. Carter, 2 Kan. *116; Dill. Mun. Corp. 470; In re Lind v. Clemens, 44 Mo. 540; Soulard v. Peck, 49 Mo. 479; Trumpler v. Bemerly, 39 Cal. 490; Lockwood v. Lockwood, 22 Conn. 426; People v. Village of Brighton, 20 Mich. 57; In re Wells Co. Road, 7 Ohio St. 21; Stockett v. Nicholson, Walk. 75; Glover v. City of Boston, 14 Gray, 288.

It was error in the court to permit the overseer to prove that he was such officer by his own oath. It was not the best evidence. It should have been shown that he had qualified by taking the oath and giving bond. Gen. St. 1085, 1086; State v. Hageman, 13 N. J. Law, 314.

Nathan Price and W. D. Webb, for defendants.

The question as to the admissibility of the various papers, records, evidence, etc., offered in evidence by the defendants, were general, and not special, except the objection to proving by parol that Sproule was overseer of highways. The attention of the court or

counsel was not called by said objections, or any of them, to any particular alleged defect in the records. For instance, the objection that the viewers did not take the oath required by law was first suggested on the argument of the motion for a new trial, (which was long after the trial of the action,) and it does not appear in *262 the transcript. The court below did not pass upon it. How, then, can the plaintiffs avail themselves of it, even if it has any merit? *State v. Jones*, 7 Nev. 408, 415; *Sharon v. Minnock*, 6 Nev. 377; *Leet v. Wilson*, 24 Cal. 398; *Dreux v. Domes*, 18 Cal. 83; *Waters v. Gilbert*, 2 Cush. 27; *Jackson v. Cadwell*, 1 Cow. 622; *Whiteside v. Jackson*, 1 Wend. 418; *Luke v. Johnnycake*, 9 Kan. *511. If it was necessary to offer any additional evidence to make the records offered admissible,—if the attention of the court or counsel had been called to it in the court below,—it might perhaps have been remedied. There might have been further and additional qualifications of the viewers on file in the office of the county clerk, which might have been produced if attention had been called to the fact that there was an *appearance* of qualification before the surveyor. But if the viewers should have been qualified before some other officer, and were not, (and still they may have been,) nevertheless, they were viewers *de facto*, and their proceedings cannot be attacked collaterally.

It was proper, but not necessary, for the defendants to prove that the signers of the petition were householders of the county, and resided in the vicinity where the road was to be laid out. *Gen. St. 897, c. 89, § 1*; *Williams v. Holmes*, 2 Wis. 129. The plaintiffs, however, objected to defendants making this proof, and cannot now be heard to complain because it was not done.

This was an action of trespass against the road overseer and his servant, and is a collateral, and not a direct, attack upon the proceedings of the commissioners. It appears from the records offered and received in evidence that the "report, survey, and plat" had been recorded, and, for the purposes of this action at least, said road must be "considered a public highway." Chapter 89, § 6, p. 901, *Gen. St.*; *Harrow v. State*, 1 G. Greene, 439. This entire case is really covered by *Beebe v. Scheidt*, 13 Ohio St. 406. Our road statute is taken from the Ohio statute therein referred to, and that decision is part of the law of this state. *Stebbins v. Guthrie*, 4 Kan. *353. See, also, *Anderson v. County of Hamilton*, 12 Ohio St. 642, and *Tomlinson v. Wallace*, 16 Wis. 224.

The road was at least 40 feet wide. Section 31, p. 907, *Gen. St. 1868*. It was in the discretion of the commissioners *to establish the width of the road, but in this case the statute makes it at least 40 feet; and unless the commissioners make a different width, 40 feet will be the established width by law.

Any person who wishes to use a highway which is unlawfully obstructed, may remove such obstruction, whether he be an officer or not. *Williams v. Fink*, 18 Wis. 265.

It was not necessary that record evidence should be offered to show that defendant Sproule was overseer of highways. If he was acting in that capacity, it was sufficient. Besides, in the answer it is alleged that he is such overseer, and it is not denied under oath. Code, § 108.

VALENTINE, J. This was an action in the nature of trespass *quare clausum fregit*; but the real question in litigation was whether a certain supposed county road had any legal existence or not. If the road was legally established, or if it was established in such a manner that it had any legal existence, then there was no trespass; but if the road was wholly void, then the alleged trespass was actually committed. The question of the legal existence of said road arose upon a motion for a new trial. The court below found that the road was legally established, and had a legal existence. Now, if this finding was sustained by sufficient evidence, then the motion for the new trial was rightfully overruled; but if it was not sustained by sufficient evidence, then the court below erred in overruling said motion. The question, as it comes to us, is whether the evidence is sufficient to show, *prima facie*, that the road was legally established. Many other questions were raised in the court below, but they can hardly be considered as being involved in the case, as the case is presented to this court. Many objections were made by the plaintiffs below (plaintiffs in error) to the introduction of certain portions of the evidence, but the objections, with one exception, were too general to be available. The objections were made without giving any reasons therefor.

This was not sufficient. *Luke v. Johnnycake*, 9 Kan. *511, *264 *518; *Simpson v. Kimberlin*, 12 Kan. *579; and also cases cited in defendants' brief. The objections should have been specific, and should have designated the grounds upon which the objection was founded. Another question was raised by the plaintiffs by excepting to the exclusion of certain evidence offered by themselves. All of these questions necessary to be considered will be considered in their proper order.

After a careful consideration of the question, we have come to the conclusion that whenever the records and files of the board of county commissioners purporting to establish a county road are regular in form, and contain everything which the statutes require to be preserved and kept in such cases, such records and files will prove, *prima facie* at least, that such road has been legally established, and has a legal existence, and therefore that there is no necessity, in the first instance, to resort to evidence *aliunde* to prove the legal existence of the road. Such ought to be the law, and especially so where the existence of the road is attacked collaterally, as in this case. The strongest reasons, and some very high authority, sustain this view of the law. *Anderson v. County of Hamilton*, 12 Ohio St. 635, 642;

Beebe v. Scheidt, 13 Ohio St. 406, 418. If such were not the law, it would be dangerous for any man to travel a road against the wishes of the owner of the land. The records of the county would be no protection to him, and he might be unable to procure evidence *aliunde* to show that the road had ever been legally established. And to show that the road had been legally established in one suit, would be no evidence of such fact in another suit instituted against some other person, or even against himself for some other supposed trespass. Of course we do not wish to be understood as deciding that the records of the county commissioners are more than *prima facie* evidence of the establishment of the road; for we suppose that generally, if not always, jurisdictional facts may be proved or disproved by evidence *aliunde*, for the purpose of sustaining or invalidating the proceedings of a tribunal of special and limited jurisdiction, such as the *265 board of county *commissioners is. In the present case, everything necessary for the establishment of said road seems to have been preserved, and the proceedings for the establishment of the road seem to be sufficiently regular to make the same valid.

It is true, the notices required to be given under sections 3 and 4 of the road law (chapter 89, Gen. St. p. 898) do not seem to have been preserved; but it was not necessary, under the law as it then existed, (1870,) that said notices should have been preserved, or that any record should have been made of them. It is otherwise now. Laws 1874, pp. 165, 166, §§ 3, 4. Besides, one of the plaintiffs petitioned for said road, and, instead of receiving a notice from some one else, should have given the notices to others, (section 4, Road Law;) and the other plaintiff made a voluntary appearance through counsel, and probably he did not need any notice. With regard to the notices required to be given under section 3 of the road law, it is provided that "on the petition being presented and the commissioners SATISFIED that notice has been given as aforesaid, they shall appoint three disinterested householders of the county as viewers," etc. From this it seems that the commissioners must examine and determine for themselves whether said notices were given or not; that is, before they proceed further they must be "satisfied" that said notices were given, and in becoming satisfied that said notices were given they act in a *quasi* judicial capacity; (*Anderson v. County of Hamilton, supra*; *Beebe v. Scheidt, supra*; *Stone v. City of Augusta*, 46 Me. 127;) and their determination upon the matter, whatever it may be, is at least *prima facie* evidence of the truth of their findings. With regard to the notice required to be given under section 4 of the road laws, see the case of *County of Leavenworth v. Epsen*, 12 Kan. *531, and cases there cited.

While it is necessary that the petition for laying out a road should be signed by at least twelve householders, yet it is not absolutely necessary, in order to make the road valid, that the *petition itself*

should show upon its face that all or any of said signers are householders. The statutes do not require anything of that kind.

*266 *The order of the county board appointing the road viewers was substantially in compliance with the statutes; and such a compliance, we think, is really all that is necessary. While superior courts should rule strictly, so as to keep inferior tribunals within their proper jurisdiction, yet superior courts should rule liberally with regard to the language used by inferior tribunals, and with regard to the mere form of their proceedings. *Beebe v. Scheidt, supra*. Besides, if said order were considered really irregular, still mere irregularities could not be taken advantage of in this collateral way.

The viewers did not report upon the width of the road, as required by section 31 of the road law. Gen. St. 907. The road will therefore, under said section 31, be forty feet wide. This failure to determine upon the width of the road will not invalidate the road.

Section 5 of the road law (chapter 89, Gen. St. 899) requires that the viewers shall, before they proceed to view the proposed road, take an oath to faithfully and impartially discharge their duties; but the statute does not anywhere require that this oath shall be preserved, or that any record shall be made of it. Now, whether the want of an oath on the part of the viewers would invalidate the road when attacked collaterally, as in this case, may be questioned. The cases referred to by plaintiffs are all, or nearly all, where the validity of the proceedings in establishing the road are attacked in a direct proceeding,—such as *certiorari*, appeal, petition in error, *supersedeas*, etc., and hence such cases do not apply in this case. But we do not think that it appears in this case that no oath was taken. The viewers make their report in writing, putting in everything required by the statute except the width of the road, and then sign the same. Immediately following their signatures are the following words, to-wit: "Qualified by James F. Foreman, county surveyor." And then follows the surveyor's return, which includes the map and field-notes of the survey of the proposed road. Now, whether the commis-

*267 sion*ers were qualified to their report, or to something else, by the county surveyor, does not appear; or whether it was the report itself that was qualified, (that is, limited, modified, varied,) by adding on the surveyor's return, is left unexplained. It is certain, however, that these words alone cannot now prove to this court, against all the presumptions in favor of the regularity of the proceedings of the viewers and of the county board, and against all the presumptions in favor of the findings of the court below, that said viewers were not sworn before they commenced to view and lay out said road, or that they were not sworn by a proper officer, or that the road was not legally established, or that it is now invalid. The law does not require that the viewers should be sworn to their report, nor does it require that they should be "qualified" to the same.

There was no separate report by the viewers, under section 7 of the road law, (Gen. St. 900,) as to the amount of damages which they allowed. But the report of damages was made by amending the original report by adding the following words, to-wit: "And we awarded Ole Clemenson \$25 damages, no other parties claiming any;" and this amendment was made by two of the commissioners only. This was a great irregularity, but it was only an irregularity. It did not invalidate the proceedings. The whole report, including the amendment, was made within the proper time. It was then acted on by the county commissioners. The county commissioners established the road. The commissioners had jurisdiction of the subject-matter of the proceedings. Their determination was in the nature of a judicial determination, and cannot be attacked collaterally for mere irregularities. The statute provides that "it shall be the duty of the commissioners, on receiving the report of the viewers aforesaid, to cause the same to be read before their meeting, and, if no legal objection shall be made to said report, or sustained by a majority of said board of commissioners, and they are satisfied that such road will be of public utility, and the report of the viewers being favorable *268 thereto, they shall cause said report, survey, and plat to be recorded, and from thenceforth said road shall be considered a public highway." Gen. St. 900, § 6.

The plaintiff objected to parol evidence being introduced to show that the defendant Sproule was road overseer, "on the ground that if he was such officer there should be record evidence of the same." The objection was rightfully overruled. *Prell v. McDonald*, 7 Kan. *426, *444, *445. It is certainly the rule that when a person is sued for an act done by himself, for the doing of which he justifies as an officer, he may always, in the first instance, show, by the introduction of parol evidence, that he was, at the time of the commission of the act complained of, such officer *de facto*; for such evidence is *prima facie* evidence that he was such officer *de jure*. But even if it were error in this case to admit such evidence, still the error would be immaterial; for the act done was the removal of an obstruction from a road so that the road could be traveled, and this any person had a right to do whether he was an officer or not.

We have had considerable trouble with road cases. It would seem that no road can be established without some irregularities intervening; and if mere irregularities in the establishment of a road will invalidate the same, then nearly every person who travels upon a supposed road without the consent of the owner of the land, express or implied, commits a trespass for which he might be made to answer in damages. We have therefore considered very carefully the question as to how irregularities committed by county commissioners and other inferior tribunals should be considered by superior courts. Now, much that comes within the scope and jurisdiction of county commissioners is judicial in its nature. Indeed, the greater portion of the

proceedings of county commissioners in the establishment of county roads is judicial in its nature; and whenever the commissioners act in a judicial, or *quasi* judicial, capacity, their proceedings are entitled to about the same respect from superior courts and elsewhere *269 as the proceedings *of other tribunals of special, limited, and inferior jurisdiction. That is, when inferior tribunals go beyond their jurisdiction, their proceedings are void; but while they keep within the strict limits of their jurisdiction, their proceedings are valid, notwithstanding irregularities may intervene. Much, however, that comes before county commissioners is ministerial in its nature. Then, how are their proceedings, when they act ministerially, to be considered? Much the same, we think, as when they act judicially, except that when they act ministerially irregularities will sometimes invalidate their proceedings. We think the true rule will be found to be, even in such cases, that while superior courts should rule strictly, so as to keep inferior tribunals within the strict limits of their jurisdiction, yet they should rule liberally in other respects, so as not to invalidate the proceedings of such inferior tribunals for mere irregularities. Even with a liberal ruling, the proceedings of inferior tribunals, where they act ministerially, would often have to be considered invalid. But with as strict a ruling as the plaintiff in error contends for, probably nearly every road in the state would have to be declared invalid.

The judgment of the court below is affirmed.
(All the justices concurring.)

ALEXANDER H. AYRES v. LITTLETON S. CRUM.

July Term, 1874.

Justices' Courts: New Trial: Review in District Court. Where an action has been tried before a justice of the peace, and a judgment rendered for the plaintiff, and no motion made for a new trial, the district court cannot, upon a petition in error, re-examine the evidence introduced on the trial before the justice for the purpose of determining whether the judgment rendered by the justice is sustained by sufficient evidence or not. [Rice v. Harvey, 19 Kan. 149; Typer v. Sooy, Id. 599; Greenwell v. Greenwell, 28 Kan. 413.]

Error from Labette district court.

The case is stated in the opinion.

*270 *Ayers & Fox, for plaintiff in error.

Crum's claim was for services rendered by him as deputy-sheriff, and he could only recover his fees by statute as deputy-sheriff, and the claim recovered is a mere extortion. But the services actually rendered were in serving papers in a case in which plaintiff in error was not a party, but only an attorney. Hence he was not lia-

ble. But there was no proof that the charge of \$12 "for four days' service" was grounded on fact, necessity, or reason; but it is on its face a mere invention, for use in a home court.

Upon the proof, it consisted of a single uncontroverted sentence of the plaintiff below, that defendant below said to him, either upon the *delivery* or the *return* of the papers: "I will see you paid." As matter of law, this does not show a promise *before* the service. Crum, the party charged by law with knowledge, could not, on his oath, say that the promise was before the services. Is he to ask the court to say so? He dare only say that it was on the *return*, and is he to ask the court to say more? The court can neither furnish fact nor conscience. It declares the law. Now, the promise not being shown to have been *before* the service, it is a nude pact at common law, independent of the statutes of frauds.

The promise proven was made by one of the attorneys through whom the costs and expenses of the action were to be adjusted. The expression proven is, upon its face, that of a surety to a principal debtor, and a promise to answer for the debt of the parties. The debt against the client subsisted. There was no agreement to accept the attorneys, or release the clients, even had the promise been made before the service.

F. A. Bettis, for defendant in error.

There is no force in the first assignment of error,—that "as *271 plaintiff in error was a member of a firm, and the cause of action was the contract of the firm, judgment should have been given against Ayres for half only." The statute makes all contracts several. Gen. St. c. 21, § 1.

The second assignment of error is "that the plaintiff did not prove a *prima facie* case before the justice." So much of the evidence as appears to have been preserved (although irregular) certainly proves the cause of action as alleged. It is true that when the services were performed Crum was a deputy-sheriff, but the law does not therefore preclude him from the transaction of private business; and the bill of exceptions before the justice does not establish that he performed the services as deputy-sheriff.

The so-called bill of exception taken before the justice is of no force in this proceeding. The exception shown was made to the final judgment of the justice. Where there is a trial by jury in a justice's court, exceptions may be taken to the rulings of the justice *during* the trial. Justices' Act, § 212. No exception is necessary or warranted to a final judgment. *Lender v. Caldwell*, 4 Kan. *339. And hence, for all practical purposes, an exception to a final judgment is inoperative. The evidence can only be saved by bill of exceptions.

The only manner in which the objection that the evidence does not support the verdict can be made available is by a motion for a new trial, and on exception, if the court should overrule the motion. From frequent decisions this has become axiomatic in Kansas. No

motion for a new trial was made before the justice, nor would the justice have been authorized by law to entertain such motion. There is no jury, and it is only upon the *verdict* of a jury that a motion for a new trial can be made in that court. Laws 1869, c. 60. And the reason is obvious. To render such a motion intelligible, where the cause was tried by the court, the justice must have made written findings of fact and law, as in the district court. This would be asking too much of justices of the peace, who are usually men unlearned in the law, and its practical operation would be the reversal of *272 the major part *of the judgments of such inferior courts upon purely technical grounds.

The law gives no method of bringing the questions at bar from justices' courts to the district court except by appeal. Such is the evident intent of the statute, and a common-sense view of the matter, and such are the decisions in Iowa and Illinois, and probably other states. Taylor v. Rockwell, 10 Iowa, 530; Swafford v. Dovenor, 1 Scam. 165; White v. Wiseman, Id. 169; Doe v. Spraggins, Id. 330; Hoppe v. Stone, 39 Mo. 378.

VALENTINE, J. This action was commenced originally in a justice's court. Judgment was there rendered in favor of the defendant in error, plaintiff in the justice's court, and against Ayres, the defendant in the justice's court. Ayres removed the case to the district court on petition in error, where the judgment of the justice was affirmed, and now, as plaintiff in error, Ayres brings the case to this court.

It is claimed that the district court erred in affirming the judgment of the justice; and it is also claimed that the justice erred in rendering the judgment he did upon the evidence introduced at the trial before him. That is, it is claimed that the evidence introduced at the trial is not sufficient, and does not sustain the judgment rendered by the justice. These are the only rulings of either court complained of. The trial in the justice's court was before the justice alone, and he found generally for the plaintiff and against the defendant, and rendered his judgment accordingly. The defendant (now plaintiff in error) excepted to the judgment, but did not ask the court to make special findings of either fact or law, and made no motion for a new trial. The exception to the judgment was the only manner in which the defendant raised any question as to the sufficiency of the evidence; and no question was raised in any form, or at any time, as to the relevancy or competency of any particular portion of the evidence. Under these circumstances is there anything for us to review?

We think not. This question has already been decided in this *273 court. Major v. Major, 2 Kan. *337, *338, **339. See, also, as having some application to this case, Taylor v. Rockwell, 10 Iowa, 530; Swafford v. Dovenor, 1 Scam. 165; White v. Wiseman, Id. 169; Doe v. Spraggins, Id. 330; Hoppe v. Stone, 39 Mo. 378.

When a case is tried before a justice of the peace upon the evidence, it is tried in the same manner as it would be tried if it were tried before a jury, and the findings of the justice are entitled to the same respect as those of a jury. Therefore, where a case is tried before a justice, if the justice is bound to render just such a judgment as ought to be rendered upon the evidence, whatever his findings of fact might be, then, where a case is tried before a jury, the court would also be bound to render just such a judgment as ought to be rendered upon the evidence, whatever the findings of the jury might be; that is, the court would be bound to wholly ignore the findings of the jury, and to render the proper judgment upon the evidence. The court could not grant a new trial, in such a case, but would be bound to render a judgment, and to render just such a judgment as the evidence would warrant, whatever the findings of the jury might be. We cannot think that this is the law.

It is our opinion that no court can wholly ignore the findings of fact, whether made by court, referee, or jury; and no court can re-examine the evidence for the purpose of determining whether such findings are sustained by sufficient evidence, except for the purpose of granting a new trial. And therefore, if no new trial is asked for, no such re-examination can be had. If the re-examination of the evidence should be for the purpose of determining what the judgment should be, then the re-examination of the evidence would really be a re-trial of the case upon its merits; and where the case had been tried by a jury, it would be an infringement by the court upon the province of the jury.

We do not wish to be understood as deciding in this case that a new trial may be granted in a justice's court on the ground that the findings of the court or jury are not sustained by sufficient evidence; and neither do we wish to be *understood as deciding that a justice is bound to make special findings of fact when requested to do so by either party. It may be that no new trial can be granted in a justice's court for such a reason; and it may be that a justice is bound only to find generally for one or the other of the parties; and it may be that where such finding and the judgment are not sustained by sufficient evidence, the only remedy of the party aggrieved is by appeal. See *Taylor v. Rockwell*, 10 Iowa, 530. We certainly think he has no remedy by petition in error, if he has not even asked that a new trial should be granted, or that special findings should be made; and this is all that we now decide.

The judgment of the court below must be affirmed.

(All the justices concurring.)

STATE OF KANSAS v. GEORGE S. SMITH.¹

July Term, 1874.

1. **Embezzlement: County Treasurer.** Chapter 83 of the Laws of 1873, amending section 88 of the crimes act (chapter 31, Gen. St.) includes within its provisions a county treasurer as liable to the penalties for embezzlement.
4. ———: **Information: Description of Funds.** In an information against a county treasurer for embezzling public funds in the county treasury it is impossible and unnecessary to set forth the particular kind of funds embezzled, whether United States treasury notes or bank notes, or gold or silver.
3. **Preliminary Examination: Plea in Abatement: Variance.** Where the accused was charged before the examining magistrate with embezzling \$67,000 of the funds of the county of Leavenworth, and in the information was charged with embezzling \$67,378.42 belonging to divers designated funds in the treasury of the county of Leavenworth, and a special plea was interposed that the defendant did not have a preliminary examination as to the embezzlement of any money or other thing belonging to any other person than the county of Leavenworth, nor did he waive his right to such examination, *held*, that there was no error in *275 ruling upon these facts that the plea was not a bar to the further prosecution of the action under the information.
4. **Instruction: Questions of Law and Questions of Fact.** An instruction that asserts that "when it has been established that the funds or property has reached the hands of the officer, and that the same was not forthcoming when properly or legally demanded, the law presumes an illegal conversion of such funds or property, and the burden of proving the legal use of such property or money is upon the officer," is erroneous in this: that it declares that the law presumes a conclusion that is exclusively within the province of the jury.

Appeal from Atchison district court.

¹An information which, in one count, charges the defendant with embezzling certain property received by him as the "agent, servant, employe, and bailee" of the owner, is not objectionable on the ground that it charges two separate and distinct crimes, *State v. Lillie*, 21 Kan. 728; indictment that accuses that accused was "intrusted as bailee" with property converted, is sufficient, *People v. Hill*, 8 Pac. Rep. 75; information charging offense in language of statute, *People v. Tomlinson*, 5 Pac. Rep. 509; what constitutes embezzlement of public moneys, *People v. Gray*, 5 Pac. Rep. 240; indictment must allege that the act was without consent of owner, *State v. Mims*, 2 N. W. Rep. 492; failure to pay over to proper officer money in his hands is *prima facie* evidence against treasurer, *State v. Mims*, 2 N. W. Rep. 683; malicious prosecution—effect of conviction, *Bowman v. Brown*, 8 N. W. Rep. 609; postmaster improperly using public funds may be indicted for embezzlement, *U. S. v. Adams*, 9 N. W. Rep. 718; sufficiency of indictment of county treasurer—excluding juror for insufficient knowledge of English language, *State v. Ring*, 11 N. W. Rep. 288; embezzlement, when not a felony, *People v. Parkhurst*, 12 N. W. Rep. 894; county treasurer may impeach settlements to prove that default was more than three years before suit, *State v. Hutchinson*, 15 N. W. Rep. 286; is sent to convert—question for jury, *People v. Galland*, 22 N. W. Rep. 81; indictment—instructions, *State v. Benton*, 22 N. W. Rep. 689; joint property, *State v. Kent*, 22 Minn. 41; neglect to pay over, *State v. Munich*, 22 Minn. 67; surplage in indictment—failure to allege demand—sufficient averment of official character—confession—time. proof of—demand, *Id.*

Information for embezzlement, filed by the county attorney of Leavenworth county in the criminal court of said county of Leavenworth, on the ninth of March, 1874. The information stated that the defendant Smith, was duly elected to the office of county treasurer of Leavenworth county in November, 1871, for the term of two years, commencing on the first Tuesday of July, 1872; that he duly qualified, and entered upon the discharge of the duties of said office, and held and occupied said office from the second of July, 1872, until the twenty-seventh of December, 1873, when he resigned, and was succeeded in office by George A. Eddy, who was duly appointed, and had qualified to fill the vacancy; "that while the said George S. Smith was acting as county treasurer of said county of Leavenworth as aforesaid, he, the said Smith, received, collected, and took into his possession, and under his care, in his official capacity, aforesaid, and by virtue of his office of treasurer of the county of Leavenworth, aforesaid, at different times, and from day to day, during the time from July 2, 1872, until December 27, 1873, many and various sums of money, state warrants, county warrants, township warrants, valuable securities, effects, and other vouchers for money, all of which were by him, the said Smith, received and collected as money, and are legally chargeable against him, as money; and the aggregate amount so collected and received by him, and that came into his possession, and under his care, by virtue of his office aforesaid, was \$564,460.66, and were of the value of \$564,460.66; that said money, war-
 *276 rants, valuable securities, effects, and vouchers *aforesaid, received and collected by the said Smith as aforesaid, were so collected as aforesaid by the said Smith for, and belonging to, and were the goods, chattels, and property of, the various persons, classes of persons, corporations, and purposes named and described below in the column marked 'A,' at the head thereof, and in the column below marked 'B,' at the head thereof, and opposite the names or description of each of said persons, classes of persons, corporations, and purposes is the amount of money, warrants, securities, effects, or vouchers so collected and received for and belonging to each of said persons, classes of persons, corporations, and purposes, respectively; and which said money, warrants, valuable securities, effects, and vouchers were received and collected by the said George S. Smith, and the same came into his possession and under his care, by virtue of his said office of treasurer, and were by the laws of the state of Kansas required to be collected and received by him, the said Smith, as treasurer of said county as aforesaid. And the said George S. Smith, of the moneys, warrants, valuable securities, and effects aforesaid, that had been collected and received by him as aforesaid, and that had come into his possession and under his care by virtue of his office of treasurer aforesaid, did, at the county of Leavenworth, in the state of Kansas, and within the jurisdiction of this court, on the twenty-seventh day of December, 1873, unlawfully, fraudulently, and

feloniously embezzle and convert to his own use the sum of \$67,378.42, and of the value of \$67,372.42, without the assent of the county of Leavenworth aforesaid, or of any of the persons, classes of persons, corporations, above mentioned, and named and described below in the column marked 'A,' at the head thereof, or of any person or persons whomsoever," etc.

The "column below" was an exhibit, divided into four columns. The first division was marked "A," under which was named and repeated the county, the state, the townships, and cities, and school-districts in Leavenworth county, and several railroad companies, and specifying the character of all the various funds coming into the treasurer's hands. In the division marked "B" was set forth (opposite the designations in column "A") the amount received by the defendant of each of said funds; in the division marked "C" was set forth the amount of each of said funds paid out or disbursed by the defendant; and in the division marked "D" was stated

*277 *the amount of each of said funds remaining unaccounted for. and which it was alleged the defendant had appropriated. The totals of the divisions were: "B," amount received, \$564,460.66; "C," amount disbursed, \$497,082.24; "D," amount due, \$67,378.42.

The information contained a second count, as follows: "And the said Luther M. Goddard, county attorney as aforesaid, prosecuting for and in behalf of said state of Kansas, in the name and by authority and on behalf of the said state of Kansas, now here, and in said criminal court of the county of Leavenworth, further information gives that the said George S. Smith, at the county of Leavenworth, in the state of Kansas, and within the jurisdiction of this court, on the twenty-seventh of December, 1873, was then and there an officer of the county of Leavenworth, in the state of Kansas, an incorporation duly organized, and existing under the laws of the state of Kansas, to-wit, the treasurer of said county, duly elected and qualified, and legally authorized and empowered, to perform all the duties of said office; and that the said George S. Smith, as such officer and treasurer of said county, was then and there intrusted, and did then and there have in his possession, and under his care, by virtue of his said office, certain public moneys, to-wit, the sum of \$67,378.42, of the property and effects of said county of Leavenworth, and of the value of \$67,378.42; and the said George S. Smith did then and there, unlawfully, fraudulently, and feloniously embezzle and convert to his own use, without the assent of the said county of Leavenworth, or of any person thereunto authorized, all of the same public moneys aforesaid, with the custody and care of which he, the said George S. Smith, was then and there so as aforesaid intrusted, and did then and there have and hold, by virtue of his said office of treasurer of the county aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Kansas."

Smith appeared, and on his verified petition the venue was changed

to Atchison county, and the transcript was filed in the Atchison district court on the fifth of May, 1874. The June term, 1874, of said district court convened on the eighth day of June. On the 12th,

Smith moved to quash said information "because the same *278 does not, nor does either count *thereof, contain facts suf-

ficient to constitute a crime under the laws of the state of Kansas." This motion was overruled. He then filed a special plea in abatement, alleging that "in so far as said information charges the embezzlement or conversion of money or other things, belonging to any other person than the county of Leavenworth, he did not have a preliminary examination, as provided by law, nor did he waive his right to such examination." In support of this motion the affidavit on which he was examined before the police judge of Leavenworth (and which appears in the record) was produced, and, after the caption, title, and venue, is as follows: "Enos Hook being first duly sworn, says, that on the 16th of December, 1873, at the city of Leavenworth, in the county of Leavenworth, state of Kansas, George S. Smith was then and there an officer of the county of Leavenworth, an incorporation duly organized and existing under the laws of the state of Kansas, to-wit, the treasurer of said county, duly elected and qualified and legally authorized and empowered to perform all the duties of said office; and that the said George S. Smith, as such officer and treasurer of said county, was then and there elected, and did then and there have in his possession and under his care by virtue of his said office certain public moneys, to-wit, the sum of sixty-seven thousand dollars, of the moneys belonging to said county, and of the value of sixty-seven thousand dollars, and the said George S. Smith did then and there unlawfully, fraudulently, and feloniously embezzle and convert to his own use, without the assent of the county of Leavenworth, all of the same public moneys aforesaid, with the custody and care of which he, the said George S. Smith, was then and there so as aforesaid intrusted, and then and there did have and hold by virtue of his said office of treasurer of the county aforesaid, contrary to the form of the statute in such case made and provided."

The plea in abatement was overruled. Smith then pleaded not guilty. A jury was impaneled, and the case tried. The evidence is not preserved in the record, but it is stated in the bill of exceptions that "*it was proved on the trial that no legal demand, by warrant, order,*

coupon, bond or otherwise, was ever made upon the defendant *279 *which was not paid, and *that the only neglect or refusal was to pay to his successor in office the amount appearing to be due by the schedules attached to the information."*

The record contains several pages of instructions asked by the defendant, and refused by the court.

The court gave the following general charge to the jury:

"As jurors it is your sworn duty to carefully examine the evidence, and apply it to this case, under the law as given you by the court.

You are the exclusive judges of the evidence, and of the weight of evidence, and you have the right to believe or disbelieve any witness in this case, and then give it that consideration you in your judgment think it is entitled to receive; and if after you have thoroughly examined the evidence in the case, and the instructions given you by the court, you are convinced, beyond a reasonable doubt, of the guilt of the defendant, you will so find, and convict him of the crime of embezzlement, and will specify in your verdict the amount you find was so embezzled or converted to his own use. But on the other hand, if there yet remains in your minds a reasonable doubt as to his guilt, you will give the defendant the benefit of this doubt, and will acquit him altogether. By reasonable doubt is meant such a doubt as a reasonable man would entertain, and not one merely imaginary or fanciful.

"The defendant is charged in the information with having feloniously embezzled and converted to his own use certain funds in his hands as county treasurer of the county of Leavenworth. Before the defendant can be legally convicted under this charge, it must appear to the satisfaction of the jury, from the evidence beyond a reasonable doubt, that when county treasurer of Leavenworth county he did feloniously and fraudulently (that is, with the intention, design, and purpose of appropriating to his own use) embezzle and convert said funds. The gist and essence of every crime consists of the intention of the person charged, and unless the evidence establishes a guilty intention, beyond all reasonable doubt, the defendant must be acquitted. By guilty intention, I mean the intention to do the act which was unlawful; and it makes no difference whether he considered it a crime or not.

"During the time the defendant was county treasurer of Leavenworth county he had the sole right to the custody, control, and management of all moneys coming into his hands as such officer, and had the right, if he so chose, to keep such *funds
*280 along with any private funds of his own,—had the legal right to deposit such funds in any bank, or keep them in his office, or at his house, or on his person. In other words, the law did not prescribe how he should keep the public funds, and it was no violation of law to keep them as he saw proper. The only duty imposed by law on him in this regard was that he should properly keep and pay such funds out upon legal demand being made therefor. It being the legal right of the defendant to keep his money and papers of whatever character which came into his hands as county treasurer wherever he pleased, he was at perfect liberty to place them where he chose. He was not bound to keep any books concerning his deposits; nor was he bound to state to his clerks, or any one else, where his funds were; and even though he did not tell his clerks where the funds were, or did not tell them correctly, that fact alone is not sufficient evidence of embezzlement. And if, by bad management, and through and by

reason of a financial crisis, or the failure or dereliction of any bank in which his funds were deposited, or through or by reason of the embezzlement of the funds of such bank by any of its officers, the defendant was unable to pay to his successor in office the amount payable under the law,—under this state of facts he cannot be convicted of embezzlement.

"An embezzlement cannot take place until a party refuses to account for, or falsely accounts for, the fund or thing alleged to have been embezzled.

"In any event, before the jury can legally render a verdict against the defendant, they must be able to determine from the evidence *whose* money was embezzled, substantially the amount thereof, and to whom it belonged.

"If the jury can account for the loss of the fund, money, or thing alleged to have been embezzled on any reasonable hypothesis other than the guilt of the defendant, they must acquit."

And at the instance and request of the counsel for the state the court gave the following instructions:

"The defendant, George S. Smith, is charged by the information filed herein that at the county of Leavenworth and state of Kansas, on the twenty-seventh of December, 1873, he did then and there, being county treasurer of said county of Leavenworth, and then and there acting as such treasurer of said county, and being then and there, by virtue of his said office, in possession of moneys, *281 goods, valuable securities, and effects *belonging to the county of Leavenworth, the state Kansas, and to the various persons, classes of persons, and corporations named in said information, and said moneys, goods, valuable securities, and effects having come into his possession and under his care by virtue of his office as such county treasurer, willfully, unlawfully, and feloniously convert to his own use and embezzle such moneys, goods, valuable securities, and effects, to the value of \$67,378.42, belonging to the county of Leavenworth, and the other persons, classes of person, and corporations named in said information. To 'embezzle' is to appropriate fraudulently, to one's own use, that which is intrusted to one's care; to apply to one's private use by a breach of trust. It is to fraudulently remove and secrete personal property with which the party has been intrusted, for the purpose of applying to his own use.

"The laws of Kansas do not prescribe what a county treasurer shall do with public moneys and property while in his custody. It is lawful for him to deposit it in a bank for safe-keeping, to keep it in his office, or on his person. The law does not prohibit him from placing such funds in the custody of another. But the use by the county treasurer of moneys or effects in his hands as such treasurer, belonging to any municipal corporation, and of which the law makes such treasurer the custodian, which has come to his hands, and under his care, by virtue of his employment or office, for the purchase of prop-

erty in such treasurer's own name for private purposes, or to pay his private debts, or in making loans to another for interest or accommodation, is unlawful, and constitutes a conversion of such moneys and property, whether such treasurer at the time of so using such moneys or effects intended to replace or repay such effects or moneys or not.

"Although the information in this cause charges that the embezzlement was done by the defendant on the twenty-seventh of December, 1873, to sustain said information it is not necessary that the proof should show that the acts constituting such crime were actually done on that day; but the information is sustained by proof showing said acts to have been committed at any time within two years preceding the filing of said information.

"The statute defining the crime and fixing the punishment for embezzlement was designed to punish the fraudulent or illegal conversion of money or property intrusted to the care of the persons named in the statute, and as a safeguard against such fraudulent or *282 illegal conversion of such property; and *when it has been established that the funds or property charged has reached the hands of the officer, and that the same was not forthcoming when properly or legally demanded, the law presumes an illegal conversion of such funds or property, and the burden of proving the legal use of such property or money is upon the officer."

The jury returned a verdict of "guilty of the embezzlement of \$67,-278.42, the personal property of another, as is charged in the information filed against him." On the twenty-ninth of June defendant's motions for a new trial and in arrest of judgment were overruled. And the record then shows that thereupon (on said twenty-ninth of June) "it is adjudged by the court that the defendant, George S. Smith, be, and he is hereby, sentenced to confinement in the state penitentiary of the state of Kansas for the term of one year from the eighth day of June, 1874."¹

Stillings & Fenlon and Taylor & Gilpatrick, for appellant.

The main question in this case is whether the act of 1873, which amends section 88 of the crimes act, includes within its provisions a county treasurer. It will not be denied that embezzlement is a purely

¹ NOTE OF HON. W. C. WEBB, STATE REPORTER.

[Court convened on the eighth of June; sentence was pronounced on the twenty-ninth. Section 291 of the crimes act (Gen. St. 881) explicitly provides: "But no person shall in any case be sentenced to confinement and hard labor for any term less than one year." In this case the words "and hard labor" do not appear in the sentence. Whether erroneous by reason of such omission or not, (4 Wis. 395, 398; 5 Wis. 29; 12 Wis. 818, 534,) there would seem to be no doubt that the sentence, as to time or duration, was contrary to the express provision of the statute. If 21 days less than a year does not invalidate the sentence, then 121 or 221 or 364 days less than a year would not render it invalid. As the court reversed the judgment upon other grounds, this error (if it be one) was not noticed in the opinion. The defendant's counsel did not discuss it,—it was an error favorable to their client; but the pro-

statutory crime; that it was a matter of the legislature to determine *what classes of persons* were to be included, and what classes of property might be embezzled. We submit that unless a county treasurer is plainly mentioned in the statute, or other words used which leave no fair question as to the intention of the law-making power to include such officer, then he is not to be considered as within the law.

The law of embezzlement, as found in our statutes, has been but little changed since the time of Henry VIII., and its legislation and judicial history will fail to show that any law-making power, or any court other than the one from whose judgment we now appeal, has ever held that this statute embraced within its meaning a county treasurer. The court below held that it did embrace a county treasurer, because the statute uses the words "if any officer of any incorporation," and held that because other statutes made counties corporations for certain purposes, that Smith, being county treasurer of Leavenworth county, was therefore "an officer of an incorporation" within the true spirit and meaning of the embezzlement law. Most of the embezzlement statutes of the American states, instead of using the word "incorporation," use the term "incorporated company," and hence our statute is to this extent peculiar and *sui generis* in its language; but when the code commissioners, who compiled the Statutes of 1868, were considering the original statutes, they simply struck out the words "incorporated company," and inserted the word "incorporation," but whether for euphony or rhetoric, to say in one word what had before that time been expressed by the two words stricken out, it could not have been intended by the code commissioners nor by the legislature that the change in the language was for the purpose of bringing within the meaning of the statute a large class of persons not theretofore considered within its purview. This is evident from the fact that in most of the states which have a general embezzlement statute similar to ours there are also statutes specifically denouncing embezzlements by public officers, and from the further fact that the whole history, legislative and judicial, of this embezzlement law under consideration shows that it was intended to punish the fraudulent embezzlement and conversion of property by *clerks, servants, apprentices, officers, agents, etc.*, of incorporations, "*without the assent of the master or employer.*" Who is the *master or employer* of a county treasurer? He

fession generally, at the time it was announced, regarded the sentence with surprise, and doubted the authority of the district court to fix a less term than one year from the day of pronouncing sentence. And the question did not escape the attention of the counsel for the state. In their brief they say: "If the sentence is one that the court below should not have rendered, it is the duty of this court to modify such judgment, and direct said court to assess the proper sentence." Where a sentence is more favorable to a defendant than that prescribed by law, he can take advantage of the error if he chooses to do so. 4 Wis. 898; 4 Metc. 860.]

is subject to the order of no employer or master; he is an officer of the law, charged with public duties, bound to obey the law; the only and sole authority over him is with the county commissioners to call upon him to settle; and to say that he has a master or employer is to assert an absurdity. The information charges the embezzlement of the funds to have been done "*without the assent of the said county of Leavenworth.*" The pleader considered this an essential averment. How could the county of Leavenworth assent? By no fair interpretation of language can we see how a court could hold that the legislature intended to go beyond the condemnation of the servants, officers, and agents of private persons, either natural or artificial. Any other construction of the statute is strained and unnatural; and the fact that the statute has been in existence in England and this country for hundreds of years, and not a solitary prosecution ever brought under it against any of the vast army of public delinquents, is an unanswerable argument to the effect that the judicial wisdom of over three hundred years has been unable to discover in this statute what has been claimed by the prosecution in this case.

The legislature has seen proper to go no further than protect the public funds in the hands of county treasurers by requiring bonds for the security of such funds, and inflicting certain prescribed penalties for dereliction upon the part of such officials. The attention of the court is called to the record, where it appears that it was *proved* that the *only* neglect or refusal on the part of Smith was to pay to his successor in office the amount appearing to be due by his books. If that be true, what penalty does the law inflict? Section 78, p. 270, Gen. St., specifically provides that when this state of facts shall exist the treasurer "shall forfeit a sum of not less than one hundred dollars, nor more than five hundred dollars, and be liable on *285 his official bond for such refusal or neglect." *Yet here, in this case, instead of being subject to the law laid down to cover the exact state of facts shown, instead of being liable to a forfeiture of from one to five hundred dollars, the defendant is convicted of a felony, and sentenced to the penitentiary.

But if it can possibly be held that a county treasurer is within the jurisdiction of the embezzlement statutes, we claim that the court erred in refusing the instructions asked by defendant below. And we claim that the court erred most grievously in giving the instruction in these words: "When it has been established that the funds or property charged has reached the officer's hands, and that the same was not forthcoming when properly or legally demanded, the law presumes an illegal conversion of such funds or property, and the burden of proving the legal use of such property or money is upon the officer." This instruction we submit is in violation of every well-known principle in the trial of criminal cases. The law never presumes anything against a defendant, and never casts the burden of proving his

innocence on him. The instruction is in direct conflict with the adjudications of this court in similar cases. *Horne v. State*, 1 Kan. *72. The doctrines that apply to the construction of the statute under consideration, and the principles that govern the trial of cases properly brought under it, are so fundamental in their nature, and so well known, that we forbear to quote authorities at any length, but satisfy ourselves by calling attention to 2 Whart. Crim. Law, 1940; Whart. Prec. 460; *Coats v. People*, 22 N. Y. 245; *People v. Allen*, 5 Denio, 76; *People v. Hennessey*, 15 Wend. 147; *Roscoe, Crim. Ev.* 402; 2 Bish. Crim. Law, § 376; *Ex parte Hedley*, 31 Cal. 108; *Lyon v. Kain*, 47 Ill. 202; *Nicholas v. Purcell*, 21 Iowa, 267; *County of Hamilton v. Mighels*, 7 Ohio St. 115; *Halbert v. State*, 22 Ind. 129; *County of Hennepin v. Jones*, 18 Minn. 199, (Gil. 182.)

The court also erred in refusing to sustain the special plea to the information. The statute in substantially abolishing the grand jury system specifically provided that no information should be filed by the county attorney against any person until such person should *286 have a preliminary examination as provided by law. In this case, as shown by the special plea and evidence to sustain it, there was no charge made before the committing magistrate, and, of course, no examination had of any offense except the embezzlement of money belonging to the county of Leavenworth, and the defendant was compelled to plead and go to trial for the embezzlement of funds belonging to some fifty or sixty different persons.

L. M. Goddard and J. W. English, for the State.

Does the law of Kansas (Laws 1873, p. 177) cover the case of a county treasurer? The history of English and American legislation on this subject must throw some light on this question. All the English statutes upon the subject of embezzlement are directed against those who misappropriate the funds and property of private persons and private corporations, and other laws have been enacted to punish public officers. So, also, the legislators of the various American states have enacted laws of a similar character with the English statutes, and in all or nearly all the same law declares the defalcation of public officers to be criminal, and imposes penalties for such crimes. In Kansas, up to 1868, the embezzlement law was similar to the English and the other American statutes above spoken of. Comp. Laws 1862, p. 301, § 82. But when the revision of 1868 was adopted, the embezzlement statute was changed so as to enlarge the terms used, and instead of "incorporated companies," as used in 1862 and in all the English and American statutes, the word "incorporation" was substituted, and, except as to state officers and county treasurers neglecting or refusing to pay to the state taxes collected, no punishment is imposed upon defaulting county officers in express terms. We also find by sections 1 and 2 of chapter 25 of the General Statutes that "corporations are either, *first*, public, or, *second*, private. A public

corporation is one that has for its object the government of a portion of the state."

No better or more apt words could be well imagined to create
 *287 a county into a corporation. With these differences *in view between our statute and all others in these general respects, we must presume that for a wise purpose the change in our laws was made. As it first was, from 1862 to 1868, a private corporation only could be intended; in 1868 the words are so changed as to embrace both *public* and *private* corporations as defined by the enactment of the same legislature, (1868.) Would it be reasonable to say that for mere *euphony* a change so radical would be made? The words as used in the Laws of 1862, following the English Law and all the American statutes, have a fixed and definite meaning, established for two hundred years, by constant use without change, and by reason of a long series of decisions of the courts of last resort during all that time. Manifest propriety would require that if the legislature of 1868 intended merely to re-enact the law of 1862 that they should use the words which are universally used and construed as having a fixed and definite meaning; and the fact that a change has been made in the verbiage (under such circumstances) demonstrates that, for some reason, the legislature wished to convey a different idea, and intended either to contract or enlarge the class of associations spoken of, and not to leave the law just as it was, notwithstanding the change. It has been contended, however, that this court has decided that a county is at best but a *quasi* corporation, and that for that reason it could not be intended that this law would embrace county officers. We can readily conceive that for some purposes a county may be deficient in some of the attributes of private corporations, but in all respects in which it does exercise the functions of a corporation it can and does use and possess them as perfectly and completely as a railroad company, or any other private corporation; but owing to public policy it may be, and doubtless is, necessary to restrict them greatly. We are, however, at a loss to understand how or why the county of Leavenworth, "which has for its object the government of a portion of the state of Kansas," is not enough of a corporation, under the law of Kansas, to guard itself against a plunderer of its treasury.

*288 *Again, as an index to the idea influencing the legislators enacting this law, we think there should be some notice taken of the omission to enact a law to punish county officers who violate their duties, and also of the fact that the law of Kansas does define the crime and prescribe the punishment to be inflicted upon a defaulting state treasurer. Would so significant an omission have been made (on the theory that the legislature was honestly endeavoring to guard against fraud) if it had been believed by them that (as the law was then worded) county officers could plunder the county treasurer with impunity? Evidently, the legislators believed that by the change they had wrought in the law of 1862 they had provided for cases like

the one at bar; and remembering the fact that the entire state could not be deemed a corporation within sections 1 and 2 of chapter 25 of the General Statutes, they enacted the state-officer law, making, as they believed, the statutes broad enough to cover the wide range of official corruption in the state.

It has been contended that the words "without the assent of his employer" are qualifying words, limiting the construction of this statute to private corporations. We think this construction not legitimate. Of course, in the strict sense, there is no employer for a county treasurer; but he is elected by the people, and receives a salary as compensation for his services. But in these respects does he differ from a bank president, who is also elected indirectly by the stockholders, and receives his salary, and is the head of the company, and has no other employer than the stockholders? In every respect these words would just as much exclude the president of the bank as the treasurer of the county; because, in either case, no employer could be found to consent. *People v. McKinney*, 10 Mich. 82, 83. For this court to hold otherwise, must determine that official corruption is no crime in Kansas, and that our laws are framed for the encouragement of larceny by public functionaries; and the court need go no further for a precedent for such a construction of Kansas laws than to the official conduct of the dozen defaulting county treasurers, most *289 of *whom are now anxiously looking for the decision of this cause. We think this court cannot be disposed to take so narrow a view of this embezzlement law; but that the obvious intention of the legislature will be fully carried out, and crime will be met by merited and just punishment. This evidently was the view taken by the district court on the trial of this cause; and we think the court committed no error by so doing. If the sentence is one that the court below should not have rendered, it is the duty of this court to modify such judgment, and direct said court to assess the proper sentence. Crim. Code, § 291.

The second instruction asked by defendant was properly refused, as its equivalent was given in the general charge. The third is manifestly wrong, in that it requires the state to show by evidence the design, intent, and purpose to cheat and defraud the person entitled to such fund; and reasonable doubt as applicable to this proposition is absurd, as intent must ever be inferred from conduct of the party, and can, from the nature of the case, never be established as an affirmative fact. The fourth was given with a modification so clearly right that it seems useless to dwell on it. The fifth, sixth, seventh, and eighth were much too broadly stated, and are mere abstract propositions, of which what of good law is in them the court gave in substance, and only rejected that which would require the state to prove things impossible to be proven,—the intent of a party in any of his acts. We hold that the intent must be inferred from the acts of a party; that the law raises presumptions as to intentions from actions; and

if the act is proved, the defendant must establish an innocent motive, or the law presumes that he contemplated the natural result of his acts. Acts must be proved beyond a reasonable doubt. The inmost workings of the human heart, of reason, cannot be proved, but must, of necessity, be presumed; and to instruct a jury otherwise is an absurdity. These observations apply to every of the instructions asked and modified by the court.

*290 It is contended that the instruction that upon the failure of *a public officer to pay on proper demand a fund which came to his hand as such officer, the law presumes an illegal conversion, etc., takes from the jury the decision of the question of the guilt of the defendant, and instructs them that, certain facts being established, the defendant is guilty, and they must so find. We do not so understand this instruction. Our idea in asking it was to have the jury understand that when it was established that the defendant had the property named, and that he refused (when he should surrender it) to give it up, that that was a conversion within the meaning of the law, and that those facts being established the burden was on the defendant to show a lawful excuse for the detention. In other words, we merely defined what *all law books* established as a "conversion" in the absence of any proof to the contrary, and, in addition, the idea that when a conversion by the defendant was established, the justification being exclusively within the knowledge of the defendant, the law imposed upon him the burden of establishing it in his own behalf. There can be no question that the burden of proof can be shifted from one side to the other in criminal cases. In larceny, the possession of stolen property soon after it was stolen throws the burden of proof on the prisoner to show an innocent possession. In murder, the killing by prisoner being proved, with no circumstances showing the motives, the burden is upon the defendant to show justification. In case of state treasurer, the statute defines presumptions almost in the words of this instruction. See Gen. St. 1868, p. 984, §§ 56, 57; *People v. Dalton*, 15 Wend. 581; *Roscoe*, Crim. Ev. 80. No better established principle can be found than that a lawful demand by one legally authorized to receive from one legally requested to surrender, and a refusal to surrender, constitutes a conversion; and when such demand and refusal is established, upon whom should devolve the responsibility of showing a legal and proper reason for refusing to comply with such demand, unless the defendant who made such refusal? The general rule that the party having the affirmative of any proposition must establish it, for rarely is it possible to establish a

*291 negative, demands that our proposition is the true interpretation of the law. And, taken with the fact that all the instructions given by the court, as a whole, modify this instruction so as to be clearly within the law, as contended for by the defendant, we are unable to see any error in this instruction even from their standpoint.

KINGMAN, C. J. The appellant was charged with the offense of embezzling the funds in the county treasury of Leavenworth county. He was tried and convicted, and from the judgment of the district court appeals. Several errors are alleged, two of which raise the question of the sufficiency of the information. The first in order of time as well as in importance is whether the law of 1873, page 177, amending section 88 of the crimes and punishment act of the General Statutes, includes within its provisions a county treasurer. So much of that section as is relevant in this case is as follows: "If any clerk, apprentice, or servant of any private person, or of any co-partnership, * * * or if any officer, agent, clerk, or servant of any incorporation, or any person employed in such capacity, shall embezzle or convert to his own use, or shall take, make way with, or secrete, with intent to convert to his own use, without the assent of his employer, any goods, rights in action, or valuable security, or effects whatsoever, belonging to any person, co-partnership, or corporation, which shall have come into his possession or under his care by virtue of such employment or office, he shall, upon conviction thereof, be punished in the manner prescribed by law for stealing property of the kind or value of the articles so embezzled, taken, or secreted. * * *

Is the county treasurer such an officer as is contemplated by the statute? It is urged with great ability and ingenuity that this question must be answered in the negative on the ground that a county is not a corporation within the meaning of the term as used in the act, and that this is apparent from the language used; that the section provides that the embezzlement must be without the assent of the employer, and that the treasurer is not the employee of any one, and even if it should be held that the county was his employer it could not in any way "assent" to an unlawful appropriation of its funds. Again, it is urged that the treasurer, by giving bond as required by law, becomes, not a bailee, but a special insurer of the public funds that come into his possession, and therefore no criminal liability attaches to him for any use he may make of such funds. The legislature, having made him an insurer, could not have intended also to make him a criminal. The course of reasoning is only suggested, and no attempt is made to state it at any length. The court has reached a different conclusion from the counsel for the appellant on this point, and the reasons for such conclusion will be briefly indicated.

A sketch of the legislation upon the subject of embezzlement is given by Mr. Bishop in the second volume of his work on Criminal Law, from which it will be seen that from the time our ancestors thought it necessary to legislate upon this subject that the law has been gradually enlarged in its scope as from time to time society required such action. The section of our statute quoted above embraces within its terms a much greater variety of classes of persons who can commit the crime of embezzlement, and a much greater variety of circumstances under which it can be committed, than was provided

for in the older statutes in which the law on this subject had its origin, and in some respects than any of the statutes of other states that have come under our notice. It is not necessary to point out these changes except in one instance, and that is the substitution of the word "incorporation" in the General Statutes of 1868 for the phrase "incorporated company" in the Compiled Laws of 1862 (section 82, p. 301,) and the continued use of this word in the Laws of 1873, while in this last statute the word "corporation" is added in describing the parties whose goods, etc., may be embezzled. This change must have been made for a purpose, and in our judgment it was intentionally made so as to include many persons who were not before within its letter.

The substituted word in the General Statutes is an awkward
*293 *one, yet still it expresses its purpose with sufficient precision.

While the word "corporation," which is also used in the law of 1873, is a better one, it still does not change the meaning. Neither the revisors nor the legislature could have been ignorant of the difference between private and public corporations, and when they substituted a term that embraced all corporations for a phrase that evidently included only a voluntary association of persons, it will hardly do to say that they did it for the sake of euphony. The same revisors and the same legislature declared that counties were bodies corporate, (section 1, c. 25,) and must have known that the change in the section quoted would bring within its terms a large class of officers of municipal corporations, and others not theretofore embraced within its provisions. Take the plain terms of the law of 1873, and the declaration that counties are corporations, and there can be little doubt that county officers are embraced within the letter of the statute. We are referred to the legislation of other states to show that those states have thought it necessary to enact specific laws embracing county officers although their statutes in reference to embezzlement were very similar to our own. The inference we draw from such legislation is that, as it has been found necessary elsewhere, it may have been thought important in this state; and certainly it was as well to do it by a change in the language of the statute of embezzlement as by a separate enactment. Indeed it seems to us the better way. If the agents of individuals or incorporated companies should be punished for certain specified offenses, then it seems fit that the agents of the public should be punished for a like offense. Nor does the giving of a bond indicate a purpose not to secure the public interests by punishing those who wrongfully execute the public trusts confided to them. Such bonds are frequently given by the employes of private persons, and yet that would not be claimed as exempting them from the penalties of the law of embezzlement. We cannot perceive why a bond should have any other effect when required by law than when exacted by contract. This view is
*294 strength*ened by reference to other provisions of our statutes which inflict severe penalties on the county treasurer for much less serious offenses than the one charged in this case. See Gen. St. §

73, p. 270, and § 75, p. 930. It is urged on this point that section 51, p. 264, establishes the relation of debtor and creditor between the county treasurer and the public, and that the treasurer, being the debtor for the funds in his possession, cannot be guilty of embezzling what is his own, as he owes it. But such is not the meaning or purpose of that section. It was intended to, and does, prescribe the method of keeping the treasurer's books, but does not pretend to determine the relations of the county treasurer to the county. To draw from a section of law intended to provide a convenient form of keeping an account an inference that those provisions define and establish the relations of the treasurer to the county is hardly warrantable, and in our view not sound.

It is argued that the treasurer cannot be included because he has no "employer," and by the statute the offense can only be committed against the assent of the employer. One thing is certain, that the treasurer is employed in his office, on business not his own, and not volunteered, but in pursuance of certain well-known conditions. All these facts constitute an employment, and also an employer and employe; and while we shall not attempt to define who is the employer, we are satisfied that there is one; and the fact that that employer cannot authorize the illegal use of the funds in the treasurer's hands, only simplifies the necessary testimony, but does not change the construction of the law. The truth is that in the original English statute the word was a necessary one, and has been retained in all the changes, although in some respects its place is an awkward one. It still retains its place in our statute, and if there is any supposable case where the word "embezzlement" itself does not presuppose the non-assent of the principal or employer, it must be in a case where the employer is legally incapacitated from giving such assent.

2. Another defect alleged is that the information fails to specifically describe the property charged to have been embezzled.

The information charges specifically to what fund each portion of the total charged belongs, but does not describe the kinds of money embezzled. In transactions such as are now under consideration, running through a long period of time, and involving large sums of money, received from a whole community, and being constantly changed by the necessities of the office, such a description of the funds is impossible, and if necessary to be averred must be proven, and therefore is an effectual bar to all prosecutions under the law. Mr. Bishop, in his treatise on Criminal Law, after showing that under the English statutes the courts have held that the particular property embezzled must be specifically described, and pointing out cases where such description would be impossible, makes upon those decisions these observations: "That a court departs from its duty when it does not allow some form of pleading to cover every offense known in the law. We conclude, consequently, that embezzlement may in reason be committed under the circumstances mentioned in

this section, and that those courts which have determined otherwise have erred." Vol. 2, § 315a. We are not forced to discuss the authorities on this point, for the change in the law necessarily compels such construction of its provisions as will give it effect, and we do not think that the reason of those decisions, when applied to the agents of private persons, who can at all times scrutinize the acts of those in their employ, apply to a public officer. The public at large can exercise no constant supervision over his acts, nor can it, like a private individual, assume the direct custody of the funds at any moment. The proper authorities may require him to account, may examine the funds in his possession, but in the next hour all these funds may be changed, long before the act of embezzlement is done, or the intent is formed. To suppose that the legislature, when they added the large class of public officers to those who might be amenable to the law for the offense of embezzlement, intended to require proof of the identity of the money embezzled, or a description *296 of it, and from whom it *was received, is to infer that they intended to enact a law the enforcement of which would be impossible. It will not do to permit an artificial rule of pleading, having a doubtful foundation in reason, to lead to such a disastrous result. This exact point has been decided in Michigan in a very able opinion, (*People v. McKinney*, 10 Mich. 54,) and we but follow that decision in holding that the information is not defective in not describing precisely the funds embezzled.

3. The next error alleged is in the overruling the special plea of defendant. These are the essential facts: Smith was arrested on a charge of embezzling the sum of \$67,000 of the funds belonging to the county of Leavenworth. The information charges him, in the first count, with embezzling \$67,378.42 belonging to divers designated funds in the treasury of the county of Leavenworth. The special plea is that the defendant did not have a preliminary examination as to the embezzlement of any money or other thing belonging to any other person than the county of Leavenworth, nor did he waive his right to such examination. The court upon an inspection ruled against the defendant, and with some hesitation we conclude correctly. To hold that the warrant of a justice should describe the offense as accurately as the information would in most cases be to defeat justice. They are generally unlearned in the technicalities of the law, and describe the offense in general terms, while the information is expected to be more exact in its terms, and more full and accurate in its statements. We think the main purpose of the required preliminary examination was reached in this case, and the defendant sufficiently apprised of the general charge, in the complaint before the police judge, of what offense he would have to answer in a more definite charge before the district court.

4. The remaining questions in this case arise upon the instructions; and while the counsel for the appellant in general terms com-

plaints of the refusal of the court to give a great number of instructions, covering many pages, yet no specific error is pointed out except as to one instruction to be *noticed immediately. Many of these instructions so refused were substantially and correctly given elsewhere in the charge, and so were properly refused; of others, the meager statement of the evidence in the record leaves us unable to say whether they were relevant to any testimony in the case or not. In this state of the case we cannot say that any of the instructions were improperly refused. One of the instructions given is as follows: "The statute defining the crime and fixing the punishment for embezzlement was designed to punish the fraudulent or illegal conversion of money or property intrusted to the care of the persons named in the statute, and as a safeguard against such fraudulent or illegal conversion of such property; and *when it has been established that the funds or property charged has reached the hands of the officer, and that the same was not forthcoming when properly or legally demanded, the law presumes an illegal conversion of such funds or property, and the burden of proving the legal use of such property or money is upon the officer.*"

The last part of this instruction lays down a rule to which we cannot assent. It would be most perilous to an officer who had faithfully discharged responsible duties for a series of years, handling in his official capacity large amounts of money, and who should find at last that there was a deficiency for which he could not account, or replace, although for a sum which, compared with the amounts which had passed through his hands, would be trivial. In such a case, under the instruction given, a jury would be compelled to find a verdict of guilty, although they might believe the man was perfectly honest. Nor is this an extreme case. Much harder ones may readily be imagined. In every case the jury are the sole triers of the main fact of the guilt of the accused, and judges of the testimony establishing each fact necessary to constitute the main fact. The facts are to be proven; what those facts show is for the jury to decide. It may be considered law in this country generally, that the burden of proof in criminal cases is on the state, and that this burden never changes.

It is true that there are some decisions seemingly adverse to this opinion, but they are very few, and do not *rest on sound reasoning. The accused stands on the presumption of his innocence until a complete case is made against him, and if the testimony is insufficient on any point he must be acquitted. These rules are merely stated. Neither the public nor the profession is interested in the discussion of questions long settled, well understood, and generally acquiesced in. This instruction, we think, violates these rules, and is therefore erroneous. In the argument it is likened to an accused person being in the unexplained possession of property recently stolen. The cases are not analagous. In the latter case the crime itself is already proven. The possession of the fruits of the crime is

such evidence as authorizes the jury to find such possessor guilty, and whether this is a presumption of law or fact, or no presumption at all, need not now be stated. We only desire to point out the difference between the two cases. In the one case it is used to prove both the offense and the offender; in the other it is only used to prove the perpetrator of a crime already proven. In the case at bar such evidence would be sufficient if the jury believed the facts showed also the guilty intent of the accused to convert the property to his own use. Ordinarily, a jury might well draw such an inference from such facts; but the court below says in effect that they are *compelled* to draw such an inference, and this, in our opinion, is an unauthorized assumption by the court of a duty that belonged exclusively to the jury. From the proven facts the jury, not the court, must find that the accused converted the money to his own use. In this case they might well have found him guilty from the facts proven, if they had been left at liberty to weigh the value of these facts, as well as any others necessary to prove the guilt of the accused. We are not certain that the instruction misled the jury, but we are not certain that it did not; and as it is clearly erroneous, on this ground alone we are constrained to direct a reversal of the judgment, and order a new trial in accordance with the motion of the appellant.

(All the justices concurring.)

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*STATE v. CALVIN H. GRAHAM.

July Term, 1874.

Appeal by the state from district court of Coffey county.

A. M. F. Randolph, Co. Atty., for the State.

Silas Pearl and *R. M. Ruggles*, for defendant.

STATE v. SIDNEY S. SMITH.

July Term, 1874.

Appeal by the state from district court of Cherokee county.

W. H. Whiteman, Co. Atty., and *Blair & Hill*, for the State.

McComas & McKeighan and *H. G. Webb*, for defendant.

These two cases were heard and considered in this court in connection with the preceding case of *State v. George S. Smith*, but no separate opinion was written except the brief one reversing the judgments. *Graham* was county treasurer of Coffey county, and *Sidney S. Smith* was county treasurer of Cherokee county, and each was prosecuted by information for embezzlement. The information against

Graham was filed on the twenty-third of February, 1874, and the charging part thereof is as follows:

"That on or about the tenth day of November, 1873, in the said county of Coffey, in the state of Kansas aforesaid, and within the jurisdiction of this court, the above-named Calvin H. Graham, being then and there an officer of a certain incorporation, to-wit, being then and there the county treasurer of the said county of Coffey,—the said county being then and there an incorporation duly organized and existing under the laws of the state of Kansas,—certain moneys, of the amount of \$12,127.19, and of the value of \$12,127.19, and then and there belonging to said county of Coffey, and being then and there moneys, goods, property, and effects belonging to said county, which said moneys had theretofore come into the possession and under the care of him, the said Calvin H. Graham, by virtue of his said office of county treasurer of said county, and in discharge of the duties thereof, did, without the assent of the said county of Coffey, unlawfully, fraudulently, and feloniously embezzle and convert to his own use, contrary to the form of the statute in such

*300 *case made and provided, and against the peace and dignity of the state of Kansas."

The defendant Graham moved to quash said information for the following reasons: "*First*, that the said information does not state facts sufficient to constitute a public offense; *second*, that said information is not direct or certain as to the offense charged; *third*, that said information does not state the facts claimed to constitute the offense attempted to be therein charged in plain and concise language, without repetition."

The court below, at the May term, 1874, sustained said motion and quashed said information, and adjudged that the defendant go hence without day; to which ruling and judgment the state excepted, and brought the case here by appeal.

The information against Sidney S. Smith was filed on the sixteenth of June, 1873. The charging part thereof is as follows:

"That while so being and acting as such county treasurer as aforesaid, and on the second day of July, 1872, at the county of Cherokee aforesaid, he, the said Sidney S. Smith, (then being over the age of sixteen years,) willfully, unlawfully, wrongfully, fraudulently, corruptly, and feloniously did embezzle and convert to his own use, without the assent of said county of Cherokee, and without the assent of the board of county commissioners thereof, certain moneys and property belonging to said county of Cherokee, to-wit, United States treasury notes, of various denominations, to the amount of five thousand dollars, and of the value of five thousand dollars; national bank notes, of various denominations, to the amount of five thousand dollars, and of the value of five thousand dollars; gold coin of the United States, of various denominations, to the amount of three thousand dollars, and of the value of three thousand three hun-

dred dollars; silver coin of the United States, of various denominations, to the amount of one thousand dollars, and of the value of one thousand dollars,—all of which said treasury notes, national bank notes, and gold and silver coin, were then and there the property, moneys, goods, and chattels of the said county of Cherokee, and which said property and money, at and before the time of the *301 said embezzlement and conversion thereof, as *aforesaid, by said Sidney S. Smith, had come into the hands and possession of the said Sidney S. Smith as county treasurer as aforesaid, and by virtue of his said office of county treasurer of said county of Cherokee, contrary to the statutes in such case made and provided, and against the peace and dignity of the state of Kansas."

A motion to quash said information was filed by the defendant, stating grounds therefor, as follows:

"*First*, that said information does not state facts sufficient to constitute a public offense; *second*, that section 88 of chapter 31 of the General Statutes of the state of Kansas is repealed, and was repealed by the legislature of said state before the institution of this proceeding; *third*, that the provisions of law defining and punishing embezzlement in the state of Kansas did not and do not affect or include public officers."

The district court, at the June term, 1873, sustained said motion to quash, and made an order discharging the defendant. The state appealed.

KINGMAN, C. J. For the reasons stated in the case of State v. George S. Smith, just decided, each of the above entitled cases is reversed, and remanded for further proceedings.

(All the justices concurring.)

*302 *MISSOURI RIVER, FT. S. & G. R. CO. v. C. A. MORRIS, Treas.

July Term, 1874.

1. **Indian Lands: Cherokee Neutral Lands: When Subject to Taxation.** By contract with the secretary of the interior, Mr. James F. Joy became the purchaser of a tract in south-eastern Kansas, known as the "Cherokee Neutral Lands." By the terms of that contract lands were patented as paid for. Having paid for and received patents for a portion of these lands, in March, 1869, Mr. Joy assigned his contract to the plaintiff in error. On the eighth of August, 1870, the plaintiff paid the balance of the purchase money, and on the second of November, 1870, received a patent for the remainder of said lands. *Held*, that these lands paid for on the eighth of August, and patented on the second of November, 1870, were not subject to taxation for the year 1870.

2. **Public Lands: Granted to Railroads: When Subject to Taxation.** On the twenty-fifth of July, 1866, congress passed an act entitled "An

act granting lands to the state of Kansas to aid in the construction of the Kansas & Neosho Valley Railroad, and its extensions to Red river." By the terms of this act, upon the certificate of the governor of Kansas that any ten consecutive miles of this railroad had been completed, patents were to issue directly to the Kansas & Neosho Valley Railroad Company for the lands opposite such completed section, and so for each successive section. No action on the part of the state was in terms called for. The said railroad company, now the Missouri River, Fort Scott & Gulf Railroad Company, as required, formally accepted the grant with its terms and conditions. Prior to 1870 it had complied with all the terms and conditions of the grant required to be performed by it. The state of Kansas took no action in reference to this matter until March, 1871, when the legislature passed a joint resolution formally accepting the grant. No patents had issued for certain of the lands within this grant in Bourbon county up to April 21, 1871. *Held*, that they were nevertheless subject to taxation for the year 1870.¹

Error from Bourbon district court.

The case is stated in the opinion.

*303 **C. W. Blair and Wallace Pratt*, for plaintiff.

The decision of the supreme court of the United States in the Case of The Kansas Indians, 5 Wall. 737, being decisive of the question of exemption from taxation of all lands owned by Indians whose tribal organization was preserved, leaves the only question for solution here to be whether the legal and equitable title to the lands were in the United States, or the Cherokee tribe of Indians, or in both, at the time of the levy of this tax, or whether the complete equitable title had passed to the plaintiff. It is a matter of history, and familiar to every member of this court, that the "Cherokee Neutral Lands" are a part of the "Louisiana Purchase," acquired by the United States from the French republic by the treaty of April 30, 1803, and that, by the second article of the treaty of December 29, 1835, between the United States and the Cherokee Nation, these lands were ceded to said nation. 7 U. S. St. at Large, 478. By the provisions of this treaty of cession to the Cherokees, the United States government renewed its pledge and guaranty of protection contained in former treaties with the Cherokee Nation, and also stipulated that these ceded lands should never be included within the territorial limits or jurisdiction of any state or territory without the consent of said Indians. Afterwards, and in August, 1866, another treaty was made and proclaimed between the United States and the Cherokees, the first paragraph of the seventeenth article of which is as follows:

"Art. 17. The Cherokee Nation hereby cedes, in trust, to the United States, the tract of land in the state of Kansas which was sold to the Cherokees by the United States, under the provisions of the second article of the treaty of 1835, and also that strip of the land ceded to the nation by the fourth article of said treaty, which is included in

¹See, also, *County of Saline v. Young*, 18 Kan. 448; *Kansas Pac. Ry. Co. v. Culp*, 9 Kan. 81, and note.

the state of Kansas; and the Cherokees consent that said lands may be included in the limits and jurisdiction of said state." 14 U. S. St. at Large, 799.

Counsel for defendant in error, as we understand, admits that
 *304 the lands were exempt from taxation under the treaty *of 1835,

but he asserts that they were so exempt only in pursuance of that provision of said treaty which stipulated that the lands should never be included in the limits or jurisdiction of any state or territory without the consent of the Indians. From this he deduces the proposition that consent that the lands be included in the limits and jurisdiction of the state of Kansas having been given by the Indians in the seventeenth article of the treaty of 1866, above quoted, from that time they were subject to taxation. We claim that these lands were exempted from taxation by the treaty of 1835, and from any other interference of state or territorial authority, not alone because of the stipulation above referred to, but because they were ceded under the assured protection of the government, and for the purpose of a home for themselves and their descendants, to a nation of Indians which at the time kept up, and ever since has preserved, its tribal organization,—a tribe which has always been recognized by the political and judicial departments of the government as a state, capable of making treaties, managing its own affairs, and subject only to the control of the government of the United States. "The acts of our government plainly recognize the Cherokee Nation as a state, and the courts are bound by these acts." *Cherokee Nation v. State*, 5 Pet. 15. And see *Cases of The Kansas Indians*, 5 Wall. 737; *The Wea Indians*, 5 Wall. 757; *The Miamis*, 5 Wall. 760; *The New York Indians*, 5 Wall. 761. And in *County of Douglas v. Union Pac. Ry. Co.* 5 Kan. *615, this court decided that, "as long as the title to land lying within an Indian reserve remained in the United States, or in the Indians, or in both, the land is not taxable by the state." The lands in question in that case were parcel of certain lands ceded by the Delaware tribe of Indians to the United States by the treaty of 1854. Nowhere in that treaty is there any provision exempting the lands so ceded from taxation, nor any provision that they should never be included within the limits or jurisdiction of any state without the consent of the Indians. And see *McCracken v. Todd*, 1 Kan. *148.

The plaintiff in error claims that the clause above quoted
 *305 *from the seventeenth article of the treaty of 1866 had the effect simply of including the lands in question within the territorial boundaries of the state of Kansas, and in no other respect changed the relative rights of the Indians and said state. The language used in the treaty admits of no other or different construction. The word "jurisdiction" is evidently used, not as descriptive of the power of or right of exercise of authority by the state, but of the territory to which such power and authority extend. Had the intention been to subject the lands to the jurisdiction of the state, how easy,

appropriate, and free from all doubt as to meaning, to have said that they consented that said lands might be included in the limits and *subject to the jurisdiction of the state of Kansas.*

Again, the object of the Cherokees, in ceding these lands to the United States in trust, was, as article 17 of the treaty plainly indicates and provides, to have them sold, and the proceeds applied to the use of the Indians. It is evident that no purchaser could have been found for them, and it is also evident that the United States government would never have consented to a sale of these lands, except possibly to some other tribe of Indians, unless they were or could be included in some state or territory. Under the stipulation in the treaty of 1835, the provisions of the act organizing the territory, and the act of admission of the state of Kansas into the Union, these lands never could have been included in the limits of said state until the Cherokees should signify their assent to the president of the United States to be so included. Hence the necessity for the clause of assent in the seventeenth article of the treaty of 1866. No such necessity existed for any consent on the part of the Indians that these lands should be subject to the laws and jurisdiction of said state. So soon as the same were sold and paid for, and the title of the Indians and the United States government extinguished, these lands became freed from the control of the federal government, and at once became subject to the laws of the state of Kansas, and liable to taxation.

Whenever the supreme court of the United States has been
*306 *called upon to construe treaties between the government and Indian tribes, it has always adopted rules of interpretation favorable to the Indians, (*Worcester v. State*, 6 Pet. 582; *Case of Miamis*, 5 Wall. 760;) hence there can be no doubt whatever but that our construction must be sustained. No one will seriously claim that it was the *intention* of the Cherokees, in making this treaty, to subject these lands to the jurisdiction and laws of the state of Kansas, and consequently to a liability to taxation. By consenting that they might be included within the boundaries of the state, they did what was absolutely essential to accomplish the object they had in view in making the cession of these lands to the United States, to-wit, a sale at the price specified in the treaty. A further consent that the land should be subject to the laws of the state in nowise aided the accomplishment of this object, because, as we have shown, so soon as they should be sold and paid for, and the rights of the Indians extinguished, precisely this result would be accomplished. Nor could such consent have been of any advantage whatever to the Indians. On the contrary, it would have been greatly to their pecuniary prejudice. No one could tell when these lands would be sold. In fact, they were not sold till about two years had elapsed after the making of this treaty. They might not have been sold for years, and in the mean time the Indians, in order to save their lands from sale for taxes, would have been required to pay a large sum of money annually to

the state of Kansas, and for what consideration? Absolutely none.

Under the provisions of the contract between the secretary of the interior and Mr. Joy, it is apparent from the agreed statement of facts in this case that, at the time of the levy and assessment of the tax in question, the plaintiff in error, assignee of Mr. Joy, had neither the legal nor equitable title to that portion of the neutral lands situate in Bourbon county. The legal title was in the United States, and the equitable in the Cherokees. The plaintiff in error had "a mere con-

tingent, conditional, and inchoate equity," liable to be forfeited *307 by its failure to pay for the same according to the terms of the contract of purchase. In the language of Mr. Justice

VALENTINE, in *Parker v. Winsor*, 5 Kan. *373; "The legal title has not passed because the patent has not yet been issued; and the equitable title has not passed because it has not yet been paid for, and because it is clearly the intention of the parties, as indicated in the treaty, that such title shall not pass until the land is fully paid for." And, again, in *County of Douglas v. Union Pac. Ry. Co.*, 5 Kan. *623, the same justice says: "The legal title to land never passes until the legal evidence of such title is executed, and the equitable title probably never passes until everything has been done so that the land cannot be forfeited." It would be difficult to frame a contract in which "time" should be made more of its essence than in the one under which these lands were purchased, or one in which the rights of the Indians could have been more carefully guarded. No right of possession was given to the purchaser, thus avoiding the acquiring of an equity by the making of improvements upon the lands. Equally was the claim of an equity, based upon part payment, guarded against, by providing that whenever the sum of \$50,000 or more of principal should be paid, the government would set off and patent to the purchaser a number of acres corresponding to the number of dollars so paid. As appears from the agreed statement of facts, this provision of the contract was faithfully observed; so that, at the time of the levy of the tax in question, the government had not received one single dollar from the purchaser for which it had not conveyed to him a corresponding acre of these lands.

The lands mentioned in the second cause of action of the petition, at the time of the levy of the tax against them, were the property of the United States, and, as such, exempt from taxation by the state of Kansas. These lands are parcel of a grant by the United States to the state of Kansas, for the use of the plaintiff in error, by an act of congress entitled "An act granting lands to the state of Kansas to aid

in the construction of the Kansas & Neosho Valley Railroad *308 and its extensions to Red river," approved July 25, 1866. *By this act certain conditions were imposed upon plaintiff in error.

One provided for a formal acceptance of the terms and conditions of the grant by the railroad company within one year; another prescribed the kind of road that should be built; and another, that the railroad company should not dispose of or incumber the land so granted under the

provisions of said act. It is admitted that plaintiff in error, (then the Kansas & Neosho Valley Railroad Company,) at the time of the levy of the tax against these lands, had complied with all of the conditions of the grant on its part to be performed. It is also admitted that the state at that time had not accepted and did not accept such grant until the second of March, 1871, when a formal resolution was passed by the legislature of the state accepting the same. We claim that, notwithstanding such compliance on the part of the plaintiff in error with all of the conditions of this grant, no such complete equitable title to the lands in question had passed to it at the time of the levy of this tax as to entitle it to a conveyance by the United States of the legal title, but that this equitable title as well as the legal, still remained in the United States, because (1) there had been no acceptance of the grant by the state of Kansas. This grant was made directly to the state of Kansas for the use of the plaintiff in error, thus constituting the state the trustee, and the railroad company the *cestui que trust*. In all deeds or grants made directly to a trustee for the use of another, there must be some sort of an acceptance by the trustee in order to make such deed or grant operative; and no presumption of acceptance can obtain where the state is named as trustee unless there has been some action of its legislative department, through which alone the state can act, indicating at least a knowledge on their part of the terms and conditions of such deed or grant. (2) The United States, in prohibiting the railroad company from disposing of or incumbering these lands until the patent should be given it under the provisions of the grant, clearly and unmistakably show that it was their intention that no interest whatever in these lands should pass to the railroad company until these patents had been executed, but that the entire equitable, as well as the legal, title should remain in the United States. At the time of the levy of this tax no patent for any of these lands had been made, and hence no such interest in them had passed from the United States to the railroad company as to render them liable to taxation by the state. Act of Admission, § 2, subd. 6; *Parker v. Winsor*, 5 Kan. *362; *County of Douglas v. Union Pac. Ry. Co.*, *615.

W. J. Bawden, for defendant in error.

The entire equitable and beneficial interest and title to said neutral lands were, at the time of the levy of taxes thereon for 1870, and since the year 1868 had been, vested in the plaintiff in error, or its grantor, James F. Joy. Plaintiff in error contends that said lands were exempted from taxation by the organic act and act of admission until the consent of the Indians should be obtained, and that the consent given in the seventeenth article of the treaty of 1866 "had the effect simply of including these lands in the boundaries, and making them subject to the process of the courts of the state of Kansas." Is this a fair deduction? The second proviso of the organic act provides that nothing in said act shall be construed "to include any ter-

ritory which by treaty with any Indian tribe is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory, but all such territory shall be excepted out of the boundaries and constitute no part of the territory of Kansas until said tribe shall signify their assent to the president of the United States to be included within the said territory of Kansas." Gen. St. 1868, p. 26. In section 1 of the act of admission (Gen. St. 67) the identical words are used as above quoted, with the exception that the word "state" is substituted for "territory," and the word "such" for "any." This, then, is the law, if any there be, under which these lands are exempted from taxation: because they are not included within the *territorial limits or jurisdiction of the state of Kansas*.

*310 *What is the language used in the treaty, which the plaintiff in error claims had the effect simply of including these lands within the boundaries of the state, and making them subject to the process of the courts thereof? In article 17 of the treaty of August 11, 1866, are these words: "and the Cherokees *consent* that said lands may be included in the limits and *jurisdiction* of the said state." If the *excluding* of these lands from the limits and jurisdiction of the state prohibits the state from taxing the same until consent is given by the Indians, then consent given by said Indians that said lands may be *included* in the limits and jurisdiction of the state removes the prohibition. But the treaty of 1866 not only removed the prohibition imposed by the organic act and the act of admission, but it went further: it made the United States the trustee of the Cherokee Nation for the sale of said lands, and authorized the secretary of the interior, acting for the United States, "to sell such lands to the highest bidder." It is admitted in the agreed statement of facts "that in pursuance of the provisions of said article 17 of said treaty, as amended by the United States senate, and of a supplemental article thereto ratified June 6, 1868, James F. Joy, on the eighth of June 1868, entered into a contract in writing with O. H. Browning, then secretary of the interior department of the United States, for the purchase of said lands; that on or about the first day of March, 1869, said James F. Joy *assigned and conveyed* to the plaintiff all of his right, title, and interest in and to said contract of the date of June 8, 1868." Did not the contract of James F. Joy with the secretary of the interior confer an equitable title upon said Joy? If not, what office did the contract perform? It is not claimed that there were any special conditions incorporated in said contract, and the presumption is that the contract was such as is usual for the sale of land; and in fact the contract itself shows that no conditions were imposed; that it was an ordinary contract for the sale of land, in which the grantor uses the words "agrees to sell, and *hereby doth sell*,"

*311 etc. It is a well-settled principle that equity considers, where land is sold on credit, and the deed is to be made when the purchase money is paid, that the land at the time of the purchase

becomes the vendee's, and the purchase money the vendor's; that the vendor becomes the trustee of the vendee with respect to the land, and the vendee the trustee of the vendor with respect to the purchase money. *Clute v. Robison*, 2 Johns. 595; *Watson v. Le Row*, 6 Barb. 481; *Howard v. Babcock*, 7 Ohio, 73-81; Washb. Real Prop. 424, 426. In the case of *Parker v. Winsor*, 5 Kan. *369, cited by plaintiff, the treaty under which the sale to the Union Pacific Railway Company was made, provides that "none of said lands shall be subject to taxation until the patents have been issued therefor;" but in the treaty under which the sale was made in the case at bar "the Cherokees consent that said lands may be included in the limits and jurisdiction of the said state." In *Parker v. Winsor* the court says: "But in this case neither the legal nor equitable title has passed. The legal title has not passed because the patent has not yet been issued; and the equitable title has not passed because it has not yet been paid for, and because it is clearly the intention of the parties, as indicated in the treaty, that such title shall not pass until the land is fully paid for." And the same principle was decided in *County of Douglas v. Union Pac. Ry. Co.*, 5 Kan. *615. In the case at bar there is no such intention expressed or implied, and no such conditions imposed. If the equitable title did not pass *because* of the provisions of that treaty and the intention of the parties that it should not pass, then, by a parity of reasoning, in the case at bar, when no such intention and no such provisions exist, the equitable title did pass.

As to the taxes sought to be enjoined in the second count in plaintiff's petition, their validity would seem to be settled by the agreed statement of facts. It is true that the act granting the lands to the plaintiff in error did impose some conditions upon said railroad company, but it is agreed that said plaintiff in error had, at the time of said levy, "complied with all the conditions of said grant on its part to be performed," leaving nothing but the naked legal title in *312 the *United States. The plaintiff company, then, had accepted the grant within one year after the passage of said act, and prior to July 25, 1867; and upon the acceptance thereof the equitable title passed to the plaintiff in error. There is no provision which makes it necessary that the state of Kansas should accept the trust.

BREWER, J. The plaintiff in error filed its petition in the district court of Bourbon county against the defendant in error to enjoin the collection of a tax levied in the year 1870 against certain real estate of the plaintiff, and containing two causes of action. The first is to enjoin a tax, amounting to about \$10,000, levied against that portion of the "Cherokee Neutral Lands" lying in Bourbon county, and to which the plaintiff acquired title by patent from the United States bearing date November 2, 1870. The petition alleges that, at the time of the levy of this tax, the plaintiff had neither the legal nor equitable title to these lands, but that they were in the United States government and the Cherokee tribe of Indians, and hence the lands were exempt from taxation. The second cause of action is to enjoin

the collection of a tax levied against certain lands granted by the United States government to the state of Kansas to aid in the construction of the railroad of the Kansas & Neosho Valley Railroad Company, (the former corporate name of the plaintiff,) by an act of congress approved July 25, 1866, which grant had not been accepted by the state of Kansas at the time of the levy of said last-mentioned tax. The facts were agreed between the respective parties, and are contained in a written stipulation on file herein, which, by order of the court below, was made a part of the record. The court below found for the defendant, and rendered judgment accordingly. The facts contained in the stipulation above referred to, and the exhibits thereto attached, relating to the first cause of action, are as follows:

"(1) That the lands mentioned in the first cause of action in
*313 the petition, are a part of the 'Cherokee Neutral Lands,' *so called, and the same mentioned in the first part of article 17 of the treaty between the United States and the Cherokee Nation of Indians, proclaimed August 11, 1866.

"(2) That in pursuance of the provisions of article 17 of said treaty, as amended by the United States senate, and a supplemental article thereto, ratified June 6, 1868, James F. Joy, on the eighth of June, 1868, entered into a contract with the then secretary of the interior department of the United States for the purchase of said 'Cherokee Neutral Lands,' by the terms of which contract Mr. Joy was to pay for the same to the secretary of the interior, as trustee for the Cherokee Nation of Indians, at the rate of one dollar per acre, as follows: Within ten days, the sum of \$75,000; \$75,000 on the thirtieth days of August, 1868, 1869, and 1870, respectively; and \$100,000 per annum thereafter, until the whole purchase money should be paid. It was further agreed, in and by said contract, that the United States should cause said lands to be surveyed as public lands were usually surveyed, and, on the payment by Mr. Joy of \$50,000, to set apart for him a quantity of said land in one body, in as compact form as practicable, extending directly across said lands from east to west, and containing a number of acres equal to the number of dollars thus paid, and from time to time to convey the same by patent to said Joy, whenever requested so to do, in such quantities, and by legal subdivisions, as said purchaser should indicate; and on the payment of each additional installment, with interest, as therein stipulated, to set apart for said purchaser an additional tract of land, in compact form, when the said purchaser might request, but extending directly across the neutral lands from east to west, containing a number of acres equal to the number of dollars of principal thus paid; and to convey the same to said purchaser, or his assigns, and so on from time to time until the whole should be paid; and no conveyance of any part of said lands to be made until the same should have been paid for as provided for in the said contract.

"(3) That on or about the first of March, 1869, Mr. Joy assigned

and conveyed to the plaintiff all his right, title, and interest in and to said contract, and to the lands therein described.

"(4) That prior to said first of March, 1869, Mr. Joy had paid to the secretary of the interior portions of the purchase money for said lands, and had received from the United States patents for a *314 corresponding number of acres of the same, set apart for him in pursuance of the provisions of said contract; but that no part of the said 'Cherokee Neutral Lands' situate in Bourbon county was included in said patents.

"(5) That on the eighth of August, 1870, the plaintiff, as such assignee of Mr. Joy, paid to the secretary of the interior the sum of \$437,478.50, the balance of the principal and interest then due and unpaid upon said contract, after deducting the payments so as aforesaid made by Mr. Joy; and on the second of November, 1870, received from the United States a patent conveying to said plaintiff the balance of said 'Cherokee Neutral Lands' not so as aforesaid patented to Mr. Joy, and including in said patent that portion of said lands situate in Bourbon county.

"(6) That in September, 1870, there was levied and assessed against said lands in Bourbon county, and by the proper officers of said county, the tax mentioned in the first count of plaintiff's petition, and that the same, with the statutory penalty of ten per cent., is in the hands of the defendant for collection.

"(7) That the Cherokee Indians retained, at the time of the levy of this tax, and still retain, their tribal organization and national existence."

It seems from this agreed statement that the only interest the plaintiff had in these lands, at the time of the levy and assessment of the tax, was derived from a contract of purchase, upon which no portion of the purchase money had been paid; for while the contract provided for the sale of the entire 800,000 acres, and some money had been paid thereon, yet it also provided for the conveyance of the land as rapidly as paid for, acres for dollars, and all the land paid for had been in fact conveyed by patent prior thereto. Of course, the government had no lien upon the lands patented for the purchase money of those unpatented; and the plaintiff had no right to a conveyance of the latter until it had paid therefor the contract price of a dollar per acre. There was therefore but a simple contract of purchase, upon which the purchaser had paid nothing. The legal title was in the government; and while the plaintiff had an equitable interest in the land, it had not the full equitable title. If these lands had

*315 been public lands, beyond any question, under the recent decision of the supreme court of the United States in the case of the Kansas Pac. Ry. Co. v. Culp, 16 Wall. 603, reversing the decision of this court, (9 Kan. *38,) they would not have been subject to taxation. In that case the court says: "While we recognize the doctrine heretofore laid down by this court that lands sold by the United States

may be taxed before they have parted with the legal title by issuing a patent, it is to be understood as applicable to cases where the *right* to the patent is complete, and the equitable title is fully vested in the party, without anything more to be paid, or any act to be done going to the foundation of his right." But these were not public lands. The government held the legal title, but held it in trust for the Cherokee Indians. These Indians still retained their tribal organization and national existence. As such their property was exempt from state taxation. In the Case of The Kansas Indians, 5 Wall. 737, the supreme court decided that "as long as the United States recognizes their national character they are under the protection of treaties and the laws of congress, and their property is withdrawn from the operation of state laws." The same doctrine was recognized in the subsequent Case of The New York Indians, 5 Wall. 761. These decisions were placed, not simply or mainly on treaty stipulations, but upon the broad ground that these Indian nations were under the protection and care of the general government, were separate nations, and outside the jurisdiction of the states. Speaking of the Shawnees, Mr. Justice DAVIS uses this language: "If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a people distinct from others, capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union." So that, whether these lands were the property of the United States or the Cherokee Nation, they were alike exempt from taxation.

But there remains a more difficult question. These lands were originally ceded to the Cherokees by the treaty of December *316 29, 1835. 7 U. S. St. 478. By that treaty it was stipulated that these lands should never be included within the limits or jurisdiction of any state or territory without the consent of said Indians. By the treaty of 1866 they were ceded by the Cherokees to the United States. 14 U. S. St. 799. The seventeenth article of that treaty is, so far as it bears upon the question, as follows:

"Art. 17. The Cherokee Nation hereby cedes, *in trust*, to the United States, the tract of land in the state of Kansas which was sold to the Cherokees by the United States under the provisions of the second article of the treaty of 1835, and also that strip of the land ceded to the nation by the fourth article of said treaty, which is included in the state of Kansas; and the Cherokees consent that said lands may be included in the limits and jurisdiction of said state."

Upon this, counsel for defendant in error contends that the Cherokees, who at the time of this tax were the sole beneficiaries of this trust, the owners of the full equitable interest, subject only to the plaintiff's right of purchase, a nation not occupying these lands, but domiciled outside the territorial boundaries of the state, had con-

sented that the lands should become a part of the state, and subject to all its laws, including its revenue and tax laws. If the Indians consented, who could object? The restraints of the organic act and the act of admission were abrogated by this stipulation, and thereafter the authority of the state was full and absolute over the lands. It cannot be denied that there is great force in this argument. But it must be borne in mind that it is settled law to construe Indian treaties liberally in favor of the Indians. As said by Mr. Justice DAVIS, "Enlarged rules of construction are adopted in reference to Indian treaties;" and by Chief Justice MARSHALL, in 6 Pet. 582: "The language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of their treaty." Now, the purpose of this cession might be defeated, and would certainly be hindered, if from the very date of the treaty, and before the government had effected any *317 sale, the state could burden these *lands with its taxes, and subject them to sale for non-payment. No benefit would inure to the Cherokees by making them subject to taxation prior to a sale. The lands would be less rather than more salable. And we cannot suppose they intended to insert a stipulation which would throw a burden upon their property, and for which they receive no consideration. It seems to us, rather, that they intended simply to do away with the prior stipulation of exclusion, leaving the lands, as other Indian lands to which such a stipulation of exclusion had never attached, under the protection of the general government until such time as the latter should effect a sale. From these considerations it follows that these lands were not subject to taxation for the year 1870, and the tax proceedings should be perpetually enjoined.

2. In regard to the lands in question in the second cause of action, it is agreed in the statement of facts that they are a part of certain lands granted to the state of Kansas by a certain act of congress approved July 25, 1866; that the plaintiff in error, had, at the time of the levy of the tax complained of, complied with all the conditions of said grant on its part to be performed; that the state of Kansas had not, at the time of said levy, accepted said grant, and never did accept the same until the second of March, 1871. Referring to the act of congress, it appears from the first section that the grant of lands was to "the state of Kansas for the use and benefit of said railroad company," (the plaintiff herein.) By the third section it was provided that "when the governor of the state of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workman-like manner as a first-class railroad, then the said secretary of the interior shall issue to the said company patents for so many sections of the land, within the limits above named, as are coterminous with the said completed section

hereinbefore granted," (and so for each successive section of ten miles:) "provided, that if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, *318 the lands remaining unpatented shall revert to the United States; and provided, further, that the said lands shall not in any manner be disposed of or incumbered by said company, or its assigns, except as the same are patented under the provisions of this act." Section seven requires that the acceptance of the company shall be in writing, and made within one year. These are all the provisions of the act that bear upon the question. It is agreed that no patent had been issued for these lands up to the time of commencing this action. Upon these facts counsel for plaintiff in error say, (we quote from their brief:)

"We claim that, notwithstanding such compliance on the part of the plaintiff in error with all of the conditions of this grant, no such complete, equitable title to the lands in question had passed to it, at the time of the levy of this tax, as to entitle it to a conveyance by the United States of the legal title, but that this equitable title, as well as the legal, still remained in the United States—*First*, because there had been no acceptance of the grant by the state of Kansas. This grant was made directly to the state of Kansas for the use of the plaintiff in error; thus constituting the state the trustee, and the railroad company the *cestui que trust*. *Second*. Because the United States, in prohibiting the railroad company from disposing of or incumbering these lands until the patent should be given it under the provisions of the grant, clearly and unmistakably show that it was their intention that no interest whatever in these lands should pass to the railroad company until these patents had been executed, but that the entire equitable as well as the legal title should remain in the United States."

It does not seem to us that either point is well taken. The case comes within the rule as laid down by Mr. Justice MILLER in the case from 16th Wall., just cited: "where the right to the patent is complete, and the equitable title is fully vested in the party without anything more to be paid, or any act to be done going to the foundation of his right." While the grant is in terms to the state for the use of the company, the act calls for no acceptance from the state, and provides for the issue of patents directly to the company, and specifies the conditions of the issue. Those conditions involve no action

on the part of the state; for, while patents were to issue on the *319 certificate of the governor, this was simply a provision on the part of the United States government to secure satisfactory evidence of the performance by the company of the conditions of the grant before a conveyance of the lands. The company had nothing more to pay,—nothing more to do. It had complied with the conditions of the grant. Nothing remained, unless, perhaps, it were the evidence of such compliance. There was certainly nothing that went to the "foundation of its right." Nor do we think the restriction on the

company's disposal of the land a restriction on the right of taxation. The government retained by it no interest in the land. The equitable interest of the company was in nowise limited. It was a naked restriction on the right to dispose or incumber. There is no reason for making it the basis of an exemption from taxation. We see no error in the ruling of the district court upon this point.

The case having been tried upon an agreed statement of facts, it is the duty of this court to direct what judgment shall be entered by the district court. The case will be remanded, with instructions to enter a judgment in favor of the plaintiff in error, enjoining and restraining all proceedings to collect the taxes for the year 1870 on the lands described in the first cause of action set forth in the petition, and for costs of suit. The costs of this court will be divided.

(All the justices concurring.)

*320

*JOHN H. WHETSTONE v. OTTAWA UNIVERSITY.

July Term, 1874.

1. **Corporation: Articles of Incorporation: Powers.** Where, in preparing a certificate of incorporation, the corporators employ only the words used in the statute to describe the general purposes of such incorporation, it will be presumed that they intended to create a corporation of the same general nature, and with the same general powers, granted by the statute, rather than that by such words they sought to apply special limitations on the powers of the corporation.¹
2. **Ultra Vires: Donation of Lots by Town Company.** A donation of lots by a town-site corporation, with no special limitation on its powers, is not necessarily *ultra vires*.
3. —: **Purposes of Donation.** Where the direct and proximate tendency of certain improvements sought to be obtained by the donation is the building up of the town, and the enhanced value of the remaining property of the corporation, the donation is within the powers of the corporation, and this though the improvements are to be made outside of the town-site.
4. —: A donation by the Ottawa Town Company to the Ottawa University of one hundred lots, to aid in the erection of a school building outside of the town-site, and distant therefrom less than half a mile, was not *ultra vires*.
5. **Corporation: Acts Bind Stockholders.** An act within the powers of a corporation, when regularly done, binds both the corporation and stockholders.
6. **Conveyances: Quitclaim.** Under our statutes, any interest in lands may be conveyed by deed, quitclaim or otherwise.

¹See *Krutz v. Paola T. Co.*, 20 Kan. 397; *Pape v. Capital Bank*, Id. 440.

7. **Bond: To Build or to Convey: Construction.** A bond, with penalty to erect a certain building by a named time, or convey certain specified lots, is, after the time to build has passed, equivalent to a bond with penalty to convey.
8. ———: **Specific Performance.** Such a bond is in equity treated as a contract to convey, which may ordinarily be specifically enforced.

Error from Franklin district court.

Action to compel specific performance of a contract to convey certain lots of land, brought by the Ottawa University, as plaintiff, against the board of county commissioners of the county of Franklin, John H. Whetstone, W. T. Pickrell, Levi C. Wasson, George S. Holt, J. L. Hawkins, W. W. Roller, the Ottawa Town Company, and Robert Atkinson, *as defendants. The board of county commissioners, the Ottawa Town Company, and Whetstone answered. The other defendants made default. The action was tried at the March term, 1878, of the district court. The judgment is as follows: "It is therefore ordered, adjudged, and decreed that the said John H. Whetstone, W. T. Pickrell, Levi C. Wasson, George S. Holt, J. L. Hawkins, and W. W. Roller, defendants, within ten days from the rising of this court, execute and deliver to the said Ottawa University a good and sufficient deed, conveying to the said Ottawa University, in fee-simple, all and every the lots, parcels, or tracts of land in said petition, and in the exhibit thereto, mentioned and described, to-wit [describing the lots as in the petition and exhibit;] and in default of the execution and delivery of said deed as aforesaid by the said defendants, it is ordered that this judgment and decree shall have the effect and operation, at law and in equity, of such conveyance, so as to vest the title to the said premises in the said plaintiff in fee-simple; and it is further considered and adjudged that the said plaintiff recover of the said defendants its costs in and about this suit in this behalf expended," etc. From this decree Whetstone alone appealed, and he brings the case here by petition in error.

C. B. Mason and Sears & Maxwell, for plaintiff in error.

We claim that the Ottawa Town Company had no power to make a deed or donation of the 100 lots to the Ottawa University, and the deed made was *ultra vires*, and therefore void. It is a violation of the grant between the state and the corporation. It may be supererogation to present any argument upon the construction of the powers of a corporation to this court, when it is a maxim "that a corporation is a mere creature of the statute, and has no powers whatever except those expressly given it, or which are incidental to its existence;" but the recurrence to fundamental principles cannot well be avoided in preparing a brief on the subject. "The principle of the limited power of corporations *is founded on the soundest principles." *Mayor v. Norfolk Ry. Co.*, 30 Eng. Law. & Eq. 137; *Perrine v. Chesapeake & D. C. Co.*, 9 How. 184; *White's B. of B. v.* v.13k—16

Toledo Ins. Co., 12 Ohio St. 605; 5 Wheat. 636. A corporation is not only incapable of making contracts which are forbidden by its charter, but, in general, it can make none which are not necessary, either directly or indirectly, to effect the objects of its creation. *Head v. Providence Ins. Co.*, 2 Cranch, 154; *Fisher v. Horicon I. & M. Co.*, 10 Wis. 351. And it is well settled, both in England and the United States, that corporations take nothing by implication. *Newhall v. Galena & C. U. R. Co.*, 14 Ill. 275; *Town of Petersburg v. Metzker*, 21 Ill. 205; *Pennsylvania R. Co. v. Canal Com'rs*, 21 Pa. St. 19; *Lyon v. Lyon*, 21 Conn. 194. And words that are ambiguous in a charter are to be construed strongly against the corporators. *Moran v. County of Miami*, 2 Black, 723; *Perrine v. Chesapeake & D. C. Co.*, 9 How. 172. Said deed is a violation of the charter, as between the managers of the corporation and the stockholders in the corporation. Every act which impairs the contract, whether by the state towards a corporation, or by the corporation towards the shareholders, is unconstitutional and void. As to unconstitutionality, see *Plant v. Long Island R. Co.*, 10 Barb. 28; *Mississippi, O. & R. R. Co. v. Cross*, 20 Ark. 449; *Young v. Harrison*, 6 Ga. 130; *Com. v. Cullen*, 13 Pa. St. 133.

The rights of the majority over the minority do not extend to the performance of any act not conformable to the principles of the constitution of the corporation. *Ang. & A. Corp.* §§ 391, 500; *McLaughlin v. Detroit & M. Ry. Co.*, 8 Mich. 100. The power to donate the property of the town company, nowhere expressly appears in their charter. The power cannot be implied as one necessary and incidental to the carrying out of the specific purpose for which the corporation was created. It requires no argument to show that "a donation to the Ottawa University, to enable that corporation to complete a certain building then being erected as a school building, outside of the limits of the town of Ottawa, and more than one-fourth of a mile distant from the limits of the property and land held and owned by the Ottawa Town Company, and off from said property and land," is a plain departure from the specific purposes of the charter of the Ottawa Town Company. The very object of the conveyance and transaction between the Ottawa Town Company and the board of county commissioners was in keeping with one of the main purposes of the

*323 charter of the town company,—*the making of improvements on the town-site*. The palpable application of one hundred lots to the benefit of the Ottawa University is a direct misapplication to any purpose, expressed or implied, for which the Ottawa Town Company has an existence. If such a disposition of the property of the corporation can be made as attempted to be done to the Ottawa University, why may not all the property of the Ottawa Town Company be donated to erect a hospital or other building, wherever it may be situated? The principle, if allowed to prevail at all, necessarily need have no limit.

If, however, such deed has been made and delivered, by a majority of the stockholders having power to do the business of the corporation, we say that the only powers delegated to the quorum by the by-laws passed, as referred to in the fifth finding of fact by the court, were such powers as were incidental to its purposes; and it cannot be implied from the proceedings therein found that the quorum so constituted should have any other or further powers than such as were necessary for the legitimate purposes mentioned in its charter. The resolutions and proceedings to which the district court has attached an importance in its decision were really immaterial to the power of the making of a deed in the year 1868. The proceedings mentioned in the fifth finding of fact occurred and were adopted April 24, 1865, and January 10, 1866. If with reference to the making of this deed, or any other power not incidental to the corporation, these proceedings had taken place, some claim for the validity of such deed might justly be presented; perhaps upon a state of facts showing the assent of the stockholders to the delegation of powers beyond the original charter, but certainly on no other grounds would any shareholder be estopped. It is fairly implied that the district court found that no authority exists in the terms of this charter to dispose of the property of the Ottawa Town Company, in the manner and conveyance made December 30,

1868, but that such authority was conferred by the proceedings
 *324 of April, 1865, and January, 1866. That any such powers *are

inferential in these proceedings, we confess is beyond our comprehension. These proceedings cannot be reasonably inferred to mean anything more than, for convenience of the performance of the legitimate business of the corporation, a small portion of its members should constitute a power capable of performing the business necessary and incidental to the existence and purposes of the corporation. The district court seems to accept these proceedings as the pivot upon which turns the validity of the deed of the Ottawa Town Company to the plaintiff below. Such conclusion of the court is plainly unjustified by the circumstances of the case, and in harmony with the uniform erroneous conclusions of law arrived at by the court throughout. The acts of the majority control only when confined to the ordinary transactions of the company, and consistent with the original objects of its formation, but cannot exceed the authority in the charter. As against the plaintiff in error, nothing obligatory upon him could occur without his assent, in any event. If present, but protesting, he was not bound by the act of the meeting of December 30, 1868. If not present, he cannot be regarded as assenting to the act of the meeting. *American Bank v. Baker*, 4 Metc. 164. The shares of stock owned by the plaintiff in error represent (1) property; (2) rights and privileges; of which he cannot be divested except by his own consent, and in the exercise of which rights the law will protect him. 43 N. H. 520; *Stevens v. Rutland & B. R. Co.*, 29 Vt. 545; *Redf. Rys.* 92; *Macedon & B. P. R. Co. v. Lapham*, 18 Barb. 312; 5 Eng. Ry. Cas. 573.

But if the town company had the power to make a deed to the university on December 30, 1868, and if no stockholder had the right to complain of the act of the majority on that day, we claim, then, that the facts found by the court do not show any title or interest in the 100 lots in the plaintiff below, as against the plaintiff here. The deed intended and purports to convey nothing more than a *bare possibility*, and that possibility the mere right of an action of a party having no legal interest in the land. The conveyance made on that day

*325 by the town company was a simple quitclaim deed of the 100 lots. A quitclaim deed carries with it nothing more than that which is then in possession of the grantor. Hence the grantee always requires an express covenant if he expects to hold the grantor, and the grantor always gives a quitclaim deed when he intends to exempt himself from liability. A quitclaim deed presupposes a previous or precedent conveyance, and he who purchases land is held bound by the maxim *caveat emptor*, and if he means to hold the grantor, he must exact express covenant. It cannot be successfully claimed that the rule of the common law in Kansas on this subject is abrogated. Neither section 2 nor section 5 of the act concerning conveyances (chapter 22, Gen. St.) applies to the deed of quitclaim. Such a construction might have been claimed with some force if the original draft of the act in 1868 by the commissioners to revise had been adopted. [By section 4 of such act, had it been adopted, the words "grant," "bargain," and "sell," or, in other words, a quitclaim deed, with those terms expressed, might have had the same effect as certain covenants of warranty, and the rights of a grantee been different. Com'rs' Rev. 261, 262, § 4.] That such provision was not made a part of the act must be construed to mean that it was not the intention of the legislature expressly to enact any such rule as to the effect of quitclaim deeds. Examining, then, section 5 of our act relating to conveyances, it cannot reasonably be enlarged to refer to deeds of quitclaim, because the section only relates to deeds where the grantor, *by terms of his deed*, "*undertakes to convey to the grantee an indefeasible estate in fee-simple absolute*;" that is, to convey the legal estate,—the term used in the statute; and the town company undertook to convey no legal estate, nor could they, as the only interest they had was such equitable interest, if any at all, in the land, as they held under the bond. A title bond, even when the purchase money has all been paid, gives the holder only an equitable interest in the land, (*Huddle v. Worthington*, 1 Ohio, 423;) nor do we think the case of *Bayer v. Cockerill*, 3 Kan. *282, under the law as then enacted, is to be construed as contrary to our view thus taken

*326 of a quitclaim deed and legal estate. If our understanding is correct,—and we submit, no other is apparent and reasonable, for it is absurd to claim that this quitclaim, by its terms, undertakes to convey any such estate as a fee-simple absolute,—then section 2 can have no application, there being no estate to which the

word "heirs" can attach, and this section, in its terms, clearly only refers to such estate as the grantor then had.

It seems to us the common-law rule must prevail in Kansas, as before stated, and that clearly the Ottawa University acquired no title or right to claim a specific performance in equity of the contract to reconvey. If, as against the grantor in the quitclaim deed, the grantee has acquired no rights he could enforce, concerning the after-acquired title, much less can it prevail against Whetstone, who holds the title from a grantor who was the owner of the indefeasible absolute fee-simple. The court, in the second finding of facts, finds the fee-simple in the board of county commissioners of Franklin county. There was and is but one fee-simple at the same time. It could not be divested by the Ottawa Town Company by any number of deeds, whether quitclaim or otherwise, when there was no fee-simple in them to divest; nor could any amount of quitclaim deed-making at such time, except by the board of commissioners, take the fee-simple out of where it was vested, or transfer the right to a specific performance of the original agreement to a grantee. The deed of quitclaim conveying no estate in the land, as we have shown, we claim the recording of such deed has no more effect upon a subsequent purchaser of the premises than a void instrument.

The obligation of the board of county commissioners of Franklin county, as shown by the third paragraph of facts, and by the bond, is in the alternative,—to build a court-house to cost not less than \$15,000, on or before the first day of January, 1870; or to reconvey, in default thereof, to the Ottawa Town Company the 100 lots, or to pay not exceeding \$15,000. And the recording of this bond on the twenty-

eighteenth day of November, 1865, was constructive notice to all *327 parties. This bond *is found to be delivered simultaneously

with the deed to the board of commissioners, and to be the consideration for the deed, that is, exchanged for the deed. Now, certainly, before any default, the Ottawa Town Company had no right to elect which alternative they could or would accept,—whether the court-house would be built; or, on default, require the lots to be reconveyed; or, on demand and refusal of commissioners to reconvey, then to resort to the legal remedy at law on the bond. And there has been no rescission of the contract in law. The facts found do not constitute a rescission. While the bond is outstanding, unrevoked, and uncanceled, there is no mutuality in the acts of the parties creating a rescission of the contract, or a breach upon which a right of action inures to the obligee, as though the contract was rescinded. If the Ottawa Town Company had rescinded, or intends to rescind, the transaction, it must be shown on their part, or by those claiming under them, that they have rescinded their rights in the obligation. If asking equity, they must show they have equitably performed their part, and thus seek to place all parties *statu quo* before the making of the deed and bond. Not having done this, we claim, on the facts, neither the Ottawa Town Company, nor their

grantee, are entitled to such legal finding set forth as paragraph 4.

This brings us to a consideration of the first two findings of law, in conclusion of our argument in the case on behalf of plaintiff in error. The two, taken together, substantially find (1) that the Ottawa Town Company, on January 1, 1870, could elect to sue on the bond for damages, or for the legal title, by reason of the equitable interest; (2) that such right as the town company had by assignment could pass to its grantee. As before stated, the bond was in the alternative. Clearly, the obligor had the right to elect in this contract. The obligation of a bond, being the language of the obligee, shall be construed in favor of the obligor. 2 Pars. Cont. 510, note 4. The board had the right to build the court-house, and, in case they did not build as stipulated, then they had the right to reconvey, and, if this

*328 was the only alternative, undoubtedly an action by a proper party would lie to compel them to reconvey. But that is not this case. *There was still another alternative.* They could keep the lots, and be liable on their bond. That which they had failed to do—to build a court-house—they were by the terms of this bond debarred from afterwards (unless, perhaps, within a reasonable time) choosing to perform. But the terms of this obligation reserved to them the right still to elect not to reconvey, and leave to the obligee the legal remedy on the bond. And the board did elect; and, they having elected, the Ottawa Town Company (had no deed been made to the plaintiff below) had a clear and adequate remedy at law, and having that would not have been entitled to equitable relief, and bring their suit after legal title had been conveyed by the board of commissioners. Story, Cont. 665, note 2; McNitt v. Clark, 7 Johns. 465. Again, whatever right, title, or interest in this transaction the Ottawa Town Company may have had, (and which we claim to have been on December, 30, 1868, or at any other time since, simply rights holden by virtue of the bond, and under that, only the legal right to damages, if the board of commissioners refused to reconvey,) they were not assigned, nor could the right to specific performance be assigned by the town company, so that the grantee stood subrogated to the rights of the obligee in the bond. And we now claim that this judgment ought not to be affirmed, because the well-established rules of a court of equity require that he can only have a right to a specific performance of a contract who shows a valuable and meritorious consideration as the basis of his claim. It cannot be said that the plaintiff in error is *in pari delictu*, for although no money has been paid by him, his obligation to pay and indemnify sustains his position in contemplation of law; nor can any comparison on this score invidious to him be made, for the plaintiff below must recover on his own equity, and not on want of equity in his adversary. Another maxim is that “where there is equal equity, the law must prevail.”

*329 *John W. De Ford*, for defendant in error.

In Whetstone's answer to petition of defendant in error is this allegation: “This defendant further alleges that the conveyance of

the said board of county commissioners to the defendant, of said one hundred lots, was made in good faith, and for a valuable consideration, and that this defendant is the owner thereof, *subject to any equities between the said board of county commissioners and the said Ottawa Town Company.*" This admission, thus solemnly made by Wheatstone, that he holds the lots "subject to any equities between" the county commissioners and the town company, would seem to resolve the whole case into these two questions: (1) If the town company were plaintiff here, would it in equity be entitled to a specific performance by the county board of the bond of May 12, 1865? If yea, then, (2) did the "quitclaim," of December 30, 1868, vest in the Ottawa University a title to the same relief? If both these questions be answered in the affirmative, the judgment should be affirmed.

Can it be contended, with any show of reason that the county board were not, in equity and good conscience, bound to perform their contract with the town company? Every principle of justice required them to build the court-house, or, failing in that, to return the lots to the town company, or pay for them, as the latter might elect. *McNitt v. Clark*, 7 Johns. 465.

Did the "quitclaim" of December 30, 1868, vest in the university a title to the same decree? The plaintiff in error says, "No," alleging that "it was *ultra vires*, beyond the power of the town company to make that conveyance, and it therefore was and is void;" that "it is void as against any shareholders not assenting to its execution;" that "it places neither a legal nor equitable interest in the grantee;" and that "the district court's conclusions of law on the rights of the obligee in the bond, or the grantee in the quitclaim deed, are erroneous." But we deem all these objections unsound.

The powers and privileges of the Ottawa Town Company
 *330 *were conferred by sections 37, 20, 18, etc., and the limitation thereupon imposed by section 45, c. 44, Comp. Laws
 1862. By section 37 they are "authorized to carry on the business and operations named in their certificate of incorporation, and by the name and style provided in said certificate shall be deemed a body corporate, with succession, and they and their associates, successors, and assigns, shall have the same general corporate powers as are provided in the twentieth section of this act, and subject to all the restrictions hereafter provided." Section 20 empowers them to "contract, and be contracted with, acquire, and convey at pleasure, all such real and personal estate as may be necessary and convenient to carry into effect the objects of the incorporation, and do all needful acts to carry into effect the object for which it was created; and such company shall possess *all the powers*, and be subject to all rules and restrictions, *provided by this act.*" And section 18 reads: "The stockholders may, from time to time, adopt such regulations and by-laws, for the management of the business of the company, as they may see proper," etc. And by section 45 the corporation was re-

stricted in the employment of its stock, means, and assets to the "legitimate objects of its creation." The town company was incorporated for the "purpose of locating and laying out a town-site, and making improvements thereon." These of course were its "legitimate objects;" and from the foregoing extracts it appears to have been clothed with ample authority to accomplish them. Was the conveyance of the 97 lots to the university, to enable her to complete a college building a quarter of a mile without the limits of the town, within the scope of these "legitimate objects?" The answer to this depends upon the meaning to be given to the words "making improvements thereon." Plaintiff in error claims that the words "making improvements thereon" mean "only erections upon, or something performed on, the land itself, to ameliorate its condition,—such as the erection of buildings, or fences, or necessary grading, or ditching to improve the drainage." But these corporations are never organized for the purpose of locating, laying out, and "making im-

*331 provements," *in that limited sense, on town-sites. Their grand object always is to enhance the value of their lots by every available expedient, and then make money by selling them. And in view of this fact, it would seem that the term as here used was employed in its most liberal sense, and includes the "performance of any act, whether on or off the town-site, the direct and proximate tendency of which is to enhance its value in the market. *Vandall v. Dock Co.*, 10 Amer. Law Reg. (N. S.) 506. And who can doubt that the finishing of the university building, at a distance of only a quarter of a mile from town, and the opening of a school in it, had a "direct and proximate tendency" to enhance the value of lots in Ottawa? At all events, the presumption is that it had this tendency, and that the act of the town company in making the deed was lawful, until the contrary appears. And even if not so, it would, in this case, make no difference. *Bissell v. Michigan S. & N. I. R. Co.*, 22 N. Y. 258.

Again, the plaintiff in error asserts that the quitclaim of December 30, 1868, is "void as against any shareholder not assenting to its execution." That Whetstone was bound, with or without his assent, by the act of a majority of the meeting which passed the resolution directing the execution and delivery of this deed, if otherwise lawful, can admit of no question. It would, in truth, be a singular town company that could not make a conveyance of this kind without the consent of every shareholder.

Whetstone further insists that the quitclaim "placed neither a legal nor equitable interest in the grantee," especially as against *him*. The town company, he argues, on December 30, 1868, had no interest, but only the "possibility" of one, in the lots, and hence their deed of that date conveyed *nothing*. But a "bare possibility" can be conveyed just as well as an absolute estate in fee-simple. "Conveyances of land, or of any other estate or interest therein, may be made by deed." Sec-

tion 3, c. 22, Gen. St. 1868; sections 2, 5, 6, Id. And Story tells us that courts of equity "give effect to assignments of trusts, and *possibilities* of trusts, and *contingent interests*, and *expectancies*, *332 whether they are in real or in personal *estate." Story, Eq.

Jur. §§ 1040, 1055; *Maduska v. Thomas*, 6 Kan. *153; *Lessee of Thompson v. Hoop*, 6 Ohio St. 480; *Mitchell v. Winslow*, 2 Story, 639; 50 Mo. 31. But the fact is that the town company, prior to January 1, 1870, had in these lots a far greater interest than a "bare possibility." They had an estate contingent upon the happening of a condition precedent,—an estate which would entirely fail, it is true, if the court-house should be built, but which, if it should not, would expand into an absolute estate in fee-simple. On the other hand, the county had a fee conditional, which would become unqualified by the erection of the court-house, and would, if they failed in that, shrink into a mere dry legal estate, held in trust for the town company or its assigns. This was the true state of the property; and to say that the town company could not assign an interest of this magnitude in December, 1868, is to waste words. It follows, then, that the quitclaim deed, granting, as it does, the 100 lots, (and not merely whatever interest the grantor had in them,) with the "hereditaments and appurtenances thereunto belonging, or in any wise appertaining," wrought a perfect transfer to the university of the bond dated May 12, 1865, and of all rights, present or future, arising out of it. *Adams v. Wilson*, 47 Mo. 272; *Garton v. Cannada*, 39 Mo. 365; *Worsham v. Callison*, 49 Mo. 208; 2 Story, Eq. Jur. § 1050.

There is no error in the conclusions of law found by the district court. But suppose it were otherwise, what right has Whetstone to complain of "the findings of the court as matter of law, or the rights of the obligee in the bond, or the grantee in the quitclaim deed?" Surely, *they* can take care of themselves; and so long as they make no objection, Whetstone may well be content. But, even if he could be allowed to fight their battles, no exception was taken to any conclusion of law, and he is therefore presumed to have acquiesced in them. *Luirance v. Luirance*, 32 Ind. 198; *City of Logansport v. Wright*, 25 Ind. 516.

The plaintiff in error thinks the county "could keep the lots, and be liable on their bond." But Story says, (Eq. Jur. § 751:) "If the contract appears only in the condition of a bond, secured by a penalty, the court will act upon it as an agreement, and will not suffer *333 the party to escape from a specific performance by offering to pay the penalty," and that such a bond is "not to be discharged by the payment of the penalty." Id. § 715. But neither Whetstone nor the county board has ever offered to build the court-house, reconvey the lots, pay the penalty, or do any other act or thing in performance of the obligation. On the contrary, the county has attempted to give the lots to Whetstone for nothing.

BREWER, J. The findings of facts made by the court below on the trial of this action are as follows:

"(1) That the plaintiff, the Ottawa University, and the defendants, the board of county commissioners of the county of Franklin, and the Ottawa Town Company, are each corporations, created under the laws of the state of Kansas.

"(2) The board of county commissioners of the county of Franklin, by deed, with full covenants, executed by the Ottawa Town Company, were seized of a good, absolute, and indefeasible estate in fee-simple of and in, all and singular, the 100 town lots in the town (now city) of Ottawa, particularly described by number, lot, and block in Exhibit A, attached to and being a part of the petition.

"(3) On the twelfth of May, 1865, said board of county commissioners made and delivered to the Ottawa Town Company a bond in the sum of \$15,000, conditioned that they, or their successors in office should, before the first day of January, 1870, erect on block 85, in the city of Ottawa, a court-house, at a cost of not less than \$15,000, or, in default thereof, to convey to the Ottawa Town Company the 100 lots described in said Exhibit A.

"(4) The deed mentioned in the second paragraph herein, and the bond mentioned in the third paragraph herein, were delivered simultaneously; that is, exchanged the one for the other. There was no consideration whatever paid by said board of county commissioners, either directly or indirectly, to the Ottawa Town Company, as a consideration for the lots described in the deed aforesaid; nor have the conditions of the bond aforesaid been complied with; that is, no court-house has been erected, or money paid, or conveyance made, as provided for.

*334 "(5) At a meeting of the Ottawa Town Company, held *Monday, April 24, 1865, the following proceedings were had: "Moved and seconded that regular meetings of the company shall be held on Monday evening, at 7:30, and that five shall constitute a quorum; carried." And at a meeting held Wednesday, January 10, 1866, it was "moved and seconded that hereafter votes of this company be taken by shares, and that each half-share be allowed one vote, whenever present, by person or by proxy; carried." These proceedings were recorded in a book furnished and kept by the company for that purpose, and in that book there is no record of any meeting after June 27, 1867.

"(6) The property of the Ottawa Town Company was divided into twenty shares, and on and before the thirtieth of December, 1868, the twenty shares of the Ottawa Town Company's stock were held as follows: By C. P. Kalloch, one share; by E. J. Nugent, three shares; by J. C. Richmond, one-half share; by F. Cobb, one-half share; by E. Cobb, one-half share; by S. C. Pomeroy, one share; by J. T. Jones, one share; by W. Libby, one-half share; by T. J. Southard, one-half share; by J. B. Gordon, one share; by C. C. Hutchinson,

one share; by R. D. Lathrop, four shares and one-half share; by C. T. Evans, one-half share; by G. S. Holt, one-half share; by S. T. Kelsey, one-half share; by A. S. Lathrop, one share; and by J. H. Whetstone, two shares and one-half share. The property of the town company originally consisted of all the land described by the town plat of Ottawa.

"(7) On the thirtieth of December, 1868, the Ottawa Town Company held a meeting, with the following shareholders, present or represented: C. P. Kalloch by I. S. Kalloch, C. C. Hutchinson, J. T. Jones, S. T. Kelsey, J. C. Richmond, E. J. Nugent, J. H. Lane by H. F. Sheldon, and G. S. Holt. The following proceedings were had: Holt elected secretary *pro tem.* * * * Voted that a quitclaim deed be given to Atkinson, for the benefit of Ottawa University, of 97 lots, previously donated to the county of Franklin. * * * Voted, that if anything accrues from the lots traded to Lathrop, that also be given to Atkinson for the same purpose. * * * Voted that the secretary *pro tem.* see that the deed be furnished this p. m., and have it signed by the president.' John H. Whetstone had notice of this meeting, and was present, just before or just at the time of the opening, but, on account of sickness, withdrew, and did not participate.

"(8) On the thirtieth of December, 1868, the Ottawa Town Company, by its president, I. S. Kalloch, and by its secretary **pro tem.*, G. S. Holt, executed and delivered to Robert Atkinson, as treasurer of the Ottawa University, for the sole use and benefit of the Ottawa University, a quitclaim deed of the 97 lots referred to in the seventh paragraph herein, being 97 of the 100 lots before that time conveyed by the said Ottawa Town Company to the board of county commissioners of Franklin county; that there was no consideration whatever paid by the Ottawa University, either directly or indirectly, to the Ottawa Town Company, for the lots aforesaid, but the quitclaim deed so made was made as a donation to the Ottawa University, to enable that corporation to complete a certain building then being erected as a school building outside of the limits of the town of Ottawa, and more than one-fourth of a mile distant from the limits of the property, and land held and owned by the Ottawa Town Company, and off from said property and land.

"(9) On the ninth of August, 1870, the board of county commissioners of the county of Franklin made and delivered to John H. Whetstone a quitclaim deed to 100 lots mentioned and referred to in the second paragraph herein, but without any consideration paid therefor by the said Whetstone, or by any person for him, either directly or indirectly, to said board of county commissioners, or to any one, for the use and benefit of Franklin county, and without any agreement or promise, either express or implied, to pay, or cause to be paid, at any time or in any manner, any valuable consideration, except that on the same day the said Whetstone, with W. T. Pickrell as his security, executed and delivered to said board of county com-

missioners a bond in the sum of \$15,000, conditioned that they will, in consideration of said quitclaim deed, save harmless the board of county commissioners of the county of Franklin from all liability, by way of damages or expenses incurred, or which may be incurred or expended, by reason of the giving of the bond by said board, referred to and described in the third paragraph herein.

"(10) On the tenth of August, 1870, John H. Whetstone executed and delivered to W. T. Pickrell a quitclaim deed for lots 18 and 20, in block 72; and on the fifteenth of August, 1870, said Whetstone executed and delivered to George S. Holt a quitclaim deed for lots 7, 9, and 11, in block 69; and on the fifteenth of August, 1870, said Whetstone executed and delivered to W. W. Roller and J. L. Hawkins a quitclaim deed for lots — in block —; and on the seventeenth of August, 1870, John H. Whetstone executed and delivered to *L. C. Wasson a quitclaim deed for lots 1, 3, 5, 7, and 9, in block 81, part of the lots described in quitclaim deed from board of county commissioners of the county of Franklin to said Whetstone, referred to and described in the ninth paragraph herein; and all the deeds, bonds, and writings herein referred to were duly recorded in the office of the register of deeds of Franklin county, in the order of their dates respectively.

"(11) On the thirtieth of December, 1868, at the time of the meeting of the Ottawa Town Company, the following were resident stockholders or shareholders, residing in, and in the vicinity of, the town of Ottawa: E. J. Nugent, J. C. Richmond, E. Cobb, J. T. Jones, C. C. Hutchinson, G. S. Holt, S. T. Kelsey, J. H. Whetstone, and A. S. Lathrop. In all of the meetings of the Ottawa Town Company, A. S. Lathrop had represented the interest of R. D. Lathrop, and said A. S. Lathrop had no notice of the meeting above referred to, and protested in his own behalf, and for R. D. Lathrop, against the attempted conveyance or transfer of the interest of the Ottawa Town Company to Robert Atkinson, treasurer of the Ottawa University, of the property referred to. John H. Whetstone also opposed the conveyance last above mentioned, and made that fact known to other shareholders of the company, and to Robert Atkinson, and has never ratified the action of the town company."

The conclusions of law found by the district court on such trial are as follows:

"(1) After the first of January, 1870, the Ottawa Town Company had an equitable interest in the 100 lots, and could elect to sue for the legal title, or for the recovery of the penalty of \$15,000 fixed in the bond.

"(2) The Ottawa Town Company, claiming title to the 100 lots, could sell and convey its interest therein, though not in actual possession, and not holding the legal title, and the action of its grantee for the legal title can be maintained by the grantee if it could have been by the grantor.

"(3) The officers and a quorum of the stockholders of the Ottawa Town Company could make a conveyance of the legal title or equitable interest of that corporation in the 100 lots, and no individual stockholder of the corporation can maintain an action to cancel or set aside such conveyance, though the same was made for an inadequate consideration.

*337 "(4) The conveyance by the board of county commissioners to John H. Whetstone vested in the grantee no greater title or interest than that held by the county at the time; and the bond for reconveyance, and the deed to the Ottawa University, being duly recorded, said Whetstone had full knowledge of the equities in favor of the Ottawa Town Company and Ottawa University; and the Ottawa University can therefore maintain the action against said Whetstone, if the Ottawa Town Company could maintain a like action against the board of county commissioners.

"The court therefore finds for the plaintiff."

The first finding of fact sets forth, among others, that the Ottawa Town Company is a corporation created under the laws of the state of Kansas. The following is a copy of the article of incorporation filed with the secretary of state, on the sixth of September, 1864, which, by stipulation of the parties, is to be taken as one of the facts found in this case:

"This is to certify that the undersigned have formed themselves into an association or body corporate, for the purpose of locating and laying out a town-site, and making improvements therein. The particular tracts of land to be obtained as a town-site are the east half of section thirty-five, (E. $\frac{1}{2}$ sec. 35,) and the west half of section thirty-six, (W. $\frac{1}{2}$ sec. 36,) both of township seventeen south, (T. 17 S.) and range nineteen east, (R. 19 E.) upon what is known as the 'Ottawa Reservation,' in the county of Franklin, in the state of Kansas. The name of the company or body corporate shall be 'The Ottawa Town Company.'

"In witness whereof we, the undersigned, have hereunto interchangeably set our hands and seals this first day of September, 1864.

"CLINTON C. HUTCHINSON. [Seal.]

"JOHN C. RICHMOND. [Seal.]

"ISAAC S. KALLOCH. [Seal.]

"CHARLES T. EVANS. [Seal.]

"ASA S. LATHROP." [Seal.]

As none of the testimony is before us, except so far as it is shown by the stipulation just cited, the only question is whether, upon the pleadings and findings of fact, the defendant in error, the Ottawa University, ought to have recovered a judgment against the plaintiff in error. Upon this the plaintiff in error makes the following

*338 points: "(1) That the deed of December 30, 1868, under which plaintiff below claims, is *ultra vires* of the corporation, and therefore void; (2) that it is void as against any shareholder not

assenting to its execution; (3) that as a deed of quitclaim it places neither a legal nor equitable interest in the grantee, and especially as against the plaintiff in error; (4) that the findings of the court as matter of law, on the rights of the obligee in the bond, or the grantee in the quitclaim deed, are erroneous."

The first is the principal question, and it is one of no little difficulty. It is insisted that there is no express power conferred to donate the property of the corporation, nor to use it for the purpose of making improvements elsewhere than within the limits of the town-site; nor is the power necessary and incidental to the carrying out of the specific purpose for which the corporation was created. Looking simply at the articles of incorporation, and regarding the words used therein as selected by the incorporators with especial reference to a limitation of the powers of the corporation, and this argument is strong. Power is given to locate and lay out a town-site, and make improvements thereon. A town can be located and laid out, and improvements made in it, without the donation of a single lot, and without the use of a single dollar's worth of property in making of outside improvements. We are fully aware of the rule that corporations take nothing by implication, and that it is the duty of courts, especially in this day, when so much of the business of the country is carried on by corporations, and so much of its wealth held by them, to see to it that the powers of a corporation are not exercised beyond its charter, but are kept within the limits which the legislature has prescribed. Only in this way can the rights of the stockholders be protected against the illegal action of the directors, or of the minority of the stockholders against similar action of the majority.

On an examination, we find that the words used in the articles *339 of incorporation under consideration were taken *from the statute, where they stand as descriptive of the general purposes of such a corporation. Comp. Laws, 372, c. 44, § 37. This section reads: "When any number of persons * * * associate themselves together *for the purpose of locating and laying out a town-site, and making improvements therein*, they shall, under their hands and seals, make a certificate," etc.; and when incorporated "shall have the same general corporate powers as are provided in the twentieth section of this act, and subject to all the restrictions hereafter provided." It would seem, then, from the adoption of the words of the statute, that the incorporators intended thereby, not so much a special limitation on the powers of this town-site corporation, as the creation of one of the nature, and with the general powers, specified in the statute. If special limitations had been sought, additional words would have been used. Turning now to section 20 of the same chapter of the statutes, (the section referred to,) we find that it empowers them to "contract and be contracted with, acquire, and *convey at pleasure*, all such real and personal estate as may be necessary and convenient to carry into effect the objects of the incorporation; to make and use a common seal, and the same to alter at pleasure;

and do all needful acts to carry into effect the object for which it was created; and such company shall possess *all the powers*, and be subject to all rules and restrictions, provided by this act." And by section 45 of said act it is provided, by way of restriction, that "no company or association, incorporated under the provisions of this act, shall employ its stock, means, assets, or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation."

Now, town-site companies are neither novel nor rare in Kansas. Every county has been the home of several, and the manner of their working, and the means employed to accomplish their purposes, are familiar to us all. Nor is Kansas peculiar in this respect. Every western state is full of them. They are private corporations, organized for the purposes of gain. They take real estate, lay it off
 *340 into lots and blocks, streets and *alleys, induce people to settle and purchase, and by the sale of lots make their profits. Their object is to make gain by the sale of lots, and they may "convey at pleasure such real estate as may be necessary and convenient to carry into effect this object." If by the donation of one lot they can double the value of the remainder, is not the one lot used directly to accomplish the legitimate object of the corporation? If by donating 100 lots to the county they can secure the county-seat and the erection of county buildings, are they not furthering the very purpose of building up a town? This the counsel for plaintiff in error seem to concede, for thus, they say, they secure improvements on the town-site. Here the improvements to secure which this donation was made, were to be placed from one-fourth to one-half of a mile away from the town. And if there, why not anywhere, urge counsel. The purpose of securing improvements on the town-site is not simply that the improvements be there, but that thereby the property the corporation has to sell may be enhanced in value. And if the lots were donated to secure the erection of a hospital or school at a remote place, as suggested by counsel, there would be no resultant benefit to the corporation of enhanced value of its unsold lots. It seems to us that this must be the test: If the direct and proximate tendency of the improvements sought to be obtained by the donation is the building up of the town, and the enhanced value of the remaining property of the corporation, the donation is not *ultra vires*. The purpose of the corporation is to build up a town, and make gain by the sale of lots. This purpose is directly furthered by such a donation. See, as bearing upon the questions here discussed, the late case from California (40 Cal. 84) of *Vandall v. Dock Co.*, reported in 10 Amer. Law Reg. (N. S.) 506, which in many respects is similar to this. The donation in this case was to aid the Ottawa University in erecting a school building near the town-site. It will hardly be doubted that the direct and proximate tendency of such an improvement was to enhance *the
 *341 value of property in Ottawa. Hence the donation was not *ultra vires*.

The donation being within the powers of the corporation, having been made by the proper officers, and having been fully authorized by a vote of the corporation at a regularly called meeting, it follows that all the stockholders are bound by the act. The proceedings on the part of the corporation appear to have been regular; at least, no defect is pointed out in them.

The Ottawa Town Company had an interest in these lands,—such an interest as is created by a bond to convey. Any interest in land may be conveyed by deed, quitclaim or otherwise. Gen. St. 185, § 3. The county had given a bond, with penalty, to build a court-house before the first of January, 1870, or reconvey the lots. The time to build the court-house had passed. It then left the contract of the county a simple bond, with a penalty to convey. Equity always treats this as a contract to convey, which may ordinarily be specifically enforced, and does not leave the party to his legal remedy on the bond. *Waynick v. Richmond*, 11 Kan. *488.

We see no error in the judgment, and the same will be affirmed. (All the justices concurring.)

LEMUEL BASSETT v. Z. A. WOODWARD.

July Term, 1874.

1. **Pleading: Variance: Judgment.** Where the allegations in the petition and the findings of fact sustain the judgment, a variance between the prayer for relief in the petition and the judgment will not, when noticed first in this court, ordinarily justify a reversal.
2. **Parties in Supreme Court.** Parties, whether plaintiffs or defendants in the district court, who are affected by errors alleged in the proceedings in that court, must be made parties to proceedings in this court before those errors can be inquired into.

*342 *Error from Labette district court.

Action by Woodward against Bassett and Kuykendall. Trial at the November term, 1871, of the district court. Findings and judgment in favor of plaintiff and against the defendants. Bassett alone appeals. Kuykendall is not joined either as a plaintiff or a defendant in this court.

W. P. Lamb, for plaintiff in error.

A demand of the relief to which the party supposes himself entitled must be contained in the petition; and no other relief can be granted by the court rightfully. Civil Code, § 87. The demand must correspond to the prior averments in the petition, and the judgment and the findings of the court must conform and agree with

avermert of the petition and the demand for judgment and relief; and judgment and finding by the court exceeding or contrary to that demanded is error, and should be reversed.

The court cannot grant relief in favor of one defendant and against another defendant on the petition of the plaintiff in a matter where the plaintiff has no interest, and where no affirmative relief is asked by either defendant. In all cases the judgment must conform to the questions raised by the pleadings before the court, and cannot extend beyond such questions. Bouv. Law Dict. 676, § 9. The judgment in this case was not authorized. The proper requisites have not been made to obtain it, either in the petition or the answer; it is, therefore, a fraudulent judgment, as it divests the plaintiff in error of his rights in the collection of his money from his co-defendant below, without any benefit to the plaintiff below.

BREWER, J. The defendant in error brought his action in the district court of Labette county against plaintiff in error *343 *and one Josiah Kuykendall to compel a specific performance of a contract to sell real estate. In his petition he alleged a written contract on the part of Bassett to sell him the real estate at any time within eight days on the payment of \$3,500; that Kuykendall had notice of this written contract; that within the eight days he tendered the \$3,500, and demanded a deed, but that Bassett, combining with Kuykendall to cheat and defraud him, refused to convey, but sold and conveyed to Kuykendall for a greater sum than \$3,500. He asked a decree compelling Kuykendall to convey to him upon payment of the \$3,500, and requiring Bassett to join in the conveyance, and enjoining Kuykendall from selling or incumbering the premises in any manner. Bassett and Kuykendall filed a joint answer in which Bassett admitted the contract, but denied everything else, and Kuykendall admitted purchasing from Bassett, and denied the other allegations. The case was tried by the court, without a jury. Findings of fact and conclusions of law were made, and judgment entered in favor of Woodward. The testimony was not preserved, so that the case is here simply on the pleadings, the findings, and the judgment. The findings sustain the allegations of the petition. In addition the court finds the terms of the sale from Bassett to Kuykendall, to-wit, cash, \$2,000, and note and mortgage for \$1,700, and that the sale had been consummated.

Upon these facts it would seem clear that Woodward upon payment of the \$3,500 was entitled to a decree for a specific performance. Such a decree was entered, and so far at least as Woodward is concerned we see no error in it. Counsel for plaintiff in error claims that the prayer for relief in the petition does not warrant the decree. The decree commanded Kuykendall, upon payment of the \$3,500, to execute a conveyance to Woodward, and Bassett to execute to Woodward an assignment of the mortgage, and to surrender the notes se-

cured thereby to Kuykendall. It was the duty of the court in framing its decree to see that such conveyances and instruments were
 *344 executed by the defendants as would secure to the plaintiff *that which he had contracted for, a clear and perfect title to the premises. This was done, and only this. It does not appear that the attention of the district court was called to the fact that the prayer for relief did not speak of an assignment of a mortgage. We certainly should not disturb a judgment on account of a variance so purely immaterial. It may be that the court erred in not directing specifically the payment of \$2,000 to Kuykendall, and \$1,500 to Bassett, but that is a matter in which Woodward is not the only party interested. If any error of that kind occurred, it can be corrected only by a proceeding in error, to which Kuykendall also is a party defendant.

The judgment will be affirmed.

(All the justices concurring.)

G. W. YANDLE v. S. A. CRANE and another.¹

July Term, 1874.

1. **Replevin: Pleading: Contradictory Defenses: General Denial.** In an action of replevin, where the defendant files an answer containing a "general denial," and six subsequent defenses, in which subsequent defenses the defendant admits that the plaintiff is the owner of the property replevied, and that the defendant detains the same from the plaintiff, *held*, that on the trial of the action said "general denial" can be considered only as a denial that the plaintiff is entitled to the *immediate possession* of the property, and that the defendant *wrongfully* detains the same from the plaintiff.
2. ———: **Issue: Evidence Under General Denial.** In an action of replevin the defendant, under a "general denial," will be entitled to prove on the trial that he does not wrongfully detain the property, by introducing evidence tending to show that his detention of the same is right-ful.

Error from Labette district court.

*345 Replevin, brought by Crane and another against Yandle. *The plaintiffs had judgment at the March term, 1873, of the district court.

F. A. Bettis, for plaintiff in error.

The plaintiffs' evidence fails to establish (1) that at the commencement of the action the plaintiffs were the owners of the property; (2) that they were entitled to the possession; (3) that the property was not withheld by due process of law; and (4) that at the commence-

¹See *Moses v. Morris*, 20 Kan. 218; *Bailey v. Bayne*, Id. 659; *Brown v. Holmes*, *post*, *482; *Holmberg v. Dean*, 21 Kan. 80.

ment of the action Yandle was in possession of the property. The defendant's answer contained a general denial, and three affirmative defenses. Under each and all of these the court refused to permit the defendant to show the *right* of possession of the cattle in controversy to have been in himself, under section 33, c. 40, Gen. St. 1868. The evidence offered should have been received under the general denial; and if this is so, then the affirmative defenses were general denials in themselves. It may be claimed that the second defense does not allege the premises to have been surrounded by a good and lawful fence; but it does allege the premises to have been "a close;" and a "close" is a lawful inclosure, and a lawful inclosure in Kansas is surrounded by a good and lawful fence.

It is set up in the answer that the cattle were strays. The court refused to hear any evidence to this point, and this was manifest error.

W. B. Glasco and H. G. Webb, for defendants in error.

VALENTINE, J. This was an action of replevin for twelve head of neat cattle. The defendants in error (plaintiffs below) replevied the cattle from plaintiff in error, and judgment was rendered in favor of defendants in error. The petition below was an ordinary petition in replevin, and sufficiently stated the plaintiff's cause of action. The answer contained, first, a general denial, and then six separate defenses setting up new matter. In these subsequent defenses the defendant admitted that the plaintiffs were the owners of the cattle, and that the defendant detained the cattle from the plaintiffs. Hence, upon the trial of the action, the general denial of the defendant could be considered only as a denial that the plaintiffs were entitled to the *immediate possession* of the property, and that the defendant wrongfully detained the same from the plaintiffs, (*Wiley v. Keokuk*, 6 Kan. *94; *Butler v. Kaulback*, 8 Kan. *668;) for the answer itself admitted and proved on the trial all the other allegations of the petition. The answer in fact proved *prima facie* the plaintiffs' whole case. It proved conclusively that the plaintiffs were the owners of the cattle, and that the defendant detained them from the plaintiffs; and as proof of ownership, if unaccompanied by other circumstances, is always *prima facie* evidence of the right of possession, and as a proof of a detention of property by a person not the owner, and against the will of the owner, if unexplained by other circumstances, is always *prima facie* evidence of a *wrongful* detention of the property, therefore the foregoing admission of ownership and detention contained in the answer were *prima facie* evidence of the plaintiffs' right of possession, and that the detention of the cattle on the part of the defendant was wrongful. If it be claimed, however, that said ownership and said detention were explained by other circumstances stated in the answer, which showed that the plaintiffs were not entitled to the immediate possession of the property, and

that the defendant did not *wrongfully* detain the same, then it may be answered that these other circumstances stated in the answer were controverted by the plaintiffs, and could not be taken as true until proved by the defendant. Under the pleadings, it did not devolve upon the plaintiffs, in the first instance, to prove anything. It devolved upon the defendant to show that he had the right to *347 the possession of said cattle, and that he did not *wrongfully detain them. And this brings us to another question.

The defendant, although admitting in his answer that the plaintiffs were the owners of said cattle, and that the defendant detained the same from the plaintiffs, also alleged that the detention was not wrongful for the following reasons, to-wit: He alleges that the plaintiffs permitted these twelve head of cattle, along with a large number of other cattle belonging to the plaintiffs, to enter the premises of the defendant, and there do a great deal of damage, for which damage the plaintiff claims to have a lien upon said cattle. Gen. St. 494, § 33; Id. 1002, § 3; Laws 1872, 384, § 3. And the defendant also alleges that he took said cattle up as estrays. Gen. St. 1003 *et seq.* All of the defenses (six in number) in which the foregoing allegations are contained are defective for reasons not necessary now to be stated, except that the defendant does not show by any of said defenses that his case comes within any of the statutes above cited. We think, however, that the defendant had a right to show, under his general denial, all the facts that he attempted to allege in said six defenses of his answer, (*Wilson v. Fuller*, 9 Kan. *177, *190;) that is, he had a right to show, under his general denial, that the plaintiffs were not entitled to the immediate possession of the cattle, and that the defendant did not wrongfully detain the same, by showing that the cattle broke through a lawful inclosure, and entered the defendant's premises, and there did damage, and that the defendant detained them for the purpose of enforcing his lien for the damages; or, by showing that the cattle were strays, and that they entered the defendant's premises, and that the defendant then took them up as strays. The court below, on objections by the plaintiffs, refused to permit the defendant to prove the foregoing facts, or, at least, the first of the foregoing facts. The question as to what may be proved by a defendant under a general denial in replevin has already been considered and decided by this court. *Town of Leroy v. McConnell*, 8 Kan. *273; *Wilson v. Fuller*, 9 Kan. *177, *190. *In these cases it was decided that under our Code the gist of the action of replevin is the wrongful detention of the property by the defendant as against the plaintiff, and that, under a general denial, the defendant may prove anything that will tend to show that he does not wrongfully detain the property as against the plaintiff. In the present case, for instance, the defendant might show that he did not wrongfully detain the property by showing that he rightfully detained it. The court below, however, on objections made by the plaintiffs, excluded all evi-

dence tending to show that the detention of the property by the defendant was rightful instead of wrongful; and herein we think the court below erred. The plaintiffs alleged in their petition that the detention of the cattle was wrongful. The defendant denied the same by a general denial. The plaintiffs then proved *prima facie*, by parol evidence, and by the defendant's admissions in his answer, that the detention was wrongful, and the defendant then had a right to rebut this *prima facie* case by showing that the detention was not wrongful.

The judgment of the court below is reversed, and cause remanded for a new trial.

(All the justices concurring.)

MOSES M. EDWARDS v. JAMES CRUME.

July Term, 1874.

1. **Parent and Child: Trespass.** Where a minor son, who lives with his father, and is under his father's control, commits certain wrongful acts, but where the said acts have not been authorized by the father, are not done in his presence, have no connection with the father's business, are not ratified by the father, and from which the father receives no benefit, the father is not liable in a civil action for damages for such wrongful acts.¹
2. **Demurrer: To Evidence.** Where a demurrer to the evidence is interposed by the defendant in a civil action, under section 275 of the Code
 *349 *as amended, (Laws 1872, p. 329,) and neither the petition nor the evidence shows a cause of action against the defendant, and the evidence does not tend to prove a cause of action against the defendant, the court does not err in sustaining said demurrer.

Error from Cherokee district court. Action by Edwards against Crume. The petition was as follows: "The said Moses M. Edwards, plaintiff, complains of the said James Crume, defendant, and shows to the court and avers that on the thirtieth day of October, 1872, he was the owner of 1,000 fruit trees, being and growing upon land owned and occupied by plaintiff in the county of Cherokee, and 500 rails laid up in a fence on his said farm in said county, and three quarters of a mile of osage-orange hedge fence, two years old, growing upon his said place; that on said thirtieth of October

¹ Where a minor son negligently and carelessly shoots and kills a mare belonging to another, the father, who had no connection with the transaction, directly or indirectly, proximately or remotely, is not liable; and where the father afterwards, without consideration, and not in writing, promises to pay the value of the mare, held that such promise does not render him liable. *Baker v. Morris*, 7 Pac. Rep. 267. Maintenance of children, see *Harris v. Harris*, 5 Kan. 84, and note; rights and liabilities of parent, see note to *Sawyer v. Sauer*, 10 Kan. 890.

one James Crume, junior, a minor, under 21 years of age, who is the son of defendant James Crume, and resides with defendant in his family, and who is a member of defendant's family, did set on fire the prairie, being the grass growing on the prairie in said county, in the vicinity of plaintiff's place, where said above-named property of plaintiff then was; and plaintiff avers that said fire so set out in the prairie aforesaid by the said James Crume, junior, minor, and son of the said James Crume, defendant, as aforesaid, did set fire to, burn up, and destroy and damage plaintiff's property aforesaid, and did occasion damage to the said 1,000 fruit trees growing on plaintiff's farm aforesaid, and the said 500 rails, and the said three-quarters of a mile of hedge fence on plaintiff's said farm, and that said fire totally burned up and destroyed said property of plaintiff; and plaintiff says said fruit trees were of the value of \$1,000; that said rails were of the value of \$15; that said three-quarters of a mile of hedge fence was worth \$50; wherefore plaintiff avers that by reason of the fire aforesaid so set out by the said James Crume, junior, minor, and son of defendant, the said property above mentioned was totally destroyed, and he has been damaged thereby to the amount of \$1,065, wherefore," etc. Answer, a general denial. Trial at the June term, 1873. Defendant demurred to plaintiff's evidence. Demurrer sustained, and judgment against plaintiff for costs.

*350 **W. M. Matheny*, for plaintiff in error.

The court erred in sustaining the demurrer. It was not interposed at the proper time. A demurrer which, like this, goes to the sufficiency of the facts stated in the petition, should have been filed before the answer, and determined by the court before proceeding to the trial of the action, it being in fact a demurrer to the *petition* and not to the *evidence*. The proof sustained all the allegations of plaintiff's petition.

The court erred in rendering judgment in favor of the defendant and against the plaintiff. The petition stated a good cause of action, and the proof introduced authorized a judgment in favor of the plaintiff.

J. R. Hollowell, for defendant in error.

VALENTINE, J. The main question in this case is whether a father is liable in a civil action for damages for the wrongful acts of his minor son, where the son lives with the father, and is under his control, but where the acts complained of were not authorized by the father, were not done in his presence, had no connection with the father's business, were not ratified by him, and from which the father received no benefit. We must answer this question in the negative. The father in such a case is not liable. *Baker v. Haldeman*, 24 Mo. 219; *Tift v. Tift*, 4 Denio, 175; *Moon v. Towers*, 8 C. B. (N. S.) 611; S. C. 98 E. C. L. 611; *McManus v. Crickett*, 1 East, 106. In

such a case the son alone is liable. Suppose a minor son, fifteen or twenty years of age, should steal a horse or rob a bank, and abscond with the proceeds of his larceny, does any one suppose that the father would have to answer therefor, either civilly or criminally? The minor alone would be liable, and he would be liable both civilly and criminally. The question in this case arose on a demurrer to the evidence interposed by the defendant under section 275 of the *351 Code as *amended. Laws 1872, p. 329. The demurrer was sustained, and the action dismissed at plaintiff's costs. Now, neither the petition nor the evidence showed any cause of action against the defendant, who is the father of the person who, it is alleged, committed the wrongful acts. The evidence did not tend to prove any cause of action against the defendant, and hence we think the demurrer was rightfully sustained. There is nothing else in this case of sufficient importance to be considered. The judgment of the court below must be affirmed.

(All the justices concurring.)

AMEY ANDREWS and another v. WILLIAM ALCORN, Adm'r, etc.

July Term, 1874.

1. **Pleading: Attaching Copy of Note to Petition: Cannot be Reviewed in Supreme Court.** In an action on two promissory notes and a mortgage, the petition did not contain a copy of either of the notes or the mortgage; and no copy of either was attached to or filed with the petition; and no reason was given why such copies were not furnished, (Code, §§ 118, 128;) and no question was raised in the court below as to the necessity for such copies; and no ruling of the court below upon any such question has been assigned for error in the supreme court: *held*, that no such question can be raised in the supreme court merely by a discussion of the questions in the briefs of counsel. No such question can be raised in the district court on demurrer.
2. **Note and Mortgage: Pleading: Causes of Action: Immaterial Error.** Where a petition, which in fact contains but one cause of action, with a proper prayer for relief, is divided into three counts, the first of which states a cause of action and the other two do not, but which, if taken in connection with the first count, modify and enlarge the cause of action stated in the first count; and these three counts are headed respectively as follows: "1st Cause of Action," "2d Cause of Action," "3d Cause of Action;" and the defendant moves the court to compel the plaintiff to elect upon which cause of action he will proceed; and also demurs to the petition on the ground "that there are not facts sufficient stated in either of said counts to constitute a cause of *action;" *352 and the court overrules both said motion and said demurrer; and afterwards a judgment is rendered in accordance with the prayer of the petition, and just such a judgment as would be proper if the words "1st

Cause of Action," "2d Cause of Action," and "3d Cause of Action" were stricken out of said petition: *held*, that although the district court may have erred in disregarding said words, still the error is not of such a substantial character as will require a reversal of the judgment by the supreme court. [Curtis v. Buckley, 14 Kan. 449.]¹

3. **Homestead: Purchase by Wife: Mortgage for Purchase Money.** Where a wife purchases a piece of land, and takes the title in her own name, and at the same time executes two promissory notes for the unpaid purchase money; and also executes a mortgage on the property to secure the payment of said notes; and said wife, at the time she purchases said property, intends to make the same her homestead, and afterwards does, with her husband, occupy the same as her homestead: *held*, that, notwithstanding said intention and said occupancy, the mortgage may be foreclosed, and the land sold to pay the unpaid purchase money for which said notes and mortgage were given.²
4. ———: **Interest of Husband.** The husband did not execute said notes or said mortgage, but the mortgage, nevertheless, may be foreclosed, and the land ordered to be sold free and clear from all right, title, and interest of the husband in or to said property, he being a party to the suit on his own motion.

Error from Bourbon district court.

¹In the case of *Andrews v. Alcorn*, 18 Kan. *351, which was an action on two promissory notes and a mortgage, one of which notes was due and the other was not due, it was held that only one cause of action was stated in the petition. The petition was divided into three counts, and, using the language of the court in delivering the opinion in that case, the "first count set forth the substance of one of said notes, which was then due, and stated a good cause of action; the second count set forth the substance of the other note, but did not state any cause of action, for the reason only that this note was not yet due." This language leaves it to be inferred, by an irresistible implication, that if the note set forth in the second count of the petition had been due, two causes of action would unquestionably have been stated. The court by this language says, in substance, that the only reason why the second count of that petition did not state a cause of action as well as the first count was that the note set forth in the second count was not yet due. In that case both parties in the supreme court admitted that only one cause of action was set forth in the original petition. See briefs of counsel in that case. The court below in that case also held that only one cause of action was stated, and rendered judgment upon only one of the notes,—the one that was due, and the one that was set forth in the first count of the petition; and the supreme court, following the district court and the counsel of the parties in that case, also held that only one cause of action was stated, and so held for the single reason—"the reason only"—that the second note was not due when that action was commenced and tried in the district court. In this present case, however, all the notes were due when this action was commenced. The plaintiffs in error in this case say that the court below based its decision in this case upon the words printed in italics at the commencement of the second paragraph of the syllabus, in the case of *Andrews v. Alcorn*. Now, said words in italics are no part of the syllabus of that case, and constitute no part of the decision of the case, but are simply the words of the reporter. The court in that case decided that a promissory note, and a mortgage executed to secure the same, taken together, constitute only one cause of action; and also decided that even two promissory notes together, with a mortgage securing them, where only one of the notes is due, do not constitute more than one cause of action. But the court has never decided that two or more promissory notes, where all are due, do not constitute more than one cause of action; and it makes no difference whether the notes are secured by a mortgage or not. Per VALENTINE, J., *Ambrose v. Parrott*, 28 Kan. 697.

²See note to *Randal v. Elder*, 12 Kan. 276; duress in executing conveyance of homestead, see *Helm v. Helm*, 11 Kan. 25

Foreclosure of mortgage, brought by Robert Hamilton, in his lifetime. Hamilton sold the mortgaged premises to Amey Andrews, a married woman, and she gave him her two notes, each for \$400, one payable February 14, 1873, and the other February 14, 1874, and executed a mortgage on said lands to secure said notes. The action was commenced in May, 1873, against said Amey alone. Afterwards Jacob Andrews, the husband, was joined as a co-defendant, at his request. Before the trial Hamilton died, and Alcorn, as administrator was substituted. Trial at the September term, 1873, of the district court. Personal judgment against defendant Amey Andrews for the amount of the note past due, and judgment against both defendants of foreclosure, and for the sale of the mortgaged premises, and both defendants bring the case here on error.

Hulett & McCleverty, for plaintiffs in error.

This case presents, first, this question of practice: How many causes of action are there in a note and mortgage, or in several notes and mortgage? The petition below makes three separate causes of action,—one upon the note then past due, one upon the second note not yet due, and a third upon the mortgage itself. We maintain that an action upon any number of notes and the mortgage securing them, known as “the foreclosure of a mortgage,” is a special statutory proceeding, in the nature of a bill in chancery, and constitutes but *one cause of action*, the several notes making up the whole amount secured by the mortgage, and only requiring a statement of the facts, in plain and concise language,” in one count; the allegation of indebtedness upon the notes, and that the mortgage was given to secure them, being the material facts. All the forms and precedents indicate this as the proper practice. See similar statute of Iowa, §§ 3660, 3661, Rev. 1860; *Tomlinson v. Funston*, 1 G. Greene, 545; *McDowell v. Lloyd*, 22 Iowa, 448. The second count in the petition is based upon the note coming due February 14, 1874; and that a note *not yet due* can be a good cause of action seems absurd. If there was then but *one cause of action*, and the pleader divided it into *three*, the court erred in overruling the motion to compel plaintiff to elect upon which cause of action he would proceed, and which remedy he would pursue. *Sturges v. Burton*, 8 Ohio St. 215.

The court also erred in overruling the separate demurrer of Amey Andrews, it being to each count separately. If there was but one cause of action in all, the demurrer should have been sustained at least to the second and third counts, the second count being upon a note not due, and the third upon a mortgage securing it. Each count in a petition must be good in itself, and where a pleader must restate a count or refer to it in order to plead another, then they both make but one. *Summit Co. Bank v. Smith, Handy*, 575. In the case at bar the notes are first set out in two separate counts, and the third count begins by saying that “*said notes were given for purchase money,*” and “*that to secure the payment of said*

notes" the mortgage was given; showing that the pleader was compelled to refer to the other two in order to make a third count at all, which is the exact point met and decided in 1 Handy, 575. The manner of pleading in this petition, we think, proves the logic of 1 Handy, and that a foreclosure should be in one count, stating all the facts, and as a part of those facts that the notes and mortgage had been given and were due. The fact that the mortgage and notes constitute but one contract would seem to determine the number of counts. As to being one contract, see Kennion v. Kelsey, 10 Iowa, 443; Muzzy v. Knight, 8 Kan. *456. The real and well-understood object of a foreclosure is to obtain an order to sell the mortgaged premises to pay the debt; and to get the benefit of that, as to the whole debt, all the facts should be stated in one count, as upon the mortgage contract alone, the notes being part of such contract.

The petition neither contains nor has attached a copy of the notes, as pointed out in the Code as necessary in such cases. If this is necessary in such a pleading, then the demurrer would be good as to the first count also; and we think it is necessary, in declaring upon a note or account alone, either to incorporate or attach a copy.

The court also erred in declaring the amount of the notes to be a lien upon the premises described in the pretended mortgage, and in ordering the same to be sold freed and cleared of all claim and interest of both defendants, for the reasons that the premises were the homestead of the defendants, and the mortgage was executed by the wife only. This court has decided in Edwards v. Fry, 9 Kan. *425, and Monroe v. May, 9 Kan. *474, "that a purchase of a homestead with a view to occupancy, followed by occupancy within a reasonable time, may secure *ab initio* a homestead inviolability." The admitted facts are that the premises were purchased with the intention of making them the homestead of the defendant Amey Andrews and *355 her family, and that *they had been actually occupied from the time of purchase since as such homestead. The findings and admitted facts bring this case exactly within the terms of the cases in 9 Kan. above cited, and make the property in the case at bar a homestead. And it has been settled that a mortgage upon a homestead, executed by the husband or wife alone, is void. Const. art. 15, § 9; Morris v. Ward, 5 Kan. *248; Dollman v. Harris, Id. *599. These fifth and ninth Kansas cases decide that the constitutional exemption should be liberally viewed and construed; and if so, then the exceptions should be strictly construed; and the exception refers only to *non-exemption* from *forced sale* for the purchase money, and not to the creation of a *lien*. Section 9 of article 15 says, too, that a *lien* upon a homestead is obtained only "by the consent of both husband and wife, when that relation exists," or at least it means that. Then, if a *lien* can only be created by the consent of both, this mortgage was no lien, since it was by the consent of one only. As we understand said section 9, it is that when suit is brought for pur-

chase money, even of a homestead, the court should make a finding of that fact, and then the law would not allow an exemption to hold against the execution. But it does not, nor does the statute, empower the court to decree that such money is a *lien*; for, if so, it would be in effect to hold that we have vendors' liens in Kansas, which this court has decided not to be true. Then, if the court could not adjudge purchase money to be a lien, neither can it adjudge a void mortgage to be a lien.

Again, the court erred in ordering the premises to be sold, freed and cleared of all right and title of both defendants. Jacob Andrews did not execute the mortgage; and as to the validity of a deed or mortgage not executed by the wife, see *Hait v. Houle*, 19 Wis. 472, and cases there cited, which will apply equally to the husband, since in this state the husband and wife stand in the same relation to each other. At the very least, then, so much of this decree as bars the husband, who did not execute the mortgage, should be modified.

*356 **McComas & McKeighan*, for defendant in error.

The first error complained of by the plaintiff in error is that the court erred in overruling the motion of the defendant in the court below, to compel the plaintiff to elect upon which cause of action he would rely; and in support of this proposition it is agreed that the petition did not disclose but one cause of action. The counsel fail to note the distinction between "one cause of action" improperly subdivided into two or more causes, and a *fictitious restatement* of the same cause of action in a second count, as was the case in *Sturges v. Burton*, 8 Ohio St. 215, to which he refers.

The demurrer to the second cause of action was properly overruled, because in fact and in law, and according to the argument of the plaintiff in error, there was but one cause of action stated in the petition. The facts as stated in the petition are one cause of action. The facts are stated in logical order, and the numbering of the paragraphs on the margin of the petition as "first," "second," and "third" cause of action will be disregarded as surplusage. The errors complained of are immaterial, and do not prejudice the substantial rights of the plaintiffs in error. This is the law of appellate procedure. *Powell*, App. Proc. 125. It is the repeatedly announced doctrine of this court. *Kansas Pac. Ry. Co. v. Pointer*, 9 Kan. *621.

It is contended in this case that the mortgage is void because it was upon a homestead, and is not signed by the husband. There is nothing in the record to show that the land was occupied as a homestead at the time this mortgage was given. The mortgage is dated the fourteenth day of February, 1872. It was given for the purchase money. The occupation commenced upon the same day. This is all the record shows. It does not, then, affirmatively appear that it was occupied as a homestead when the mortgage was given. The in-

ference would be that the property was first conveyed to Mrs. Andrews; that she gave these notes and mortgage for the purchase money, *357 and then moved into it as a homestead,—*this all occurring in one day. The doctrine of *Edwards v. Fry* and *Monroe v. May*, 9 Kan., does not fit this case. This court also holds if an attachment intervene between the purchase and occupancy, the homestead does not defeat the attachment. *Bullene v. Hiatt*, 12 Kan. *98. It becomes a homestead *ab initio* by the occupancy. But if a woman purchase a piece of land with the intent to occupy it as a homestead, she may dispose of it as she pleases *before it is so occupied*. She may change the intent, and never so occupy it. Then, as the record does not show (and error must be made affirmatively to appear) that this land was "occupied" as a homestead at the time the mortgage was given, it does not require the joint act of husband and wife to alienate it, even if it had not been given for the purchase money. But this was given for the purchase money, and the homestead exemption has no validity as against debts of this class.

The other error complained of is that a copy of note and mortgage was not set out in the petition. There are two answers to this: *First*, the point was not raised in the court below; *second*, the law does not require a copy of the note and mortgage to be set out in the petition. *Nash*. Pl. 787; *Swan*, Pl. 200.

VALENTINE, J. This was an action on two promissory notes and a mortgage. The judgment was in favor of the plaintiff, and the defendants now bring the case to this court. The petition did not contain a copy of either of the notes or the mortgage. No copy of either was attached to or filed with the petition, and no reason was given why such copies were not furnished. Code, §§ 118, 123. But as no question was raised in the court below as to the necessity for such copies, and as no ruling of the court below upon any such question has been assigned for error in this court, no such question can now, and for the first time, be raised in this court, merely by *358 a discussion of the question in *the briefs of counsel. No such question can be raised in the district court on demurrer.

The petition below was divided into three counts, headed, respectively, as follows: "1st Cause of Action," "2d Cause of Action," and "3d Cause of Action." The first count set forth the substance of one of said notes, which was then due, and stated a good cause of action. The second count set forth the substance of the other note, but did not state any cause of action, for the reason only that this note was not yet due. The third count set forth the substance of said mortgage, but probably did not state facts sufficient to constitute any cause of action thereon. The prayer for relief was just what it should have been if the words "1st Cause of Action," "2d Cause of Action," and "3d Cause of Action" had been stricken from the petition, and everything else stated in the petition had been stated (as it should have

been stated) in one count only, and the judgment was in accordance with the prayer for relief. The defendant Amey Andrews moved to require the plaintiff to elect upon which cause of action he would proceed. The court overruled the motion. Said defendant then filed a demurrer, demurring separately to each and every count in plaintiff's petition set forth, and assigned as grounds of demurrer that there were not facts sufficient stated in either of said counts to constitute a cause of action. The court overruled the demurrer. Now, while we think that the court might properly have sustained, and perhaps ought to have sustained, both said motion and said demurrer, (the demurrer, however, only as to the second and third counts,) as a punishment to the pleader for negligently inserting the useless words—in fact, worse than useless words—"1st Cause of Action," "2d Cause of Action," and "3d Cause of Action," in his petition, yet we do not think that the court committed any substantial error by overruling said motion and said demurrer. Only one cause of action was in fact stated in the whole of said petition. It is true, the first

count, taken alone, stated a cause of action,—an ordinary
 *359 cause of action on a promissory note; but it is also true that the whole of the petition, taken together, (with these useless words stricken out,) stated *only one cause of action*,—an ordinary cause of action on two promissory notes, (one due and the other not yet due,) and a mortgage executed to secure their payment. While the facts stated in the first count constituted a cause of action, the facts stated in the other two counts (so called) simply modified and enlarged that cause of action; and as *all the facts stated in the whole petition constituted but one cause of action, they should all have been stated in one count*. We suppose the court below treated said useless words merely as surplusage, and in this the court perhaps may have erred; but the error was slight, and, as substantial justice was done to all the parties, we shall not now reverse the judgment of the court below merely on account of such immaterial error. Code, §§ 140, 304.

Said promissory notes were given for the unpaid purchase money of a certain piece of land. The mortgage was given on the same land, and at the time of the purchase thereof, to secure the payment of said notes. The defendants below also claim that the defendant Amey Andrews purchased the land with the intention of making it her homestead; that afterwards she did make it her homestead; that said mortgage was executed by herself alone, without her husband, Jacob Andrews, the other defendant, joining with her in its execution; and therefore they claim that said mortgage is void. There are at least two answers to this claim: *First*. The mortgage was given for the unpaid purchase money of the mortgaged premises at the time of the purchase. *Pratt v. Topeka Bank*, 12 Kan. *570. *Second*. Her intention to make said property her homestead was not her only intention. She also at the same time entertained the inten-

tion, as expressed in her mortgage, to pledge the property she was then purchasing as a security for the unpaid purchase money which she was to pay on her said intended homestead. Her intention to make the property her homestead was modified by her other intention to pay an honest debt contracted in obtaining her in-

*360 *tended homestead. Both intentions can stand together, and be enforced as really one intention; that is, the property can be held as her homestead subject to the payment of the purchase money. She did not intend when she purchased the property, as the mortgage shows, to cheat and defraud the vendor out of the purchase money; and she did not intend, as the mortgage shows, to make her homestead right paramount to the lien of the vendor, which she expressly gave him on the property for the purchase money. But her intention was, as the mortgage shows, decidedly the contrary. It has already been decided in this court that at any time before the property actually becomes a homestead a lien, which could not be created on a homestead, may be created on such property the same as on any other property; and the fact that the property afterwards becomes a homestead will not destroy the lien thus previously created. *Bullene v. Hiatt*, 12 Kan. *98. And a vendor's lien on real estate may be created at the time of the purchase of the same by the express contract of the parties to the purchase and sale. *Smith v. Rowland*, *ante*, 245.

The title to said property, after Mrs. Andrews purchased the same, was wholly in her. Her husband, Jacob Andrews, had no interest in the property, except such as he might have by virtue of being her husband, and by virtue of residing on and occupying the property as a homestead. Mrs. Andrews alone executed said notes and mortgage. The court below rendered a personal judgment against Mrs. Andrews for the amount due on the first note, but rendered no personal judgment against Jacob Andrews. The court, however, rendered a judgment against both of the defendants that the amount of the notes was a lien on the mortgaged premises, and that said premises should be sold free and clear of and from all right, title, and interest of both of the defendants to discharge said lien, etc. Of this judgment the defendant Jacob Andrews now complains, and he complains merely on the ground that he was not a party to said

*361 notes or mortgage. Now, he was in possession of the *property, claiming it as his homestead, and was a proper party to the suit and to the judgment; and he was made a party to the action on his own motion, after the suit had been previously commenced against his wife alone; and he had no interest in the property which could not be destroyed by a valid execution sale against his wife. In this state all property not exempt from execution or other final process may be sold at judicial sale. Civil Code, § 443. And as we have before seen, this property, by virtue of being a homestead, is not exempt from sale under a judgment rendered for the unpaid purchase

money, and it is not claimed that it is exempt for any other reason. All right, title, and interest of Amey Andrews may therefore be sold on execution or other final process, and such sale will divest Jacob Andrews of all his interest in the property, as he holds wholly under his wife. In this state, when the real estate of a husband or wife is sold at judicial sale, there is nothing left for the other to inherit or receive after the death of the one who owns the real estate. The rights of husband and wife are precisely alike in this respect. Gen. St. 395, c. 33, § 28. And the statute clearly shows that the wife, on the death of her husband, obtains no interest in any real estate ever owned by the husband, if the same had previously been sold to pay his debts on any execution or other final process. Gen. St. 393, c. 33, § 8. Therefore, as the court below had a right to render a judgment against the wife, in whom the title to the property was vested, ordering the property to be sold free and clear from all right, title, and interest held by the wife therein, we think it necessarily follows that the court also had a right to render a judgment against the husband, who held solely under his wife, ordering the property to be sold free and clear from all right, title, and interest held by him in the property. Such a judgment would seem to be necessary to bar the husband's homestead interest.

The judgment of the court below is affirmed.

(All the justices concurring.)

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*SUSAN J. SMITH v. HELEN M. PAYTON.

July Term, 1874.

Attachment: Return-day: Service and Return of Order. Where an order of attachment is issued at the commencement of an action, and the clerk fixes the return-day thereof at twenty days from its date, instead of within ten days as prescribed by law, the order of attachment is not void for that reason, and the sheriff may serve the same at any time within ten days of its date; and when so served it is error for the court to set aside and vacate such order merely because of such mistake of the clerk in fixing the return-day.

Error from Labette district court.

The case is stated in the opinion.

F. A. Bettis, for plaintiff in error.

The court cannot presume that the order of attachment was applied for and obtained at the time of commencing suit. In truth, the affidavit for attachment recites that the suit had *already* been commenced. But if the order should have been made returnable in *ten* instead of *twenty* days, it was a mere irregularity, and the court should have ordered its amendment in "furtherance of justice." Code,

§ 139; *Irwin v. Bank of Bellefontaine*, 6 Ohio St. 81; *Very v. Levy*, 13 How. 350; *Ames v. Weston*, 4 Shep. 266. But the direction to the officer to return the writ in twenty days is mere surplusage. The officer must take notice of and follow the law. The law fixes the time of the return, and the Code nowhere requires the order of attachment to designate the return-day. "The court must, in every stage of the cause, disregard every error or defect in the pleadings or proceedings which does not affect the substantial rights of the *363 adverse party." Code, § 140. The error in the order, if *any existed, was a mere mistake of the clerk, and in nowise affected any substantial right of the defendant in error.

Ayres & Fox, for defendant in error.

The judicial discretion as to amendments, under section 139, is not reviewable, except in case of gross abuse thereof. Of this there is no information upon the facts brought to this court.

The process was void, and could not be amended, and the amendment would not have validated the order. The attachment was issued and served three days before the filing of the petition and commencement of the suit. Code, §§ 57, 100. The affidavit was properly ruled insufficient, since it was entitled in the action, whereas no action had been commenced, and it does not state that Smith ought to recover of Payton, nor that the latter was a non-resident, nor other ground for the attachment, save by referring to "said defendant," when there was no defendant. *Milliken v. Selye*, 3 Denio, 54; 7 How. 127. The attachment was issued with the summons, and should have been returnable at the same time as the summons, (Code, § 195,) but was ten days later.

VALENTINE, J. In this action an order of attachment was issued. The defendant moved the court to set aside and vacate said order on the following grounds, to-wit: "(1) It was issued at the commencement of the action, and the return-day thereof is not the same as that of the summons. (2) The return-day of the order appears on its face to have been altered after the issuing thereof. (3) There is no proof of service or return of the order. (4) The affidavit on which the order is based is insufficient in not showing the specifications required by the statute for the issuing of the order. (5) There has been no publication nor commencement of action. Said motion will be based upon the papers in the action." The motion came on to be heard upon the papers in the case. "And thereupon the *364 plaintiff, by her attorney, F. A. Bettis, *moved the court for leave to amend the order of attachment in the cause issued by making the return-day thereof ten days from the date of the issue thereof, which the court refused; to which the plaintiff then and there excepted. And the court, having heard the argument of counsel upon the motion to discharge the order, doth find that said order of attachment is void, and not amendable, and doth order that the same

be discharged; to which ruling the plaintiff, by her attorney, then and there excepted."

The action seems to have been commenced on the twenty-fifth of September, 1872. Both the summons and the order of attachment were issued on that day. The only irregularities appearing in the record of the proceedings are as follows: The petition is marked "Filed September 28, 1872," and the return-day of the order of attachment is October 15, 1872, while that of the summons is October 5, 1872. From the other evidence contained in the record, we must consider the marking of the petition as "Filed September 28th," a clerical mistake. It should have been marked "Filed September 25th." No action can be commenced except by filing a petition; and no summons or order of attachment can be issued except at the time of, or after the commencement of, an action. Section 57 of the Code provides that "a civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon." Gen. St. 640, 641. Section 190 of the Code provides that "the plaintiff, in a civil action for the recovery of money, may, at or after the commencement thereof, have an attachment," etc. Laws 1870, p. 171, § 4. Now, the presumptions of law are always in favor of the regularity of the proceedings of a public officer, and it is much less probable that the clerk of the district court in this case should have made a mistake in issuing a summons and order of attachment before any suit was commenced than that he should have made a mistake in marking the time of filing the petition. It is scarcely possible *365 that the clerk could have issued, *through mistake, a summons and an order of attachment three days before the petition was filed; but he might, through mistake, have marked the petition "Filed September 28th," when it was in fact filed September 25th. Besides, the affidavit for the order of attachment was sworn to and filed on the twenty-fifth of September, and the plaintiff in the affidavit then swears "that said plaintiff, Susan J. Smith, has commenced said suit against the above-named defendant, Helen Payton," etc. An affidavit for service by publication was also filed in the case, and in this affidavit the affiant, W. P. Lamb, attorney for the plaintiff, says that "said cause was commenced on the twenty-fifth day of September, 1872, by the filing of a petition, the issuing of a summons thereon, and the filing of an affidavit for attachment, and the issuing of an order of attachment thereon," etc. The defendant herself, in her motion to set aside the order of attachment, says that the order of attachment was issued at the commencement of the action, etc.; and she does not at any time, as appears from the record, make any specific point that the order was issued before the petition was filed. This is a strong admission against the defendant. We are therefore led irresistibly to the conclusion that the petition was in fact filed September 25th.

The only question, then, for us to consider is whether the order of attachment was void because it was made returnable in twenty days instead of in ten days. Section 195 of the Code provides that the return-day of the order of attachment, when issued at the commencement of the action, shall be the same as that of the summons; when issued afterwards, it shall be twenty days after it is issued. Gen. St. 666. And section 61 of the Code provides that "the summons shall be served and returned by the officer to whom it is delivered, except when issued to any other county than the one in which the action is commenced, *within ten days from its date*. Gen. St. 641. In the present case the order of attachment was issued on the day of the commencement of the suit, but whether at the time of the commencement of the suit or afterwards is not shown, except, possibly, *366 by the affidavit of the plaintiff made for the purpose *of obtaining the order of attachment filed September 25th, where she says "that said plaintiff, Susan J. Smith, *has commenced said suit*," etc. This would indicate that the order was issued after the commencement of the suit. But, for the purposes of this case, suppose that the order was issued at the commencement of the suit, then was the order void? We think not. The *statute* fixes the return-day of the writ, and not the clerk. Code, §§ 61, 195. And even though the clerk should make a mistake in designating the true return-day, still his mistake would not invalidate the writ. It would still be the duty of the sheriff to serve the writ within the time prescribed by law, and then return the same to the court. The statute does not even require that the clerk should designate the return-day. In the present case the writ was not only served within ten days from its date, as prescribed by the statute, but it was completely served within two days. The writ in this case was returned twenty-one days after it was issued; but we suppose that it will not be claimed that a writ, or the service thereof, becomes void by reason of a failure of the sheriff to return the writ on the return-day. It is the general practice of sheriffs not to return writs until after the return-day. The order of attachment issued in this case should not have been set aside, and therefore the order of the court below setting it aside must be reversed, and the cause remanded for further proceedings.

(All the justices concurring.)

*367 *GEORGE A. HAGERTY v. B. C. ARNOLD and others.¹

July Term, 1874.

1. **Counties: Officers of New Counties: Term of Office: Vacancies.** On the tenth of April, 1872, the governor, having received the requisite preliminary papers preparatory to the organization of the county of Harvey, appointed commissioners and clerk for that purpose, as the statute requires. On the twentieth of May thereafter an election was held, at which all the county officers were elected. At the succeeding general election all the county officers were elected, and among them C. A. Tracy was elected sheriff. At the general election in 1873 the plaintiff was elected sheriff. *Held*, that Tracy was elected to fill the unexpired term until the time provided by the general law for the election of sheriff should arrive.
2. **County Officers: Constitutional Term.** The provisions of section 3 of article 9 of the constitution, that "all county officers shall hold their offices for the term of two years, and until their successors shall be qualified," applies only to the regular term of the office, and not to vacancies or exceptional cases. [Odell v. Dodge, 16 Kan. 443; Ottawa Co. v. Nelson, 19 Kan. 243.]
3. —: **In New Counties.** The legislature has the power to say how county officers shall be elected, and when their terms shall commence, and to make that commencement uniform throughout the state; and to provide how vacancies shall be filled, and how the officers of a newly-organized county shall be elected, until the time when such offices are filled according to the provisions of the general law.²
- [4. **Mandamus: Parties.** The action of *mandamus* must be brought by the proper public officer or the real party in interest.]

Original proceedings in *mandamus*.

Hagerty, claiming to have been elected to the office of sheriff of Harvey county, at the general election held in November, 1873, for the term of two years, to commence in January, 1874, commenced proceedings in this court on the twenty-first of November, 1873, in his own name, as plaintiff, to compel the board of county commissioners and the county clerk of said Harvey county to canvass the votes cast at said election for county officers. An alternative writ was granted and issued. After reciting the facts at length, (which are sufficiently stated in the opinion,) said writ is as follows:

"Now, therefore, we being willing that speedy justice may be done in the premises, do command and require you, the said defendants

¹See *Graham v. Cowgill*, *ante*, *114.

²Where the first election in a newly-organized county is held for county officers on the Tuesday succeeding the first Monday in November, the day for holding general elections, all county officers then elected continue to hold their offices until the next general election, and until their successors are elected and qualified. *State v. Hodgeman Co.*, 28 Kan. 264. See *Morgan v. Pratt Co.*, 24 Kan. 78; *State v. Mechem*, 81 Kan. 437; *S. O. 3 Pac. Rep. 816*; *In re Hinkle*, 81 Kan. 715; *S. C. 3 Pac. Rep. 581*.

B. C. Arnold, A. G. Richardson, and T. S. Floyd, as county commissioners of the said county of Harvey, and you, the said defendant *368 H. W. Bailey, as county *clerk of the said county of Harvey, and each of you, to meet at the office of the county clerk of the said county of Harvey on the twenty-eighth day of November, 1873, at the hour of 10 o'clock in the forenoon; and that then and there, as such county commissioners, you, the said B. C. Arnold, A. G. Richardson, and T. S. Floyd, proceed to open the several returns of said election made to said office of county clerk, and make due canvass thereof, and from such returns you then and there determine the persons who have received the greatest number of votes at the said election for the said several county offices aforesaid, and reduce such determination to writing, and sign the same as such county commissioners; and we do command and require you, the said defendant H. W. Bailey, as such county clerk of said county of Harvey, as soon as said commissioners have determined the persons who have received the highest number of votes at said election for said several county offices, to make out, sign, certify, and deposit in your said office, an abstract of the votes cast at said election for said several county offices of the said county of Harvey; or that, in default thereof, you, the defendants, and each of you, show cause, if any you have, to the supreme court of the state of Kansas, by the sixth day of January, 1874, why you have not done as herein commanded and required; and have you then and there this writ, with your return thereon.

"Witness the Hon. SAMUEL A. KINGMAN, chief justice of the supreme court of the state of Kansas, at chambers, at the city of Topeka, this twenty-first day of November, 1873.

[Seal.]

"A. HAMMATT, Clerk Supreme Court."

The allowance of said writ was indorsed on the back thereof, (Code, § 693,) as follows:

"The within writ of *mandamus* allowed and granted by me this twenty-first day of November, 1873.

"S. A. KINGMAN,

"Chief Justice of Supreme Court of Kansas."

Arnold and Floyd, commissioners, and Bailey, county clerk, moved to quash the writ as to all the county offices except the office of sheriff, because the plaintiff, Hagerty, was a private person, having no interest in any office other than that of sheriff; and as to the office of sheriff, they made a return, admitting the facts as alleged, but claiming that the election of Hagerty as sheriff of said county, *369 in the year 1873, was *void, said office having an incumbent, duly elected and qualified, whose term did not expire until the second Monday of January, 1875.

C. C. Nichols, for plaintiff.

The only questions raised by defendants' return to the alternative writ are questions of law, and are substantially these: Was there a

sheriff for Harvey county for the regular term, to commence in January, 1874, to be elected at the general election held in November, 1873? Or, in other words, was C. A. Tracy, the then present incumbent of that office, and who was elected in November, 1872, chosen sheriff of said county for a *regular* term of two years, or for an *unexpired* term of one year? If C. A. Tracy was chosen for an *unexpired* term, ending on the second Monday of January, 1874, then the election of the plaintiff, Hagerty, in November, 1873, was legal, and on said Monday in January (1874) next after his election he was entitled to the office.

If the acts of our legislature concerning the subject-matter in issue are not beyond the pale of the constitution, there can be but little or no doubt in the matter. The provisions of our constitution relating to this question are section 19 of article 2; section 2 of article 4; section 1 of article 9; section 2 of article 9; section 3 of article 9; section 1 of article 15; section 2 of article 15. Now, taking all these sections of the constitution of our state, and considering them separately, or as a whole, and I arrive at one conclusion, namely, that the constitution of our state, so far as it relates to county offices and officers, has but one restrictive provision in it, and that it has clothed our legislature with authority concerning county offices and county officers. On this question it is totally silent, except where it declares the term of county officers, and where it delegates *all other powers* concerning them to the legislature, to be disposed of and provided for as the legislature in its wisdom may direct. The constitution

*370 does not create a single county office, unless by implication it creates the office of county sheriff and the office of county treasurer; but it vests in the legislature the power to create such county offices as may be necessary, not even declaring whether the incumbents of such county offices as the legislature may create shall be filled by election or appointment, but leaves the matter with the legislature, and as it may provide. The constitution does not, by inference or otherwise, declare that the terms of county officers shall *all* be regular terms of two years; nor does it preclude the idea that they may not be, nor the idea of an unexpired term. It does not fix the date when regular terms shall begin, nor does it preclude the legislature from so doing, nor from making that date uniform in every county throughout the state. And in view of these facts, the legislature has enacted such laws as to it seemed wise in the premises. They have said that all county officers should be elected for full terms once in two years; that the regular term shall commence on the second Monday in January after their election; that sheriffs shall be elected for a full term in the odd years; and that whenever a sheriff shall be elected at any other time it shall be for the unexpired term only; and this rule (the terms and commencement thereof being fixed by other provisions) applies to the first officers elected in newly-organized counties as well as to those subsequently elected. If section

the said county of Harvey; that the said Tracy duly qualified, and on the thirteenth of January, 1873, entered upon the discharge of the duties of his said office; that since said time he has neither resigned, died, nor been removed from said office, but that, on the contrary, he has ever since said time been and now is discharging the duties of said office of sheriff. The facts being admitted as proved, the first and only question to be solved is, for what period of time was Tracy elected to hold said office of sheriff at said general election in 1872? If this question is answered by the court, as we think it must be, that he was elected for the period of two years, then, of course, the matter is ended, and the peremptory writ will be refused, for the very obvious reasons that if there was by the laws of this state, and the circumstances of the case, no person to be elected to fill the office of sheriff of Harvey county at the general election held on the fourth of November, 1873, it follows, of course, that any votes cast at such election for any person to fill such office were mere *374 nullities, and the canvass of such votes would be of no *benefit to the plaintiff or any one else; and this being the case, the writ, under the rulings of this court, must be refused. *Tarr v. Haughey*, 5 Kan. *638; *Gossard v. Vaught*, 10 Kan. *162. If, however, upon the other hand, the court should hold that Tracy was elected to hold his office only until the general election of 1873, it will of course be admitted that a peremptory writ must be issued.

In order to reach a determination of the question as to what period of time Tracy was elected at the general election in 1872 to serve as sheriff of Harvey county, it will be necessary to examine the constitutional provisions in reference to such elections. Section 3 of article 9 of the constitution is as follows: "All county officers shall hold their offices for the term of two years, and until their successors shall be qualified." Section 2 of article 4 provides that two elections shall be held each year,—one to be a general election and the other to be a township election. It of course follows from this constitutional provision in relation to elections that all county officers, and all other officers, to be elected other than township officers, are to be elected at the general election, whenever they are elected to fill the constitutional term of office. In other words, (in the absence of express statutes to the contrary, at least,) every constitutional term of a county office must commence with a general election. And if this were not so by reason of the constitution itself, it would be so by reason of the provisions of chapter 36 of the General Statutes. By the same constitutional provision in relation to elections, we find that the general elections are to be held in November of each year. It appearing from the facts in this case that the first general election which ever could have or ever in fact was held in the county of Harvey was held on the fifth of November, 1872, it seems to us to inevitably follow as a conclusion that the constitutional term of the office of sheriff in that county could only have commenced from the first gen-

eral election. In other words, the constitutional term of office for sheriff of Harvey county had never commenced to or had run in Harvey county prior to or before the first general election held in that county.

*375 If the propo*sitions above made be correct, then it seems to us that all that remains of this question to be discussed is whether the constitutional provision above quoted in reference to the terms of county officers is self-asserting, or whether it lays in abeyance until called into life by an act of the legislature. If the constitutional provision fixing the term of county officers is self-asserting, it of course follows that it immediately asserted itself at this first general election, and attached itself to the office of sheriff of Harvey county, and that therefore Tracy was elected to fill that office for the term of two years. But if this constitutional provision is not self-asserting, and lays in abeyance until called into life by an act of the legislature, it follows that the legislature has a right of control over it, and to say when it shall run, and when it shall not run; and having, by section 2, p. 428, Gen. St., said when the constitutional term of the office of sheriff in every county in this state shall commence to run, it can only commence to run from such time; and therefore we admit that if the legislature has control over this constitutional provision, and can say when it shall run and when it shall not, that by this section of the statute above quoted the constitutional term of office of sheriff of Harvey county did not and could not commence to run until the general election held in that county on the fourth of November, 1873, and that Tracy was only elected to fill an *interregnum* that necessarily existed in the office of sheriff of that county from the general election of 1872 to the general election of 1873. In other words, under this construction it must be held that the constitutional term of the office of sheriff in that county lay in abeyance until the general election of 1873; for, as we have seen, it can only commence to run from some general election, and that prior to the general election of 1873 there had never been a general election held in that county which would give to it a starting point by reason of this statute. To go back to our starting point, we think, beyond a doubt, that the plaintiff in this action, in order to maintain it at all, is forced to squarely take

*376 the position that this constitutional *provision is not self-asserting, but is subordinate to the will of the legislature, and can only come into life and force upon an expression of such will; and that, therefore, by the terms of said section 2, p. 428, Gen. St., it necessarily lay in abeyance until the general election of 1873.

The defendants take the position that it is self-asserting, and will always attach itself to any term of office, at any general election, where it ought to attach itself if it be self-asserting, irrespective of any and all acts of the legislature concerning it; that the legislature has no power or control over it; that it never lays in abeyance; and that, therefore, it will always, in every newly-organized county, in

evitably assert itself at the first general election held in such counties, the legislature to the contrary notwithstanding. Which of these two positions is the correct one? We think that this question has been fully, forcibly, and squarely answered by this court in the case of *State v. Thoman*, decided by this court at the July term in 1872. 10 Kan. *191. The facts in that case, the court will remember, were these: The legislature, in 1867, created the Sixth, Seventh, Eighth, and Ninth judicial districts, and provided that at the next general election judges should be elected in each of these districts to hold their offices for the term of four years, and until their successors in office were elected. John R. Goodin was elected under this law at the general election in 1867, as judge of the Seventh judicial district. At the general election in the fall of 1871 he was again elected judge of that district. The question before the court was, was Judge Goodin elected at the general election in 1871 for the constitutional term of four years, or was he elected merely to fill an *interregnum* existing between the time when his office expired under the election of 1867 and the general election of 1872? Section 3, p. 428, Gen. St., had attempted to fix the time when the constitutional term of the offices of district judges should run, in just the same way as section 2 of the same page attempts to fix the time when the constitutional terms of county officers shall run, and by that section the time fixed for *377 the *election of district judges for the constitutional term was at the general election in 1868, and every four years thereafter. While it was admitted by the defendant in that action that the legislature had a right, by special statute, to provide for the election of a judge in 1867 in the Seventh judicial district, and that such judge should hold his office for the constitutional term of four years, yet the defendant contended (and of course rightly) that upon the expiration of this four years, for which Judge Goodin was elected in 1867 under this special law, that the special law had spent its whole force, and that after that term provided for by it had expired it had nothing further to do with the election of judges in that district. Then it was further contended for by the defendant that section 5 of article 3 of the constitution, fixing the period of the terms of district judges, just the same as section 3 of article 9 fixes the period of the terms of county officers, was not self-asserting, and only came into existence when called into life by an act of the legislature; and that section 3, p. 428, Gen. St., had fixed the precise times, and the only times, when the constitutional terms could attach to the office of district judge in this state, except only when otherwise changed by special laws, and therefore it was further claimed as the very logic of the position that this provision was not self-asserting; that, as the legislature had by the special law only given this constitutional promise life during the four years immediately succeeding the general election of 1867, its life expired with the expiration of that four years, and thereafter depended entirely upon section 3, p. 428, Gen. St., (in

the absence of any other act of the legislature upon the subject,) in reference to its asserting and attaching itself to the office of district judge in that district; and that by that section of the statute it could only commence running and attach itself to that office from and after the general election to be held in 1872; and that by reason thereof there was an *interregnum* in the office of district judge of the Seventh judicial district from the general election in 1871 to the general election in 1872, during which the constitutional term lay in

*378 *abeyance*; and that therefore any one who was elected at the general election in 1871 could only hold until his successor should be elected in 1872. On the other hand, it was contended that the constitutional provision was self-asserting, and therefore immediately attached itself to the first general election held after the term provided for by the special law had expired; and that, therefore, Judge Goodin's election at the general election in 1871 was for the constitutional term of four years, notwithstanding section 3, p. 428, Gen. St. And this court, after a very able and elaborate argument of the question, decided that the constitutional provision *was* self-asserting,—was a higher and paramount law to the act of the legislature; and that notwithstanding section 3, p. 428, Gen. St., it attached itself to the office of judge of the Seventh judicial district at the first general election after the term provided for by the special law expired.

What is the very logic of this decision? It can be and is nothing else than that the legislature cannot control the constitutional provisions establishing the terms of any offices; that such provisions never lay dormant or in *abeyance* until called into life by an act of the legislature; that they spring into existence, and attach themselves to their respective offices, irrespective and regardless of any and all laws of the legislature upon the subject. Was or is this decision any more applicable to the construction of section 5 of article 3 of the constitution, and section 3, p. 428, Gen. St., than it is to the construction of section 3 of article 9 of the constitution, and section 2, p. 428, Gen. St.? Is not this decision conclusive upon the question as to whether section 5 of article 3 of the constitution, or section 3 of article 9 of the constitution, are self-asserting, by saying that they are? If this be so, is there any way to escape a conclusion in the case at bar in favor of the defendants? Is there any escape from saying that, by the very logic of this decision, the constitutional term for county officers in all newly-organized counties attaches itself to the various offices at the first general election held in such county?

Would this court have arrived at any other determination in

*379 the above *case* if the legislature had created the Seventh judicial district in 1871, and provided that the governor should appoint a person to act as judge until the general election in 1871, and remained silent as to how long the person elected judge at the general election in 1871 should serve, and a person elected at the general election in 1872 had brought the action under that state of

facts? If this court would not have decided different under such a state of facts, what must be its decision in a case when a county, organized in the spring of 1872, provided with temporary officers until the general election in the fall of that year, and at that first general election county officers are elected, and the court is asked to decide that such county officers are not elected for a constitutional term, but are only elected to fill an *interregnum* that exists in such offices from the first general election in the county until the second general election in that county, by reason of the fact that the legislature has not permitted the constitution to assert itself in that county until such second general election?

But, again, outside of this decision, and the principles involved in it, we think that the law upon this subject is with the defendants, even conceding, for the sake of the argument, that the legislature has entire control of the provision of the constitution fixing the terms of county officers, and can say when such terms shall run and when they shall not; for although the legislature has said by section 2, p. 428, Gen. St., that the constitutional term of two years for the office of sheriff of any county shall run only from general elections held on the odd years in such county, yet this section is limited by exceptions made by section 5, same page, in its application; and we think that one of the exceptions provided for by this section 5 is in the case of any newly-organized county, when a special election has been held by the inhabitants thereof upon its organization, under section 3, p. 249, Gen. St., for county officers, and such county officers are elected by the people at such election, for the reason that section 8, p. 251,

Gen. St., provides that such county officers, so elected by
 *380 *the people, shall only hold their offices until the first general election thereafter, and their successors shall have been elected and qualified. Now, whenever the first general election in such a county comes on an *even* year, if the persons elected at such general election are not elected for the constitutional term of two years, it follows that the people of such county are called upon to hold *two elections* to fill one vacancy or *interregnum*. This, of course, would be no argument if the first county officers were appointed to hold until a general election, but as they are elected by the people, *one* such election would be sufficient to fill the *one vacancy*. Surely, the legislature never intended to require two elections to fill but one vacancy. Therefore we say that by section 8, p. 251, Gen. St., the legislature intended, in all cases of newly-organized counties, that at the first general election held in such counties their full complement of county officers should be elected for the full constitutional term. To give it any other construction would be to say that the legislature intended that in all newly-organized counties that happened to be organized in the even-numbered years there would be a vacancy in the offices of county clerk and county commissioners that would have to be filled (1) by an appointment by the governor; (2) by a

special election by the people; (3) by a general election held by the people. Evidently the legislature had no such intention in enacting the various statutes in relation to the election of county officers.

KINGMAN, C. J. On the tenth of April, 1872, the governor, having received the requisite papers preparatory to the organization of the county of Harvey, appointed commissioners and county clerk for that purpose, as the statute requires. On the twentieth of May thereafter a special election was held, at which a full set of county officers was elected, and immediately thereafter qualified. At the general election in November, 1872, all the county officers were elected, among *381 which C. A. Tracy was elected sheriff. At the general election in November, 1873, the plaintiff was elected sheriff. But the defendants, the county commissioners and county clerk of said county, refused to canvass the votes therefor. The real question raised on these facts, and the only one necessary to decide, is this: Was Tracy elected for a full term of two years? If he was, it would be an idle thing to direct the canvass of the votes for the plaintiff. If he was not, then certainly the plaintiff is entitled to the office, and to have the votes canvassed and the result declared, so that he may enter upon the discharge of his duties.

The statutory provisions bearing upon this question are these: Chapter 24 of the General Statutes (page 249) provides for the organization of new counties; and, after directing how the county officers shall be elected at a special election, fixes their term of office in section 8, (page 251,) directing that they shall hold their respective offices until the next general election, and until their successors shall be elected and qualified. Section 2, p. 428, Gen. St., provides for the election of sheriff and certain other county officers at the general election in 1869, and at the general election in every second year thereafter. Section 57 of chapter 36 provides for filling vacancies in county offices, as well as others, by appointment, until the next general election; section 58 fixes the time when the regular term of office begins, on the second Monday of January next after the election; section 59 regulates the term of officers appointed or elected to fill vacancies, and therein declares that they shall hold during the unexpired term for which they are elected, and until their successors are elected and qualified. These are the material statutory provisions on the question, and from them we think it clear that it was the purpose of the legislature to fix a uniform time for the commencement of the regular term of officers; one class to be elected in the odd years, and one class in the even years, and the term of each class to commence on the second Monday in January after their election; and wherever vacancies occurred, then the person elected to fill the same was only elected for the unexpired term, so *382 that all officers of any one class should, throughout the state, be elected at the same time, thus avoiding confusion, and the necessity for a great multiplicity of laws. If the statutory provisions

upon the subject were alone to be consulted, we should have no doubt that Tracy's election as sheriff in November, 1872, was only for an unexpired term, and that his successor would be elected at the general election in 1878. We think this is the fair construction of the statutory provisions on the subject; and had the question rested on those provisions, it is not likely that any litigation would have ever grown out of them. The constitutional provision on this subject, and not the statutes, has given rise to the difficulties in this case.

Section 3 of article 9 prescribes the term of county officers in these words: "All county officers shall hold their office for the term of two years, and until their successors shall be qualified." It is contended that this section attaches to every county officer immediately upon the election or appointment of such officer. Taken in its hardest literal terms, and the clause seems to bear this construction, and would apply alike to all county officers, upon their accession to office, whether elected to fill a vacancy or for a full term, for it applies to *all* county officers, making no distinction between those appointed or elected to fill a vacancy, and those to fill a full term. Such a construction would be productive of great confusion, as, in the course of time, from removals, resignations, death, and other causes, it would come to pass that the commencement of the term of office would be different as to each office in a county, and in each county in the state. From other constitutional provisions it is apparent that but two elections are contemplated in a year,—a township election and a general election,—so that, to add to the confusion, it would happen that a great number of county officers would hold by appointment, while others might be elected. It is the general policy of the constitution that the people elect the officers, and this policy is the one adopted by the legislature. But as to county officers the constitution is silent.

It prescribes the length of their term, but as to how they shall *383 be selected, or when the term *shall begin, there is no provision. The conduct of public business, under circumstances such as above suggested, would be so difficult as to be nearly impracticable. We cannot think the framers of the constitution intended any such result; nor do we think it necessary to give such a construction to the clause. It was undoubtedly intended to fix the regular term of county officers at a uniform period of two years. The constitution furnishes general rules for the government of the state. It rarely comes down to details, and in this provision we understand the purpose to be to furnish a general rule fixing the duration of a regular term, and not provisions for a vacancy, or an exceptional case. We cannot give it the literal interpretation claimed by the defendants without making it absurd from its impracticable workings. We must therefore give it a construction that is neither violent nor unreasonable.

The provisions of the constitution as to some of the officers are explicit,—that they are to be elected; that in case of vacancy, it shall

be filled by appointment; and the appointment runs only until the next general election that shall occur more than thirty days after such vacancy shall have happened, (section 14, art. 1; section 11, art. 3;) while as to county officers, the entire discretion is vested in the legislature as to how many there shall be, (with some possible exceptions,) how they shall be selected, when their terms shall begin, and what shall be their duties. The sole restriction is as to length of term. By giving this restrictive clause the fair construction of applying to the regular term of county offices, and not to vacancies or exceptional cases, we conform to the almost uniform practice of the counties of the state, to the construction placed upon it by the legislature in the statutes above referred to, and to the construction this court has heretofore given it in the case of *Bond v. White*, 8 Kan. *333. Does this case form one of the exceptional ones? We think so. The legislature is given the power to provide for the organization of new counties. This includes the right to prescribe the terms and conditions prerequisite thereto, and all the steps necessary *384 to secure that result. Such *regulations are prescribed, and, among others, it is provided that their organization may be effected at any time when the prescribed conditions exist; that the first commissioners and clerk are to be appointed by the governor. At the first election the county officers are only to hold until the next general election, when another election is to be held. If section 3 of article 9 is to have any other construction than the one we have given it, then it applies with full force to the officers elected at the first election, and they must hold for a full term; and then each new county might, and probably would, have its political year beginning at a different period from that of any other county. It is not contended that the constitutional provision applies to these, nor is it consistent with the position of defendants that they should so hold; for then the first officers, and not themselves, would be entitled to hold the offices. This is not said by way of estoppel on the defendants, but as a suggestion of the consequences of giving to the section the construction claimed, and applying it to the organization of new counties.

We think that under the power to organize new counties the legislature had the power to designate how the offices shall be filled until the commencement of the regular term, and that the fact of its having provided for two elections does not derogate from their power. And we think that there is no doubt that the legislature may determine when a regular term shall commence, and that they have so determined in the election law; that certain of the county officers are elected in the odd years, and their terms commence in January of the even years, and that certain other county officers are elected in the even years, and their terms commence in January of the odd years. The term of all these offices is two years. The legislature cannot make them more nor less; but for vacancies, and for exceptional cases, such as the organization of new counties, we think they have the power

to say how the office should be filled up to the time when the regular term commences, even if it requires two elections in one year. With these views, it follows that a peremptory writ must be awarded *385 against the defendants, commanding them to canvass the votes for plaintiff for sheriff of Harvey county.

While it is the duty of defendants to canvass the votes for the other officers mentioned in the alternative writ, we cannot command them so to do on the application of plaintiff. The application must be in the name of the proper public officer, or of the real party in interest, to authorize the court to act in the premises.

As the defendant A. G. Richardson, one of the board of commissioners, by his answer has shown his willingness to canvass the vote at the time prescribed by law, and his attendance at the proper place and time for that purpose, and was only prevented by the refusal of the other commissioners; and has also shown by his attendance at the time and place commanded in the alternative writ for the canvass of the vote, and by his request to the other commissioners to canvass the vote then and there,—the peremptory writ will go at the costs of the other defendants.

(All the justices concurring.)

THOMAS H. BUTLER v. GEORGE W. McMILLEN, County Clerk, etc.¹

July Term, 1874.

1. **Trial: When to be Concluded.** A trial should be completed, so far at least as the introduction of testimony is concerned, at the term at which it is commenced.²
2. ———: **Effect of Continuance.** Where a trial has been commenced at one term, the testimony of the plaintiff and part of that of the defendant introduced, and then the trial stopped by reason of the close of the term, and the case continued from term to term till the third ensuing term; and at such third term the trial is resumed, over the objection of the defendant; and the defendant concludes his testimony; and there is nothing further offered except evidence in rebuttal: *held*, that a finding supported by the testimony offered at the last term would not be disturbed, nor could any inquiry be made, at the instance of the plaintiff, into errors alleged to have taken place in the rulings of the court on the trial at the first term.

*386 *Error from Neosho district court.

Injunction brought by Butler (under authority of section 5, c. 79, Laws 1871) to enjoin McMillen from removing his office of county

¹ This case in court, *McMillen v. Butler*, 15 Kan. 64.

² Where a trial is to the court, without a jury, and all the testimony is offered, the arguments concluded, and the case submitted to the court for judgment, the court may take the case under advisement to the next or succeeding term. *Tarpenning v. Cannon*, 28 Kan. 665.

clerk, and the records thereof, from Osage Mission to Erie. The county-seat had been duly located at Osage Mission, and the county offices were there kept and held. An election was held March 26, 1872, for the purpose of relocating the county-seat. The board of county commissioners canvassed the vote, and caused proclamation thereof, showing that 3,391 votes had been cast, of which 1,712 were in favor of Erie, and 1,679 were in favor of Osage Mission, and determined that the county-seat, by a majority of 33 votes, was located at Erie. Butler, in his petition for an injunction, alleged that said election was void, claiming—*First*, that the petition for the election was fraudulent, and did not contain names of electors equal to three-fifths the whole number of electors in said county, as shown by the last registration made by the assessors, and on file in the county clerk's office, as provided by the "Act for the registration of all adult persons in each county," (chapter 86, Gen. St. 894; section 4, c. 26, Gen. St. 297;) *second*, that no valid election was held in Erie precinct. Regarding the first objection, Butler alleged that of the pretended signature to the election petition, more than six hundred in the aggregate were names of fictitious persons, minors, and non-residents, and names of resident electors signed thereto without their knowledge or consent. Respecting the election held at Erie precinct, Butler alleged that before the polls opened 83 fictitious names were placed on the poll-books, and a corresponding number of spurious ballots placed in the ballot-box; that 259 votes only were actually polled, (of which fifty were cast by minors and non-residents;) making the whole number, at the closing of the polls, (including said 83 spurious votes,) 342, of which the election board canvassed 337 as cast for Erie, and 5 for Osage Mission; that afterwards the poll-books and returns *387 for said precinct were destroyed by the election *board of Erie, and that said board manufactured new and spurious poll-books and returns, showing that 595 votes were cast at Erie precinct, (of which 590 were for Erie, and 5 for Osage Mission;) that these 595 votes so fraudulently returned from Erie were canvassed by the county board, and said 590 included in the number (1,712) canvassed and allowed in favor of Erie for the county-seat. McMillen answered, denying averments of the petition, and alleging that illegal and fraudulent votes were cast at Osage Mission, and other precincts, and canvassed for and in favor of Osage Mission for the county-seat.

The trial commenced on the twenty-third of April, 1872, (at the April term of the district court,) and continued through eleven days, until the fourth of May, when the trial was continued until the next term. The trial was resumed at the April term, 1873, when fifteen days more were occupied in taking testimony, and then the court took the case under advisement until the next term. More than fifty witnesses were sworn and examined. No testimony was offered in regard to the petition for the election, but the evidence on both sides was mainly in regard to the alleged frauds at Erie precinct, and al-

leged illegal and fraudulent voting at Osage Mission and other precincts. Five witnesses (citizens of Osage Mission) testified that they were present when the polls were closed at Erie, and proclamation of the result of the election there was made; that there were only 342 names on the poll-books, as numbered, and that the ballots were taken from the ballot-box, and counted in their presence, and were 342 in number.

One of the clerks of said election, called by defendant, testified: "At the time the polls closed the proclamation made was that the polls of that election was now closed. I did not hear anything said with regard to the votes cast. After the announcement that the polls were closed, they commenced counting out the votes. They continued to count until they got through. Don't know how long it was. Stopped counting two or three times, a little while at a time. Think Layng,

Quinlan, and other Osage Mission men left about 9 o'clock,
*388 —may be not so late. It was before we had finished *counting the votes,—perhaps three-quarters of an hour. Don't know why they left at that time. We had between 300 and 400 votes counted out when they left. Think there was about the same number counted out when they left that we had numbered on the poll-books. About the time the Osage Mission men left, G. F. Dutton [of the judges of election] remarked to the house that the whole number of votes cast was 342, and remarked that we would like to have the room, and they [the Osage Mission men] lit out. That [342 votes] was not the true number. I knew they were not all out. Don't know why he [Dutton] did it; 342 may have been the last number that had been set down at that time. Immediately after those men left the house we took a little rest, and then commenced counting out again. I mean we recommenced counting out the balance of the ballots that were in the box. Commenced counting out of the same box we had been using all day. The box was open while they were taking the ballots out. Before the Mission men went away the board did not want the room cleared, or, at least, the board said nothing about wanting it cleared. The Mission men gave them no time to say anything about their remaining longer if they wanted to. At the time Dutton said the whole number of votes cast was 342 we had not numbered all the names that were on poll-books. None of the poll-books was in public view. They were not in public view all the time we were numbering them. They were in separate sheets. The sheets that we were numbering could have been seen by those in the room,—at least by those standing close by. We had sheets with names on them that were underneath the ones we were numbering. We kept them out of sight that way until the men from the Mission left. We did it simply because we knew that if the Mission men knew how many votes we polled they would poll four times as many in order to beat us. We had a couple of large blotting papers that we used, that we placed on top of our poll-books; kept one above and one below my hand. When we filled a sheet, would place it un-

derneath the pile from which we were using. * * * I don't know what part of the page the number '342' was. The number may have been half-way down a page when the polls were closed. When the Mission men left I don't remember whether we had numbered all the names that appeared in their sight or not. We stopped counting because one of the judges said they were all counted out. I *389 did know better than that at the time. I said some*thing about it not being correct a little while afterwards. Think I asked him what he called out that number for, or something to that effect. He said it would not do to let those Mission men know how many were polled, for if we did they would go down and raise their count enough to beat us."

Considerable testimony was given by the defense for the purpose of showing that the Osage Mission party had used money improperly to influence voters in favor of Osage Mission. One witness testified that at the first election (at which there was no choice) he had voted for Erie, but afterwards sold his vote to the Missionites for two dollars and a half, and at the second election had voted for the Osage Mission. At the July term, 1873, the court made its findings of fact and conclusions of law. Its findings were that the election at Erie was legal, that the county commissioners rightly canvassed and counted the vote from that precinct as returned, and that Erie had received a majority of the legal votes cast;¹ and its conclusion was that plaintiff, Butler, was not entitled to the relief demanded. Judgment was entered in favor of the defendant.

Carpenter & Jones and John T. Voss, for plaintiff.

Stillwell & Baylies, for defendant.

BREWER, J. This is a contest over a county-seat election in Neosho county. The contestants now, as heretofore, were Osage Mission and Erie. As the result of the canvass, the county commis-*390 sioners declared that Erie had received a ma*jority, and directed the removal of the county offices to that place. Plaintiff in error, who was plaintiff below, instituted this proceeding to contest the election, and to restrain such removal. The judgment of the district court was in favor of the defendant, and sustained the result of the canvass as declared by the commissioners. The record of the case is very voluminous, comprising 647 pages of legal cap. As errors in the proceedings of the district court, plaintiff alleges

¹NOTE OF HON. W. C. WEBB, STATE REPORTER.

[The commissioners' canvass was, total vote, 3,891,—1,712 for Erie, and 1,679 for Osage Mission; majority for Erie, 33. This election was held March 26, 1873. An examination of the official canvasses (as given in the Annual Reports of the Secretary of State) shows that the total vote cast in Neosho county at the general election was as follows: In November, 1871, for representatives, 1,949,—being 1,442 less than at the county-seat election held March 26, 1873; in November, 1872, for representatives, 2,709,—being 682 less than at the county-seat election of March 26, 1873; in November, 1873, for representatives, 2,032,—being 1,859 less than at the county-seat election held March 26, 1873.]

certain rulings in the introduction of testimony, permitting an amendment of the answer, and certain of the findings of fact and conclusions of law.

But, preliminary to any inquiry into these matters, we are met by a counter-objection on the part of the defendant, which, if well taken, is conclusive of the case. The trial was commenced at the April term, 1872, of the district court of Neosho county. The plaintiff introduced his testimony, and rested. The defendant commenced his, and examined a witness or two. All this testimony was reduced to writing as it was given. Before the defendant had rested, the April term closed, and the further hearing was postponed. The record reads as follows: "And the time fixed by law for the holding of said April term of court having expired, this cause was continued from term to term, until the April term of said court 1873, when the same was resumed." By law two terms intervened between the commencement and close of the trial. At the April term, 1873, the defendant finished his evidence. Rebutting testimony was offered, and the case submitted to the court. The trial in April, 1873, was treated as a continuance that began in April, 1872, and as though there had been but an adjournment from day to day during the same term. There was no formal offering of the testimony as written down,—no re-examination of the witnesses. Now, it is insisted by counsel for defendant in error that the trial which commenced in April, 1872, was ended by the close of the term, and that that in April, 1873, was a separate, independent trial, and as at that time no testimony was offered supporting the plaintiff's claim, the judgment was properly entered for defendant. We think *this objection of the defendant in error well taken. We do not understand that a case can be tried piecemeal in this way. Here two terms and a year's time intervene between the term at which part of the testimony is heard and that at which the remainder is introduced. If the case were tried before a jury, the impropriety would be more apparent, in view of the difficulty of securing the reattendance of the same triers; but the impropriety would not be more real, where a great length of time intervenes, as in this case. Undue weight will very likely be given to the testimony offered at one of the terms. The case is not presented to the consideration of the court in a symmetrical and well-proportioned manner. Impressions settle into convictions, while the manner of witnesses, and much of the *minutia* which gave rise to those impressions, are forgotten. It frequently happens that the testimony on the one side, even when not contradicted, is explained or qualified by that on the other, and, when so explained or qualified, carries a very different meaning from that which it conveys by itself alone. If this explanation or qualification is not heard for a year, it will often go but little ways towards changing the effect first produced on the mind. The whole force of the argument in favor of the statutory requirement that exceptions must be reduced to writing *at the*

term is against the propriety of a trial in the manner this was tried.

Again at common law, the judgment, and all proceedings, were entered and dated as of the first day of the term, as though it was but a single day's duration, and there were no break or interruption of any kind in the session of the court. The idea seemed to be that a trial was a continuous proceeding, from its opening to its close. The jury were under charge of an officer, and forbidden to separate through the entire trial, and not, as now, only when counseling upon the verdict. A criminal trial once commenced must be carried through to its close, and a failure to finish it was equivalent to an acquittal of the defendant. Jurors were and are summoned only for the term.

Process for witnesses loses its force at the end of the term.

*392 *Exceptions must be reduced to writing at the term. Questions even have been raised as to the power to continue a motion for a new trial to a subsequent term, though in Ohio and in this state it has been decided that such a motion could be continued.

Coleman v. Edwards, 5 Ohio St. 51; Brenner v. Bigelow, 8 Kan. *496. In Ohio the continuance of such a motion does not carry with it the right to make a bill of exceptions as to rulings upon the trial.

Kline v. Wynne, 10 Ohio St. 223; Morgan v. Boyd, 13 Ohio St. 271; "All indictments and information shall be tried at the *first term* at which the defendant appears, unless the same be continued for cause."

Crim. Code, § 157; Gen. St. 845. "Actions shall be triable at the *first term* of the court after the issues therein, by the time fixed for pleading, are or should have been made up." Civil Code, § 315; Gen. St. 689. A trial docket is to be made out twelve days before the term, and actions set for particular days, and so arranged that they may be tried as nearly as possible on the days for which they are set. Code, § 313; Gen. St. 688. We are aware that the statute empowers the court to continue "an action at any stage of the proceedings." Code, § 316; Gen. St. 689. But the question here is not as to the power to continue, but the effect of the continuance.

The court may break up a trial at any time, and continue the case; but at the next term the trial must be recommenced, and cannot be taken up where it was left off. "A final adjournment of the court for the term operates as a legal discharge of a jury, and terminates their functions as such." Ashbaugh v. Edgecomb, 13 Ind. 466. In Indiana there is a special statute applicable to cases where the time fixed by law for the close of a term comes in the midst of a trial. 2 Gav. & H. St. 27, § 32; Dorsch v. Rosenthal, 39 Ind. 209.

Our conclusion, then, is that inasmuch as the plaintiff, at the April term, 1873, offered no testimony to support his case, the defendant was entitled to judgment; and that it is immaterial whether any errors were committed in the rulings in April, 1872. At the time the

*393 trial was resumed in April, *1873, the defendant objected to any consideration of the testimony offered the year previous, and moved for a dismissal of the case, so that the matter was fully

called to the attention of the district court. While we have been constrained to place our decision upon this ground, we deem it due to the parties litigant and interested, and to the importance of the case, to say that we have examined the whole record before us, and considered all the objections made by counsel for plaintiff in error to the various rulings of the district court; and that while upon such record there appears a great conflict of testimony, yet, in accordance with well-settled rules of decision, we should have been compelled to uphold the findings of the trial court upon the disputed questions of fact.

The judgment will be affirmed.

(All the justices concurring.)

E. T. CARR and another v. GEORGE O. CATLIN and others.

July Term, 1874.

1. **Administration: Partnership Property: Liability of Administrator.** Where one member of a partnership dies intestate, and the administrator of his individual estate gives the second bond required by the statute, and takes possession of the entire partnership property for the purpose of settling up the partnership estate, and thereafter converts such property to his own use, an action can be maintained against him and the sureties on said second bond, by any partnership creditor, without any allowance of such creditor's claim in the probate court, or any settlement of the partnership affairs in such court.¹
2. ———: **Citation to Surviving Partner: Appearance.** The citation to the surviving partner, provided for by section 49 of the executor's act of 1859, (Comp. Laws, 520; Gen. St. 437, § 35,) only serves to bring such partner into court; and if, without any citation, he comes into the probate court, and files a written refusal to close up the partnership business, the court has jurisdiction to direct the administrator of the decedent to give bond and take charge of the entire partnership assets, and the bond given in pursuance thereof is valid.
- *394 *3. **Contracts: Written: Construction.** Every instrument must be construed in the light of the circumstances under which it was executed, and sometimes these circumstances will make perfectly plain the otherwise doubtful intent of the party executing it.
4. **Administration: Partners: Refusal to Continue Business.** No form is prescribed for the refusal of a surviving partner to give bond and

¹ Upon the death of one of the members of a firm, composed of two persons, the surviving partner becomes a trustee for all concerned. *Blaker v. Sands*, 29 Kan. 551. See, also, *Ravenscraft v. Pratt*, 22 Kan. 20. Individual and partnership estates, administration of, see *Glass Co. v. Ludlum*, 8 Kan. 38, and note; evidence upon the question of alleged fraud of surviving partner, who was also administrator, held insufficient to entitle to relief, *Hutton v. Laws*, 8 N. W. Rep. 642; presentation of claim in probate court does not necessarily estop claimant suing in equity as partnership claim, *Way v. Stebbins*, 11 N. W. Rep. 166; in suit against executors for an accounting, evidence of surviving partners will not be admitted, *Eccard v. Brush*, 11 N. W. Rep. 756.

close up the partnership affairs, and a statement that he "refuses to continue the business of the late firm, and requests the administrator of the decedent to take charge of his interest in the property of said firm," is sufficient.

5. — : **Administrator's Bond.** The bond in this case, given by the administrator on taking possession of the partnership property, is held to be good, notwithstanding it specifies in greater detail than required by the statute the obligation of the administrator.¹
6. — : **Limitation: Action on Bond.** No action accrues against an administrator in his individual capacity until there has been some violation of his trust, nor against the sureties on his bond until there has been some breach of the conditions of the bond; and then the statute of limitations begins to run from the date of such violation and breach.

Error from Leavenworth district court.

Action by Catlin and two others, partners as Catlin & Co., commenced against Carr, Clark, and Mills, as sureties in a bond given July 13, 1866, by Samuel S. Ludlum, administrator of the estate of William H. Hays, deceased, for the proper execution of the trust imposed on him by taking possession of the partnership property of the firm of Hays & Ludlum. The plaintiffs were creditors of Hays & Ludlum. The action was commenced October 24, 1868. An amended petition was filed July 20, 1869, and a second amended petition was filed in September, 1871, and in November, 1872, the second amended petition was amended by attaching a copy of the bond sued upon. All three defendants answered the first and second petitions, and the defendants Carr and Mills answered the last amended petition. The action was tried at the May term, 1873. Verdict and judgment against Carr and Mills for \$618.20. No finding,
 *395 ver*dict, or judgment against Clark. Carr and Mills bring the case here by petition in error.

Clough & Wheat, for plaintiffs in error.

No reason is known to us why judgment should not have been rendered against Thomas R. Clark, if it was proper to render judgment against Carr and Mills. We refer to said second amended petition, as it was finally amended, and to the answer of Carr and Mills thereto, and to the reply to said answer, and to the special verdict; and claim that there is not any cause of action established against Carr and Mills, and that, therefore, their motion for judgment should have been sustained. But, even if it is shown that there was once a cause of action against them, then we claim that the same was not sued for or on until said second amended petition was filed, on the twenty-fifth of September, 1871, and that the same was then, and also when the suit was first brought, on the twenty-fourth of October, 1868, barred by the statute of limitations.

In support of our claim that there was not any cause of action

¹Petition in action on administrator's bond, see *Stratton v. McCandless*, 37 Kan. 296.

found against Carr and Mills, we draw attention to the finding, from which it appears that John B. Ludlum, the surviving partner, never was cited, as required by section 49, c. 91, Comp. Laws 1862, p. 520. And as John B. Ludlum was at common law, and notwithstanding the statutes, entitled to the control and disposition of the partnership property until he should neglect or refuse to give bond after being cited for that purpose, (*Bredow v. Mutual Sav. Inst.*, 28 Mo. 181, and section 51 of said act,) we submit that the probate court had no power or jurisdiction to make any order in relation to the partnership property, or to assume jurisdiction over the same, or to require Samuel S. Ludlum to give the bond mentioned in section 50 of said act; and that, therefore, the bond sued on is void, because the proper steps had not been taken to divest such rights of John B. Ludlum, or to confer power to control the property on the administrator of the deceased partner. *Thomas v. Burrus*, 23 Miss. 550; 1 Redf. 331; *Cook v. Carr*, 19 Md. 1; *Flinn v. Chase*, 4 Denio, 90; *Griffith v. Frazier*, 8 Cranch, 9; *In re Hamilton*, 34 Cal. 464; *Jochumsen v. Suffolk Sav. Bank*, 3 Allen, 87; *County of Monroe v. Budlong*, 51 Barb. 514; *Olds v. State*, 6 *Blackf. 91; *Monroe v. James*, 4 Munf. 194; *Behrle v. Sherman*, 10 Bosw. 293; *Kane v. Paul*, 14 Pet. 39; *Fredrick v. Pacquette*, 19 Wis. 541; *Shanks v. Seamond*, 24 Iowa, 131; *Langworthy's Heirs v. Baker*, 23 Ill. 489; *Toll. Ex'rs*, 121; *Adams v. Adams*, 36 Ga. 241; *Alfred v. McKay*, Id. 441.

This matter of citation was not mere form. Until thus cited, the surviving partner had the right to retain and dispose of the property. It was an act required to be done to divest John B. Ludlum of his otherwise right to control and dispose of the property, and, that act of citation not being done, we submit that John B. Ludlum was never divested of his rights to and concerning the partnership property; and, if not, it of course follows that said bond was void. If it shall follow that said bond is good as a *voluntary* bond, then we suggest that unless it is one of the bonds mentioned in section 575 of the Civil Code of 1859, (Civil Code 1868, § 726,) any cause of action arising from a breach thereof should have been brought in the name of the state of Kansas, (*People v. Norton*, 9 N. Y. 176; *Annett v. Kerr*, 28 How. Pr. 324; *Sandrey v. Michell*, 113 E. C. L. 415-418; *People v. Townsend*, 37 Barb. 520; *Corporation of Washington v. Young*, 10 Wheat. 406; *Tucker v. Hart*, 23 Miss. 548;) and, of course, unless said bond was such an one as was by some law authorized to be taken as an official bond, it is not one of those mentioned in said section 575. If it shall be claimed for plaintiff that the recitals in said bond estop Carr, Clark, and Mills from denying that John B. Ludlum, after having been duly cited for that purpose, neglected or refused to give the bond required in said sections 46 and 47, (those being some of the necessary facts to give the probate court jurisdiction over the partnership property,) then we say that inasmuch as it is not in the said bond recited or admitted that John B. Ludlum had been cited, (or that

he had in or to the probate court refused to give such bond,) we submit said defendants are not so estopped, because an estoppel cannot be extended beyond the exact terms of the admission. *Miller v. Hampton*, 37 Ala. 346; *Campbell v. Knights*, 11 Shep. 332; *Van Rensselaer v. Kearney*, 11 How. 326; *Fitzsimmons v. Allen's Adm'r*, 39 Ill. 442.

And it appears to us that the rule of law that a party shall not be deprived of his property, or of his right to possess, control, and dispose of property, without due process of law, etc., would of it-
 *397 self render void all the proceedings of said *probate court in relation to said partnership property; and show that it is the duty of Samuel S. Ludlum, as an individual, to account to John B. Ludlum, as the surviving member of the firm, thus leaving the partnership creditors to look to John B. Ludlum as the representative of the late firm, rather than to found an action upon void proceedings of a probate court. And we submit that if such creditors are confined, so far as the partnership property is concerned, to such remedies as they may have against John B. Ludlum, not only will no rule of law be violated, but the idea evidently on the mind of John B. Ludlum, when he refused to continue the business of Hays & Ludlum, will be carried out; for if that paper is not utterly void, its legal effect was simply a refusal on the part of John B. Ludlum to continue the business of the late firm, and a request that the administrator of William H. Hays, deceased, (whoever he might be,) should take charge of his (John B. Ludlum's) interest in the property of said firm, thus, in substance, merely appointing such administrator, whoever he might be, his agent to take charge of the property.

And, further, in support of our claim that there was not any cause of action found against Carr and Mills, we draw attention to sections 48 and 189 of said chapter 91 of the Compiled Laws, and to the want of any pretense in the pleadings on which the action was tried, of any judgment, or order of distribution, or for the administrator to pay any claim or claims; nor is there any finding that such was the fact, or of any order of the probate court for distribution or payment to be made by the administrator; and therefore we submit that the motion of said Carr and Mills for judgment should have been sustained. See sections 48, 189, 190, and 227 of said act; and 2 Amer. Lead. Cas. 135; *People v. Barnes*, 12 Wend. 492; *Com. v. Evans*, 1 Watts, 437; *Justices v. Sloan*, 7 Ga. 31; *Com. v. Fretz*, 4 Pa. St. 344; *Dinkins v. Bailey*, 23 Miss. 284; *People v. Corlies*, 1 Sandf. 228; *Siglar v. Haywood*, 8 Wheat. 675; *State v. Modrell*, 15 Mo. 421; *McGill v. Armour*, 11 How. 142; *Gordon v. State*, 11 Ark. 12; *State v. Cutting*, 2 Ohio St. 1. And we submit that a reasonable construction of the aforesaid sections of said act, in connection with the other parts thereof, show that it was not the intention of the legislature
 *398 that the admin*istrator of a deceased partner should have the same power with reference to or to dispose of the property of a firm he might administer on, under sections 49 and 50 of said act,

as the surviving partner would have if he closed up the business of the firm.

The verdict is not sufficient to sustain the judgment. Even if defendants in error ever had a cause of action, it was barred by limitation. Although they alleged that their claim, which was general *indebitatus assumpsit* for goods, wares, and merchandise sold and delivered by plaintiffs to Hays & Ludlum, had been presented and allowed by the probate court, so as to bring themselves within the requirements of section 151, and the following sections of said act relating to allowance of claims, yet there was no proof or finding made of any such allowance or presentation. It appears from the verdict that the debt sued for came due on the sixth of July, 1865, more than three years before the commencement of the first action, and more than five years before the second amended petition was filed, and there is, we submit, nothing in the verdict to take the case out of the ordinary three-year statute of limitations. It is very clear on said verdict that when the said action was first commenced, in October, 1868, sections 20 and 21 of the Code of 1859 barred any action against the survivor, John B. Ludlum, for the money due for the goods sold; and also that the same sections then barred any action against the administrator for the goods sold, even leaving out the time (which, we submit, ought not to be done) which elapsed after the death of Hays, on the twenty-sixth day of March, 1866, to the fifth day of July, 1866, the time Ludlum was appointed administrator; because from the fifth of July, 1865, the time when the debt came due, to the twenty-fourth of October, 1868, the time when the suit was first brought, is a period of three years and one hundred and nine days; so that the supposed cause of action, on which defendants in error sued as their claim of indebtedness, was barred, so far as bringing any action therefor was concerned, at least nine, if not one hundred and nine, days before the action was commenced, (Toby v. Allen, *3 Kan. *399,)

and therefore no cause of action was shown by the verdict. And we submit that when the cause of action for the debt was barred by the limitation law, as above shown, that no action could be maintained as attempted by defendants in error. In this connection we refer to Chick v. Willetts, 2 Kan. *384; Pollock v. Maison, 41 Ill. 517; U. S. v. Athens Armory, 35 Ga. 344, 358.

And, further, in this same connection, if defendants in error proved a cause of action against Carr and Mills but for the statute of limitations, we further submit that if the supposed cause of action set forth in the last-amended petition is other and different than the cause of action set forth in either of the preceding petitions, that, therefore, the supposed cause of action was not sued on until the twenty-fifth of September, 1871, even though it was filed in the same action. See the opinion of this court in the case of Hiatt v. Auld, 11 Kan. *176, and cases therein cited; Dudley v. Price's Adm'r, 10 B. Mon. 84; Toby v. Allen, 3 Kan. *412, *414; Richmond v. Van-

book, 8 Ired. Eq. 585. But if such cause of action is not other or different than the one first sued on, in the same action, then the decision in *Glass Co. v. Ludlum*, 8 Kan. *40, (a similar case,) is conclusive against defendants in error. The record in said case in 8 Kan. will show, we think, that that case raised all the questions relied on by the present defendants in error; which, among other things, shows the indebtedness of Hays & Ludlum to the company, and a request for the district court to find conversion by the administrator of the firm property; and if the evidence in this case is sufficient to show the conversion found, then in that case it was sufficient to require a finding in relation thereto; but the judgment in that case was not reversed, notwithstanding the refusal to find on the alleged conversion.

We submit that the bond executed by Carr, Clark, and Mills with Samuel S. Ludlum, as his sureties, is *void*, because the conditions therein are not *any* of them the conditions specified in said section 50, c. 91, Comp. Laws. The bond is void if the conditions thereof are not *any* of them the condition specified in said section 50. *Tomlin v. Green*, 39 Ill. 225; *Kelly v. Archer*, 48 Barb. 68; *Minor v. Mechanics' Bank*, 1 Pet. C. C. 46; *Jackson v. Simonton*, 4 Cranch, C. C. 255; *Haines v. Levin*, 51 Pa. St. 417; *Fulcher v. Com.*, *400 *3 J. J. Marsh. 592; *U. S. v. Bradley*, 10 Pet. 364; *Postmaster General v. Early*, 12 Wheat: 136-150; *Woods v. State*, 10 Mo. 700; *Purple v. Purple*, 5 Pick. 226. The conditions in said bond, after the first one therein written, are substantially the conditions (as nearly as in the nature of the case they could be) required in the bond of a surviving partner when he administers on the partnership estate, (see sections 46 and 47 of said act,) and are therefore void. *Fulcher v. Com.*, *supra*; *Small v. Com.*, 8 Pa. St. 101. And as to the first of the conditions in said bond, we submit that the only trust therein referred to was that consequent upon, and such only as resulted merely from, S. S. Ludlum's having taken possession of the property, which, as we have above seen, simply placed him under obligations as agent of John B. Ludlum. But even if it was an undertaking of which creditors could take advantage, it was not, we submit, sufficient to sustain the assignment of such breaches as are necessary to maintain the judgment complained of, even if the limitation and other objections raised shall be decided against us. And, further, a bare receipt of assets is not the commencement of administration thereon, (*Kendall v. Lee*, 2 Pen. & W. 482;) and as such taking possession was not the commencement of administration thereon, and as the first condition in said bond was merely to the effect "that Samuel S. Ludlum should faithfully execute the trust incurred by the act of taking possession of the partnership property, with no unnecessary waste or expense," and as that was not the condition required in a bond given in pursuance of said section 50, or by any other section of law, we submit it and the bond, so far as con-

nected therewith, are both void. Sureties are never held responsible beyond the clear and absolute terms and meaning of their undertakings. Presumptions and equities are never allowed to enlarge, or in any degree change, their legal obligations so as, by construction, to extend their undertaking. *Miller v. Stewart*, 9 Wheat. 680; *U. S. v. Kirkpatrick*, Id. 720; *Leggett v. Humphreys*, 21 How. 67; *U. S. v. Boyd*, 15 Pet. 187; *Smith v. U. S.*, 2 Wall. 235; *Bowers v. Beck*, 2 Nev. 139; *Judah v. Zimmerman*, 22 Ind. 392; *Dobbin v. Bradley*, 17 Wend. 422; *Walsh v. Bailie*, 10 Johns. 180; *Walrath v. Thompson*, 6 Hill, 540; *McCluskey v. Cromwell*, 11 N. Y. 598.

*401 **Stillings & Fenlon*, for defendants in error.

It was not necessary for the defendants in error to establish their demand in the probate court to entitle them to payment thereof out of the partnership assets of *Hays & Ludlum*; or, if the probate court had no jurisdiction to *allow, classify*, and order payment out of partnership assets, then of course no allegation need be made in the petition of the classification of their claim by the probate court, and an order on the administrator of *William H. Hays* to pay the amount allowed and classified. [Here follows an argument covering several pages, construing the executors' and administrators' act of 1859, (Comp. Laws 1862, pp. 512-546,) which argument is adopted by the court, and inserted in the opinion, *infra*, pp. *404-*407.]

Counsel for plaintiffs in error attempt to confound this case with the case of *Glass Co. v. Ludlum*, 8 Kan. *40; but there is a broad distinction between the two cases, as they appear in court, although the facts out of which both actions originally grew are the same. In that case, it will be remembered, the plaintiff based its action on the judgment or findings or orders of the probate court, alleging in its petition, first, that the estate of *William H. Hays* had no property. On this allegation *Anthony and Dunlop*, who were the sureties of *Samuel S. Ludlum* as administrator proper, demurred the plaintiff out of court, and properly so. But when they alleged, again, as against *Carr and Mills*, the defendants here, (plaintiffs in error,) that the probate court had settled the *partnership* estate, and ordered a payment to plaintiff out of such estate, they failed on the proof; for the court found from the records of the probate court that the estate settled and the order made was on the *individual* estate of *William H. Hays*. So, in that case, *Anthony and Dunlop* defeated the plaintiff on his own pleading, and *Carr and Mills* beat the plaintiff on the failure of evidence to sustain the allegations of the petition. That case, therefore, is no criterion nor guide nor precedent for this.

*402 We take *totally different grounds. We deny all and any powers in the probate court to adjudicate on partnership matters, other than to cite the administrator, acting as special trustee of the partnership property, or the survivor, should he act, to account for his doings. If the surviving partner had taken the property, hav-

ing given bond, and then had squandered and converted the property, in an action against him and his bondsmen, would any one contend it would be necessary for a creditor to first establish and classify his claim in the probate court? And is it not clear that the administrator, by the statute, simply takes the place of the declining surviving partner, assumes only his duties, and he and his bondsmen assuming precisely the obligations which the surviving partner and his bondsmen would have assumed if he had taken the partnership property? Of course it is not contended, if the creditors here (defendants in error) had desired to make the separate individual property of William H. Hays responsible for this debt, that it would not have been incumbent on them to prove and classify their debt; but they had the right (being creditors of Hays & Ludlum) to look to the partnership property to pay their debt, and they elected so to do. They knew, as the jury found, that there were sufficient partnership assets to pay all debts. They demanded the payment of this debt from Ludlum, who was the special statutory trustee of this property, and for whose acts and for whose omissions, in respect to this special property, Mills and Carr made themselves liable. Ludlum converted these assets to his own use, and apparently the only answer the sureties now give is, "We will not pay because you did not prove your claim in the probate court. If we had proved it there, we would have been met with the fatal objections made in the Boston Glass Company's case, which doubtless would have been agreeable to Ludlum and his sureties." *Green's Adm'r v. Virden*, 22 Mo. 506; *State v. Baldwin*, 27 Mo. 103.

No substantial question can be made on the statute of limitations.

The bond upon which this action is based was filed and approved on the thirteenth of July, 1866, and the action commenced October 24, 1868. We are unable to see how any real question can be presented under the limitation statute.

BREWER, J. This was an action on a bond given by the administrator of the estate of William H. Hays, deceased, upon taking possession of the partnership property of the firm of Hays & Ludlum, of which firm the deceased was a member. It appears from the pleadings and special verdict that in March, 1866, the firm of Hays & Ludlum was composed of William H. Hays and John B. Ludlum; that the twenty-sixth of that month William H. Hays died, intestate; that, on the fifth of July, Samuel S. Ludlum was appointed administrator of his estate; that thereafter the surviving partner filed in the probate court a written refusal to continue the business of the late firm, and a request that the administrator take charge of the partnership property; that the probate court ordered the administrator to take possession of said partnership property, giving a new bond therefor as provided by statute; that the administrator did take possession and give a new bond, the one sued on in this action; that he sold the property and converted the proceeds to his own use; that

the partnership property he received was ample to pay all the partnership debts; that the firm of Hays & Ludlum was indebted to the plaintiff in the amount sued for; and that demand was made of the administrator for payment, and payment refused.

A great many questions are raised and discussed by counsel in their briefs. We shall notice only those we deem the most important. And, first, can this action be maintained without proof of the allowance of the claim by the probate court, or of any settlement in said court by the administrator of the partnership estate? As the record stands, no action is shown of the probate court subsequent to the approval of the bond. After a careful examination of the statute and the authorities, we must answer this question in the affirmative. We *404 cannot express our views better than in the language of the able counsel for defendants in error, and so quote from their brief:

"The probate court is established by the constitution, (article 3, § 8,) and its powers are limited to '*such probate jurisdiction and care of estates of deceased persons * * * as may be prescribed by law.*' It would seem clear that unless there be some 'law' specifically prescribing that the probate court shall have the power to *allow, classify, and order payments of partnership debts out of partnership assets*, that no such power exists. It is a well-known rule that the powers of a court of limited jurisdiction are to be found only in the statute which confers them; that such a court takes nothing by intendment or construction. If, then, this power to allow, classify, and order payments is not—to use the language of the constitution—'*prescribed by law,*' it does not exist; and it cannot, with any show of reason, be argued that such a power is necessary to the execution of any other power conferred by law, upon the probate court. What powers, then, do we find are '*prescribed by law?*' The first forty-four sections of the act approved thirtieth July, 1859,—the act under which the bond in this case was given, and the proceedings had out of which this action grows,—apply wholly to the granting of letters and matters strictly connected therewith. The eight sections next following relate to the disposition of the property of a firm of which the deceased was a member. Sections 55 to 150, inclusive, prescribe the power of the court, and the duty of the administrator respecting the money and property of the deceased. Sections 151 to 178 provide for the allowance and classification of demands *against the estate of deceased persons*, and specify the manner in which different characters of claims are to be paid from the estate of the deceased, and how these claims may be established. The sections then next following (sections 180 to 196) prescribe the mode of settlement by administrators, and define the power of the court therein; from 197 to 222, inclusive, the statute prescribes the mode of distribution of the *decedent's estate*; and the balance of the statute provides for proceedings against executors and administrators and for appeals; and this com-

prises all the legislation on this subject. Shall it be claimed that section 151 (Comp. Laws, 534) confers the power on the probate court to classify the claim of the plaintiff? If there are no partnership assets, and the claim was sought to be made out of the individual property of William H. Hays, then, *of course, the court would have power under that section to classify the demand; and then, to maintain an action on the administrator's bond, probably it would be necessary to allege an allowance and classification. But such is not the case at bar. Here is a partnership debt, with partnership assets sufficient to pay all such debts, and not a claim that is sought to be enforced against the individual property of the decedent. It is unquestioned law that the partnership debts are to be paid in preference to individual debts out of the partnership assets; yet if it can be maintained that section 151 confers the power on the probate court to classify partnership debts, then the entire assets of the firm could or might be employed in the payment of the individual debts of the decedent, so setting aside a rule that has prevailed from time immemorial. Such a construction is surely not to be forced, and can only be conceded when the plain reading of the statute demands it. The legislature is speaking only in this section of the estate proper of the decedent, and providing what claims as against it shall be entitled to preference. No other rational construction can be given to this section, especially when we notice that the whole subject-matter of legislative attention, as shown by the sections immediately preceding and following, is the *estate proper of the decedent*; and this conclusion, it would seem, becomes entirely irresistible when we consider that this same law-making power which is now speaking of debts of the deceased, and of the property of the deceased, devotes several entire sections of this same law to prescribing what shall be done with claims against a *partnership*, and what disposition shall be made with *partnership effects*. The two subjects were before the legislature, and they provided for each separately; and when a mode is prescribed and a power given to allow and classify one character of claims, if the same power was intended to be given as to the other, it would have been as easy to express it. Not having been expressed, it is not only fair, but in accordance with all settled law, that it was not intended to be given.

"But, again, giving credit to the legislature for enacting laws in view of well-established principles of equity, and the rights of the creditors of a partnership to the extent of the partnership assets, and examining the provisions of the act under consideration bearing on the question, we think it clear that the legislature did not intend to make the allowance and classification of a partnership debt by the probate court a condition precedent to the right of a creditor of the firm to *recover on the bond given, either by the surviving partner or the administrator of deceased member of the firm. The legislature knew that the creditors of the firm had a right to be

paid out of the partnership property, and therefore it provided, in accordance with the principle of survivorship, that the surviving partner should first retain the partnership property; but in order to protect the interest of the decedent, the statute (section 47) compelled him to give a bond which required him 'to apply the property to the payment of the partnership debts,' and which also required him to render an account of his doings to the probate court. Two leading ideas are manifest in this section: the payment of the partnership debts, and the preservation and payment to the administrator of any balance that might be due the estate of the decedent. Could it be claimed that if the surviving partner had given the bond required by the statute, taken the goods, and converted them to his own use, that these plaintiffs could not recover against his bondsmen, because their demand had not been allowed, classified, and ordered paid by the probate court? Would the probate court have the power to allow a claim that might be presented to the survivor, and the power to order him to pay it? It would be a judgment as well against himself as the estate of the deceased, and where, either in the constitution or statute laws, does the probate court obtain the power or jurisdiction to render judgment against a surviving partner? The constitution says it 'shall have such probate jurisdiction and care of the estates of *deceased persons* as may be prescribed by law,' and not jurisdiction to render judgments against *living persons* on ordinary common-law liabilities. It is true, the law (section 48) gives the probate court power to cite him to account, and to adjudicate upon the account, as in cases of an ordinary administrator; and this power is a necessary power to protect the interests of the decedent. His duty and obligation is to pay partnership debts, and in adjudicating upon his accounts, if the court should find that he had paid out money of the partnership in payment of other than partnership debts, the court would disallow it, 'as in cases of ordinary administration;' and this is all the power conferred by 'law' on the probate court over the surviving partner.

"But, again, the legislature, wisely anticipating the very state of affairs in this case, provided that if the surviving partner should not give the bond, then the administrator of the decedent, upon *407 giving bond, should be entitled to the possession *of the property of the partnership,—to be dealt with how, and in what manner? As the other property of the estate? No; for the statute says, in express terms, 'he shall with the partnership property pay the debts of the late firm.' When? Within a year, or three years, as he pays by statute the other debts of the decedent? No; but 'with as much expedition as possible,' and pay the surviving partner his proportion of the excess. Is it not clear that the legislature intended simply to substitute the administrator for the surviving partner, giving him the same powers with reference to the partnership effects, and imposing upon him the same duties? He is to pay the debts '*with as*

much expedition as possible,—not wait for the process of allowance in the probate court. It is not the debt of an estate, nor of a decedent, nor of an individual, he is commanded to pay. In carrying out the trust, he is not acting as administrator, nor are his bondmen liable on his administrator's bond for his misdeeds in the execution of this trust. This has already been decided by this court. *Glass Co. v. Ludlum*, 8 Kan. *40, *47. He is neither more nor less than a special trustee as to this property and this class of debts. He needs no order from the probate court to pay them. By accepting the trust he takes upon himself the burdens of deciding what are debts. While we feel an abiding conviction that upon principle, analogy, and reason we are right in our conclusions, we are not without the very best of authority to sustain our position. The case of *State v. Baldwin*, 27 Mo. 103, is directly in point, the decision being upon the statute of Missouri of 1845, from which our statute is taken, and the court in that case, page 107, say *'the law does not require partnership demands to be allowed by the court.'* And the same court, in the case of *Green's Adm'r v. Virden*, 22 Mo. 506, hold the same doctrine, and deny to the probate court any power over the partnership assets, or over the surviving partner, except those expressly granted, to-wit, to cite him to account, and to adjudicate upon his account."

A second question of importance is this: no citation was ever issued by the probate court to the surviving partner, as provided for in section 49 of the administrators' act. Comp. Laws 1862, 520. That section reads: "In case the surviving partner, *having been duly cited for that purpose*, shall neglect or refuse to give the bond *408 *required," etc., "the executor or administrator on the estate of such deceased partner, on giving a bond as provided in the following sections, shall forthwith take the whole partnership estate," etc. It is earnestly insisted by counsel for plaintiffs in error that such citation was *jurisdictional*, and that "the probate court had not power or jurisdiction to make any order in relation to the partnership property, or to assume jurisdiction over the same, or to require Samuel S. Ludlum to give the bond mentioned in section 50 of said act; and that, therefore, the bond sued on is void, because the proper steps had not been taken to divest the rights of John B. Ludlum, or to confer power to control the property on the administrator of the deceased partner." We think that this citation is a matter personal to the surviving partner, and that while he may insist on his right to the possession of the partnership property until after such citation, and a refusal or neglect to give the statutory bond, yet that when he comes voluntarily into the probate court, and declines to take any further charge of the partnership property, he waives the necessity of any citation, and cannot thereafter object that none was served upon him; and that the objection to the subsequent proceedings which he is estopped from making, no one else can make for him, or for themselves. It is jurisdictional in the sense that a summons is.

It brings the party into court. But when a party voluntarily appears in court, it is unnecessary to inquire what, if any, process has been served upon him. Counsel also criticises the paper filed in the probate court by John B. Ludlum, and says that "its legal effect was simply a refusal on the part of John B. Ludlum to continue the business of the late firm, and a request that the administrator of William H. Hays, deceased, (whoever he might be,) should take charge of his [John B. Ludlum's] interest in the property of said firm; thus, in substance, merely appointing such administrator, whoever he might be, his agent to take charge of the property." The paper is addressed to the probate judge, and reads: "I, as the surviving partner of the late firm of Hays & Ludlum, do refuse to continue
 *409 the business of the late *firm, and request that the administrator of William H. Hays, deceased, take charge of my interest in the property of said firm," etc. We think there is no difficulty in giving proper effect to this writing. True, it purports to be a refusal to continue the business, instead of a refusal to give the bond, as named in the statute; but every instrument must be construed in the light of the circumstances under which it is executed. One or the other—the surviving partner or the administrator—was to take the property, give bond, and close up the partnership business. By this paper the surviving partner comes into court, and in unmistakable language declines in favor of the administrator. No form of refusal is prescribed. This was sufficient.

Again, counsel insist that the bond sued on is void because the conditions in it are not any of them the conditions specified in the statute. The statute (section 50) provides that "before proceeding to administer upon such partnership property, as provided in the *preceding section*," the administrator shall give bond "conditioned that he will faithfully execute that trust, with no unnecessary waste or expense." The form of a bond is not given in this case as it is for the surviving partner, or in ordinary administration. In order to understand what trust is intended, we must refer to the *preceding section*. There it is provided that he shall take the whole partnership estate into his possession, and with it pay the partnership debts with as much expedition as possible, and return to the surviving partner his proportion of the excess, if any there be. Now, the bond in this case (which seems to have been in part copied from the form given for a bond of a surviving partner) covers all these points. It recites the refusal of the surviving partner, and that the administrator has taken possession of the partnership property, and the first condition is that he shall "faithfully execute the trust incurred by such act with no unnecessary waste or expense." If this had been all, we think the bond would have been sufficient. It, however, goes on and specifies more in detail the obligation assumed by the administrator.

*410 *Again, it is urged that if defendants in error had any cause of action it was barred before suit was brought. The petition was filed October 24, 1868. The verdict shows that the debt was due

from Hays & Ludlum to defendants in error on the sixth of July, 1865,—more than three years prior thereto. But no cause of action could arise on the bond until it was given, and that was in 1866,—none against Ludlum, in his individual capacity, or against his sureties, until after a breach of the condition of the bond, and a conversion of the goods to his own use. When the administrator assumed the charge of the partnership estate the defendants in error had a valid claim against that estate. He had ample means to discharge that indebtedness. Instead of so doing, he converted those means to his own use, and thereby created a personal liability against himself and the sureties in his bond, which dated from the time of such conversion.

We do not think the amendments to the petition were so radical as to make the last petition present a cause of action substantially different from that in the first.

Other questions have been presented by counsel for plaintiffs in error in their brief, but we cannot stop to discuss them at length. We have endeavored to examine them all carefully, and, after such examination, we are satisfied that no substantial error appears in the record, and that the judgment must be affirmed.

(All the justices concurring.)

*411 *JOHN C. GATES and another v. CHARLES SANDERS.

July Term, 1874.

1. **Appeal: From Justice's Court: What Taken Upon.** Where A. sues B. before a justice of the peace, and at the same time obtains an order of attachment, and thereafter the order of attachment is discharged by the justice, but judgment rendered on the claim in favor of A., and A., intending to appeal, files an ordinary appeal-bond, reciting the judgment, but neither reciting nor referring to the attachment, or its discharge, the proceedings on the attachment are not taken up to the district court for re-examination or review, but were ended by the decision of the justice. [Brown v. Tuppeny, 24 Kan. 29.]
2. **Amendment: Appeal-Bond.** While the district court may permit the amendment of an appeal-bond insufficient in form or amount, it may also, in the exercise of a sound discretion, refuse to permit any amendment.¹

Error from Saline district court.

The case is stated in the opinion.

¹Where a judgment is rendered in favor of A., against C., before a justice of the peace, or a similar award of damages for right of way made by a board of county commissioners, and C., for the purpose of perfecting an appeal to the district court, gives a bond running to B., an entire stranger to the record and proceedings, and no special equities are shown, the district court commits no error by refusing to permit the perfecting of an appeal by the giving of a new bond running to A. Lovitt v. Wellington & W. R. Co., 26 Kan. 297.

John Foster, for plaintiffs in error.

The judgment of the justice discharging the attachment was such a final judgment as is appealable, under section 120 of the justices' act. *Kirby v. Fitzpatrick*, 18 N. Y. 484; *Thomson v. Dean*, 7 Wall. 342; *Brenner v. Bigelow*, 8 Kan. *498; *Kayser v. Bauer*, 5 Kan. *202; *In re McGrade*, 24 Mo. 125; *Zoller v. McDonald*, 23 Cal. 136; *Howell v. Kingsbury*, 15 Wis. 272; *Powell*, Appel. Proc. c. 9, § 16. The appeal brings the whole cause to the district court, and opens up the whole merits of it, and it is tried *de novo*. Section 7, Laws 1870, p. 184; *Long v. Hitchcock*, 3 Ohio, 274; *Horton v. Horner*, 14 Ohio, 437.

If there was any defect in the appeal-bond, the application to amend should have been allowed. Sections 139, 140, Civil Code; *Bentley v. Dorcas*, 11 Ohio St. 398; Justices' Act, § 131.

*412 *The judgment of district court specifies interest at 10 per cent., and is a larger judgment than that of the justice; and it was error to render judgment against plaintiffs for costs of appeal. Gen. St., c. 52, § 6; Justices' Act, § 128.

T. F. Garver, for defendant in error.

We take it that it is too fundamental to need argument that an appeal taken from the final judgment of the justice does not remove attachment proceedings in such action to the district court, and that the naked order of the justice, discharging an attachment, without any judgment for the costs of attachment proceedings, is not a final judgment from which an appeal can be taken to the district court. The district court sustained the first of these propositions, and there was no error in its decision.

Nor did the district court err in refusing to allow the appeal-bond to be amended, and in refusing to admit testimony to show what the plaintiffs had intended to do, and that, through accident and mistake, they got into court as they did. It does not matter what were their intentions, accidents, and mistakes. The fact is, the appeal was simply from the final judgment in the action, and did not pretend to be anything else, and nothing more could be included without there being in effect a new appeal.

The plaintiffs had full and adequate remedy by proceeding in error from the decision of the justice on the attachment, and that was their only remedy. Failing to pursue such remedy, they lost their right to have the order reviewed.

The judgment for costs of appeal against plaintiffs was proper, for in both courts they obtained judgment for the full amount of their claim, with interest as asked for.

BREWER, J. Plaintiffs in error commenced an action against defendant in error before a justice of the peace, and at the same
*413 time sued out an order of attachment. There*after, upon motion of the defendant and hearing, as provided for in section 53 of the justices' act, the order of attachment was discharged.

by the justice, but a judgment was rendered in favor of the plaintiffs for the amount of their claim. From this judgment they appealed, and filed an ordinary appeal-bond, reciting the judgment, etc., but making no mention of or reference to the attachment or its discharge. On the trial in the district court they obtained a judgment, as before the justice, for the amount of their claim, and then asked for an order of sale of the attached property. This was refused. They then asked leave to amend the appeal-bond, so as to show that they appealed from the order discharging the attachment. This also was refused, and they were taxed with the costs of the appeal. Upon these facts two questions arise: *First*. Did the appeal from the judgment bring up for review or retrial the proceedings in attachment? *Second*. If not, ought the district court to have allowed an amendment of the appeal-bond? Both of these, we think, must be answered in the negative. The attachment is but an ancillary proceeding, and may stand or fall without affecting the progress of the suit. The judgment is rendered for or against the plaintiff, and upon the sufficiency of his cause of action, without reference to the disposition of the attachment. *Boston v. Wright*, 3 Kan. *230. It was of the judgment the plaintiffs complained in their appeal-bond, and that only which they sought to change. If they sought a review of the attachment proceedings, something more than an appeal from the judgment on the merits of the case was necessary.

While the district court has ample power to permit an amendment of the appeal-bond, when insufficient in form or amount, (Justices' Act, § 131,) yet an amendment is not a matter of right, upon which in all cases of insufficiency a party may insist. The court must exercise a sound discretion in deciding whether, under the circumstances of the particular case, the party should be allowed to amend.

*414 In this case we cannot, from anything before us, see *that the court improperly refused the application for leave to amend.

The attachment had been discharged by the justice. For aught that appears, the property attached had been returned to the defendant, and by him wholly disposed of. No notice had been given of an intention to retry the question of the attachment. It might be that if the attachment was brought up for retrial and sustained, an unpleasant question would arise as to the responsibility of the constable for not having the goods in his possession. It is useless, however, to speculate. It is enough that the record fails to show that the court abused its discretion. The costs of the appeal were properly taxed to the appellant. Justices' Act, § 128.

The judgment will be affirmed.

It is understood that the same questions arise in the case of *Eames, Crampton & Eberle* against this defendant in error, and the same judgment will be entered in that case.

(All the justices concurring.)

STATE OF KANSAS *v.* ISAAC POTTER.¹

July Term, 1874.

1. **Homicide: Evidence: Character of Deceased.** On a trial for murder, it is error to permit the state in the first instance, and as a part of its case, to offer testimony showing the character or reputation of the deceased as a quiet and peaceable man.
2. ———: **Statements of Deceased: Hearsay.** Where the deceased and defendant had two affrays in the same afternoon, the interval between which was about an hour, and during such interval were out of the sight and hearing of each other, though driving along the same road on the way to their respective homes, *held*, that the second affray was not a continuation of the first to such an extent as to make competent evidence of the statements of the deceased, or his comrades, in such interval, and in the absence of the defendant, as to what had happened, or what he thought the intentions of the defendant were.
- *415 *3. ———: **Self-Defense.** In order to establish that a homicide was committed in self-defense, it is not essential that the defendant show that deceased *actually* had a deadly weapon. It is sufficient in that respect if he show that the conduct of deceased was such as to induce a reasonable belief that he had one.²

Appeal from Atchison district court.

Information for murder in the second degree against Isaac Potter, George Potter, and Walter Boyle, charging them with killing one Jacob B. Keeley. Isaac Potter demanded a separate trial, and the case against him was tried at the June term, 1874. The district court gave some twenty special instructions, at the instance of the prosecution, of which the second and fifteenth are as follows:

"(2) If the jury find from the evidence that the defendant, Isaac Potter, at the time he assailed the deceased, did so with intent to kill him, or if, after attacking the said deceased, he conceived an intent to take his life, and with such intent inflicted the wounds upon the person of said deceased, from the effects of which he died; and further find that such acts on the part of the defendant were committed purposely and maliciously, and without justification therefor, then, although committed without previous deliberation or premeditation, the jury will find the defendant guilty of murder in the second degree."

¹ This case again in court, 16 Kan. 93.

² Cases involving law of self-defense, see *State v. Rose*, 30 Kan. 501; *S. C. 1 Pac. Rep. 817*; *State v. Horne*, 9 Kan. 82; *State v. Potter*, 15 Kan. 302; *State v. Bowen*, 16 Kan. 475; *State v. Bohan*, 19 Kan. 28; *State v. Riddle*, 20 Kan. 711; *State v. Brown*, 21 Kan. 88; malice—self-defense—refusal to instruct, *Cook v. Territory*, 4 Pac. Rep. 887; defendant may show that his use of a knife was in self-defense, although it caused death, *State v. Nett*, 7 N. W. Rep. 844; killing of assailant justified on ground of self-defense, when, *State v. Mahan*, 20 N. W. Rep. 449; arrest without warrant—killing officer—self-defense, *People v. Wilson*, 31 N. W. Rep. 905; to justify a homicide on the ground of self-defense, a state of facts must exist to justify his acts, and reasonable grounds for such relief, *State v. Shippey*, 10 Minn. 223, (Gil. 178.)

"(15) To justify defendant in taking the life of the deceased, the jury must find, from the evidence, not only that the deceased had the means at hand to effect the deadly purpose, but said deceased must have indicated, by some act or demonstration at the time of such killing, a present intention to carry out such purpose, thereby inducing a reasonable belief on the part of defendant that it was necessary to deprive deceased of his life."

The jury returned a verdict of guilty of murder in the second degree. New trial refused, and defendant was sentenced to imprisonment in the state penitentiary for ten years.

*416 **Horton & Waggener and C. F. Cochran*, for appellant.

The court should have sustained the motion to quash the information. It does not set forth in plain and concise language, and without repetition, the offense of murder in the second degree. Crim. Code, § 109.

The court erred in allowing the state to introduce evidence of the character of the deceased for being a quiet and peaceable man. This was no issue in the case. It did not in any manner tend to show that defendant "purposely and maliciously" killed Jacob B. Keeley, and could serve no purpose except to prejudice the jury against the defendant. *Pound v. State*, 43 Ga. 128; *Chase v. State*, 46 Miss. 707; *Ben v. State*, 37 Ala. 103; 3 Greenl. Ev. § 27; *Wise v. State*, 2 Kan. *428. It was not shown that defendant knew the reputation of deceased. *Franklin v. State*, 29 Ala. 14. It cannot be contended that it involved any greater degree of moral turpitude in defendant, or made him any more amenable to the law, to kill a quiet and peaceable man, than a desperado, if the killing in either case was done *purposely and maliciously*. *State v. Barfield*, 8 Ired. 344; *Whart. Crim. Law*, 172.

It was claimed in the court below that this testimony was material and proper, as it formed part of the *res gestæ*; but how, or under what circumstances, the character of the deceased entered into and became a part of the *res gestæ*, wherein the killing was done purposely and maliciously, or in any other manner, so far as establishing the guilt of defendant is concerned, we have searched the books in vain to ascertain. 3 Greenl. Ev. § 27. If such testimony is admissible, by analogy would it not be proper to support the character of a witness for truth before it had been assailed, or prove the character of the accused for violence before evidence of good character had been introduced? *Ben v. State*, 37 Ala. 105. Would not the character of the accused for violence, etc., form as much a part of the *res gestæ* wherein he was charged with *purposely and maliciously* killing another, as the character of the deceased for being a peaceable man? Yet no one will contend that the character of the accused can in any

*417 manner be assailed by the state until put in issue by the defendant himself. This court indirectly passed upon this same question in *Wise v. State*, 2 Kan. *428, *429. But in the case at

bar the testimony of the character of deceased was admitted before the state had rested its case; and the defendant at no time attempted to prove the character of deceased, nor was any such testimony offered in his behalf. *Ben v. State, supra.*

The court erred in admitting testimony of the statements and acts of George Potter previous to said alleged homicide. George Potter was not on trial. Isaac Potter was in no way bound by his statements and acts. Yet the same were permitted to go to the jury as evidence against Isaac Potter. *Clawson v. State*, 14 Ohio St. 234; *Hightower v. State*, 22 Tex. 605; 3 Greenl. Ev. § 94; *State v. Farr*, 33 Iowa, 553; *State v. Pike*, 51 N. H. 105.

The court erred in permitting the statements of Mike Brannon to Polk Keeley, in the absence of defendant, to go to the jury as evidence against the defendant. It was a conversation between two disinterested parties, and in no sense was it competent to go to the jury as part of the evidence upon which the jury were to acquit or convict defendant of the crime for which he was on trial. *Clawson v. State*, 14 Ohio St. 238; 1 Greenl. Ev. § 124.

The court erred in permitting the witness, Polk Keeley to testify to the statement as to the intention of defendant, made to him by deceased in the absence of defendant. This was so clearly erroneous it seems unnecessary to do more than call the attention of the court to it. It was simply proving the intention of defendant by the declaration of another, not made in the hearing of defendant, and long previous to the commission of the alleged homicide, and the court should have sustained defendant's motion to strike out the same. *Cheek v. State*, 35 Ind. 492. The evidence was well calculated to make or induce the jury to believe that the assault was made by defendant without any justification therefor.

The court below permitted evidence of the general reputation of Polk Keeley (a witness) for being a quiet and peaceable boy to go to the jury. For what purpose this testimony was material we cannot conceive, unless it was that Polk Keeley, being a quiet and peaceable boy, was therefore (as argued to the jury by counsel for the prosecution) entitled to some credit as a witness! Yet, regardless of the absurdity of the proposition, this evidence was permitted to go to the jury as tending to prove that the defendant *purposely* and *maliciously* killed Jacob B. Keeley! The defendant at no time during said trial attempted to prove the character of said witness in any respect, and the motion to strike out said testimony should have been sustained.

The court in its general charge to the jury, in substance says that if the jury entertain a reasonable doubt as to whether defendant is guilty of murder in the second degree, but are satisfied that he is guilty of some other grade of the same kind of an offense, then it was their duty to convict him of manslaughter in the first, second, third, or fourth degree. In order to convict him at all of an offense less

than murder in the second degree, under this instruction, it must be manslaughter in all the degrees.

The court erred in giving instruction No. 2, asked for by the state. The only answer that defendant had to the charge preferred against him was that he acted in self-defense; that deceased assaulted and attacked him, and that, in resisting such attack and assault, it was necessary for him to slay his assailant. Yet the court takes away from him his entire defense by giving this instruction. The court says if defendant "*at the time he assailed,*" etc., "*or if, after attacking said deceased,*" etc. The court could not in much plainer language have said to the jury that defendant *did assail* and *did attack* deceased. It was not admitted by defendant that he "assailed" or "attacked" deceased; and there was a great conflict of testimony as to who was the assailant. The court assumed in this instruction a fact as *established* which it was the *exclusive* province of the jury to determine from the evidence. *Horne v. State*, 1 Kan. *73; *Craft v. State*, 3 Kan. *486; *People v. Bennett*, 49 N. Y. 148. And by a subsequent instruction, (No. 18,) asked by the state, the court said, *419 in effect, that if defendant voluntarily attacked and as*sailed deceased, then there would be no justification for the act on the ground of self-defense. The jury is first told that defendant *was the assailant*, and, secondly, that, being the assailant, he could not excuse himself on the ground of self-defense. Construing these two instructions together, (and we have no right to assume that the jury did not so construe them,) the defendant might as well have pled guilty to the charge, and saved the formality of a trial. The court may have charged the jury correctly on this point in other instructions, but these instructions being separate and distinct, might they not have been the controlling views with the jury? *Horne v. State*, *supra*.

Inasmuch as the court had given said instruction No. 18, as explanatory of that instruction the court should have instructed the jury as subsequently requested by defendant, as there was evidence that the affray in which deceased was killed, was brought about by deceased. Yet the jury, from instruction No. 18, might infer that if defendant had, previous to the alleged homicide, made an assault upon deceased, he was forever thereafter precluded from justifying his killing deceased on the ground of self-defense, regardless of the time that intervened between his assault upon deceased and the time he committed the homicide.

The court erred in giving instruction No. 15 asked for by the state. In order for the defendant to be justified in taking the life of deceased, it was not necessary for deceased to have the means at hand to slay defendant. If defendant acted from reasonable and honest convictions that it was necessary to kill deceased in order to protect his own life, it is well settled that he would be justified, although in fact the danger he apprehended was not real, but merely apparent. *State*

v. Horne, 9 Kan. *119. And in order for defendant to be justified in killing deceased, it was not necessary for deceased to have indicated, by some act or demonstration at time of such killing, a *present* intention to carry out such purpose. State v. Horne, *supra*. *420 *W. W. Guthrie, for the State.

Enough of the evidence is preserved to show the following facts in the case: Jacob B. Keeley, (the deceased,) his son John, and Mike Brannon, while riding along the road, were set upon by the three defendants at Brack's corner, and the boy, John, injured by a stone thrown by George Potter. The parties here parted. The Potters had been the aggressors; the Keeleys, innocent victims. The Keeleys drive on homeward, some two miles, where they stop in the road opposite a field where another son, Polk Keeley, is at work. The deceased remains at the wagon, and the two boys go over in the field to Polk. Meanwhile the Potters have followed along the road until they have come in sight of the Keeley wagon, when they leave the wagon by the fence, arm themselves with fence-rails, and move upon the deceased. The boys, Polk and John, go to the aid of their father, and the two parties, each armed, meet in the road, when a combat ensued, and the deceased came to his death at the hands of appellant.

As to the character of deceased. He was killed in a renewed encounter, which had overtaken him on the road where he had stopped. The state must show such killing to have been purposely and maliciously done. State v. Boak, 5 Iowa, 433. If deceased, smarting under the blows of the first encounter, had stopped to gather help at the first opportunity, and then intercept his former assailants, and they, in self-defense, had killed him, now no longer an innocent victim, but the aggressor, then the state failed in its case. The circumstances which led to that encounter which entered into the affray were a part of the *res gestæ*, (State v. Benham, 23 Iowa, 154-160; Copeland v. State, 7 Humph. 479; Wesley v. State, 37 Miss. 327; Monroe v. State, 5 Ga. 85; Franklin v. State, 29 Ala. 14; Pritchett v. State, 22 Ala. 39; State v. Keene, 50 Mo. 357;) and was so held by this court in Wise v. State, 2 Kan. *428, *429. It is not the question of greater or less moral turpitude, but was it a *crime*, or an act of *self-defense*? and of evidence tending to prove or disprove such fact, or to explain that conduct which, unexplained, *421 would *tend to prove or disprove such fact. Why did deceased go up the road with a whiffletree in his hand when he saw a large man armed with a rail advancing upon him? and why did his son Polk also advance up the road when he saw three armed men coming down upon his father? and what induced the parties to engage in combat? Was it not part of the *res gestæ* to show the size, age, and character of the combatants? Until this was done, and the conduct of the Keeleys explained, was a case of purpose and malicious killing made out by the state beyond a reasonable doubt? Had

the state shown that the Potters had not acted in self-defense? By the same rule that the accused might show deceased a bad man to explain his conduct, and make out a case of justifiable killing, the state might show his quiet disposition to make out a case of unjustifiable killing. In either case, it is only where the case admits of a doubt as to whether the killing was done in self-defense, and may serve to explain the conduct of the deceased, and thus becomes a part of the *res gestæ*; and in such cases all the reported cases agree in holding the evidence proper. But it is said that this evidence was offered before the state had rested. It was properly offered whenever a foundation had been laid, which might be either by circumstances developed by the testimony offered by the state or the accused.

The parties met, first, at Brack's corner, and two miles further on, and two hours later, at Albright's field, where, without a word, the encounter was renewed. Then the first encounter was a part of the *res gestæ*; and the act alone or words spoken by one of several joint participants is the act of all, and is alike evidence, where the trial is severed, as on joint trial. When it had been shown that Brannon was in the first encounter,—had gone into the field and talked with Polk, who then engaged in the second encounter,—it was evidence to explain away the inference that Brannon had been sent by deceased to obtain the reinforcement of Polk to prepare for a second affray, and that Polk had responded. Both were interested parties. Polk Keeley was one of the actors in the fatal affray. His acts are a part of the *res gestæ*, as were those of George Potter and Walter Boyle. Two parties engaged in combat, and what might be testified concerning one member of either party is equally competent as to any other of that party. It did not tend to give credit, but was as to a part of the *res gestæ*. But how can this court say that any of such testimony was incompetent, in absence of all the evidence in the case, which, if preserved, might show that the proper foundation had been laid therefor.

There was no error as to the instructions. Isolated instructions are not the subject of review. They do not determine the character or effect of the charge or instructions considered as a whole. The defense is *self-defense*. The testimony shows that the defendant was the first aggressor. The defendant testified and admitted that his party made the first assault, but claim to have done the killing when driven to the wall by the party assailed. These positions are not consistent. No fact was assumed by the court, and the instructions were right.

BREWER, J. The appellant was convicted in the district court of Atchison county of the crime of murder in the second degree, and sentenced to the penitentiary for ten years. From this he has appealed to this court, and alleges numerous errors in the proceedings

of that court. And, first, he complains that that court erred in overruling a motion to quash the information. We do not think the objections made to the information are well founded, and hence see no error in the rulings on the motion to quash. Again, he insists that the court erred in allowing the state to introduce evidence of the character of the deceased as a quiet and peaceable man. It appears that the deceased was killed in an affray; that this was the second quarrel upon the same afternoon between the deceased and defendant, others participating. The first quarrel took place

*423 shortly after the parties left Atchison to go to their respective homes, each in his own wagon, and with two companions. No serious injury was done to either of the parties at this time. At its close the deceased drove ahead with his wagon, and the parties lost sight of each other. After driving some miles, the deceased stopped beside a field where one of his sons was at work, and while there the other wagon, with the defendant, came along. The quarrel was resumed, and in it the deceased was struck on the head and elsewhere with a piece of a rail or club, and so injured that he died shortly thereafter. On the trial, and before closing their case, the prosecution was permitted, over objection, to ask witnesses, who had testified that they knew the deceased, this question: "State if you knew his general reputation for being a peaceable, quiet, and law-abiding citizen;" and the witnesses testified that he was a peaceable, quiet, and law-abiding man. No attack was made by defendant at any time during the trial on the character of the deceased, and no attempt to show that he was a quarrelsome or turbulent man. The question, then, is fairly presented whether the prosecution, on a trial for murder, may, in the first instance, and as a part of their case, show the character and reputation of the deceased. We do not understand counsel for the state as claiming that such testimony is admissible in all cases, but only in cases where there is a doubt as to whether the killing was done in self-defense, and where such testimony may serve to explain the conduct of the deceased, and is therefore fairly a part of the *res gestæ*. In such cases it is said that the authorities hold that the defendant may show the bad character and reputation of the deceased as a turbulent, quarrelsome man. See, among other authorities, *Franklin v. State*, 29 Ala. 14; *State v. Keene*, 50 Mo. 357; *Wise v. State*, 2 Kan. *429; *People v. Murray*, 10 Cal. 310. And if the defendant may show that the deceased was a known quarrelsome, dangerous man, why may not the state show that he was a known peaceable, quiet citizen? The argument is not good. The

*424 books are full of parallel cases. The accused may, in some cases, show his own good character. The state can never, in the first instance, show his bad character. A party can never offer evidence to support a witness' credibility until it is attacked. The reasons for these rules are obvious. Such testimony tends to distract the minds of the jury from the principal question, and should

only be admitted when absolutely essential to the discovery of the truth. Again, the law presumes that a witness is honest, that a defendant has a good character, and that a party killed was a quiet and peaceable citizen, except so far as the contrary appears from the testimony in the case; and this presumption renders it unnecessary to offer any evidence in support thereof. No authorities have been cited sustaining the admission of such testimony, and the following are in point against it: *Ben v. State*, 37 Ala. 103; *Chase v. State*, 46 Miss. 707; *Pound v. State*, 43 Ga. 128. For the same reasons the court erred in permitting the state to offer evidence of the character and reputation of Polk Keeley, a son of the deceased, who took part in the last affray.

Another error complained of is in admitting hearsay testimony. The facts are these: The places of the two affrays were about four miles apart. The time between them about an hour. After the deceased had reached the place of the second affray, Mike Brannon and John Keeley, who had been in the wagon with him, got out and went over into an adjoining field, where Polk Keeley was at work. When Polk Keeley was on the stand he was asked what Mike Brannon and John Keeley, or either of them, told him at that time. This question was objected to, but the court overruled the objection. The witness then testified that Mike Brannon told him "that the Potter boys had thrown a rock at father, and hit my brother, John Keeley;" and "that George Potter claimed that my father had run into Mr. Doyle's wagon, but that he did not." He also testified that his father called to him to come, and said that the Potter boys were going to kill him.

At these times the Potter boys were not in sight or hearing.
 *425 This testimony was admitted *as a part of the *res gestæ*. In this we think the court erred. The interval between the two affrays was so great—the separation between the parties so complete—that we cannot consider the one a mere continuation of the other, to such an extent as to make all the statements and conversations of the deceased and his companions in the interval, and in the absence of the defendant, a part of the *res gestæ*. It seems to us that such testimony was plainly hearsay, and ought not to have been admitted. It seems probable, too, that part of it, at least, might have prejudiced the case against the defendant.

Appellant also complains that the court erred in giving and refusing instructions. Counsel in their brief call attention to quite a number, and in many instances have pointed out wherein, as they think, consists the error. We have examined with care the instructions, and considered them with reference to so much of the testimony as is before us in the record, and are constrained to say that so little of the testimony is in the record that it seems wiser not to attempt any extended discussion of the separate instructions. The theory of the defense, as we gather it, was that the killing was in self-defense; and it seems to us that the court, in the special instructions given at the

instance of the defendant, laid down the law applicable to this defense fully and correctly. Objection is made to instruction No. 15, given at the instance of the state, on the ground that it implies that the deceased must *actually* have had a deadly weapon, and *actually* been in a position and condition to inflict great bodily harm, etc. The actual possession of a deadly weapon may not be essential, if the conduct of the party is such as to induce a reasonable belief that he has one, or is so prepared that he can commit immediately the apprehended injury. Yet the instruction as given may not, in view of the actual facts of the case, though erroneous, have misled the jury. Again, instruction No. 2, given at the instance of the state, is criticised as involving a declaration by the court that defendant commenced the affray. While the instruction does not in terms *426 contain such a declaration, yet we think the *language might very naturally convey to the jury the impression that such was the view of the court in reference to the transaction, and, unless it was an undisputed fact that defendant commenced the affray, ought to be modified. These are all the suggestions we feel warranted in making, in view of the incomplete condition of the record.

The judgment of the district court will be reversed, and the case remanded for a new trial. The defendant will be returned from the penitentiary, and delivered over to the jailor of Atchison county, there to abide the order of the district court of that county.

(All the justices concurring.)

JOHN Q. WATKINS v. LEVI PARSONS and others.¹

July Term, 1874.

1. **Payment: Bank-Check: Burden of Proof.** Where a party both receives and uses a check, the presumption is that he realizes the full amount thereof, and if thereafter he seeks to recover that amount from the drawer, it is incumbent on him to show that he did in fact fail to realize.
2. ———. Where A. is engaged in doing work under a contract with B., and at the time both parties have funds on deposit in the same bank; and in payment of said work B. draws his check on said bank to the order of A., which A. receives, indorses, and deposits to his own credit; and where B. has at the time standing to his credit on the books of the bank an amount larger than the amount of the check; and where five days thereafter the bank suspends, owing A. on a general balance of

¹See *American Bridge Co. v. Murphy*, *ante*, *35; *Stout v. Hyatt*, *ante*, *248; checks, drafts, and notes, how far payment; *Kermeyer v. Newby*, 14 Kan. 164; *McCoy v. Hazlett*, *Id.* 490; *Shepard v. Allen*, 16 Kan. 184; *Medberry v. Saper*, 17 Kan. 369; *Mordis v. Kennedy*, 23 Kan. 408; *Shaffer v. McKanna*, 24 Kan. 23; *Fox v. Bank of K. C.*, 30 Kan. 444; *S. C. 1 Pac. Rep.* 789; *Mullins v. Brown*, 33 Kan. 312; *S. C. 4 Pac. Rep.* 805.

account a sum less than two-thirds the amount of the check; and where no testimony is offered showing what transactions, if any, took place between A. and the bank during those five days: *held*, that A. could not recover the amount of such check, or any portion thereof, from B., even though it appeared that the bank was insolvent at the time of the drawing of the checks, and that B. was aware that it was embarrassed, while A. was wholly ignorant of its condition; and though the proprietor of the bank, while conducting the bank as an individual matter, was also interested as partner in the business of B. on account of which A. was working and the check drawn.

***427** *Error from Wyandotte district court.

It appears by the transcript that Julius Hammerslough and another brought their action to foreclose a mortgage executed by Stephen S. Sharp and others. Such proceedings were had in said action, and new parties made thereto, that an issue came to be joined therein between John Q. Watkins, claiming a cause of action in his own behalf, against Levi Parsons, Francis Skiddy, H. A. Johnson, David Crawford, Jr., August Belmont, Shepard Gandy, and Robert S. Stevens, others of the defendants in said action. Watkins claimed as assignee of Sharp, Shaw & Co., who had performed certain work in constructing the Union Pacific Railroad, Southern Branch, between Junction City and Emporia, under a contract with the Land-grant Railway & Trust Company, in which said Parsons, Skiddy, and others were stockholders. The whole case was referred to N. C., sole referee, before whom a trial was had. The referee made and filed his report. Said report was confirmed by the district court at the March term, 1873, and judgment entered, as recommended by the referee, in favor of Watkins for \$3,059.41. Watkins claimed the additional sum of \$25,000, which the referee found had been paid by Parsons and others to Sharp, Shaw & Co., before the assignment to Watkins, and as to this item or claim Watkins appeals, and brings the case here by petition in error.

Thacher & Stephens, for plaintiff in error.

The case presents the question as to whether, under the circumstances and facts found by the referee, the check of \$25,000, drawn by A. P. Robinson on Hale's Bank, and left in the bank by Robinson, and which afterwards came to the hands of Sharp, Shaw & Co., was a payment to Sharp, Shaw & Co. of that amount by the Land-

***428** grant Railway & Trust Company. It is true that Sharp, Shaw & Co. indorsed the check, and it was passed to their credit, and they, by their assignee, Watkins, proved up the same in bankruptcy, as a demand against Hale; yet we claim this does not make the check a judgment, under any well-considered adjudication, and that there is a clear current of authority holding such check as simply a cumulative remedy in their hands.

In the first place, there is no fact found showing an intention that the delivery of the check should operate as a payment, and there is nothing showing its acceptance as a payment. It was delivered

in the absence of Sharp, Shaw & Co., and afterwards, at the request of Hale, indorsed by them. It was a check of the copartnership, upon an individual member of the company, whom that company had made the depository of its funds. The drawer of the check knew before he drew and delivered it that Hale was embarrassed. The company had actual knowledge of such fact, and Hale himself knew that he was insolvent. The check was for a part of the indebtedness of this insolvent member of the company to his copartnership. Of the facts of the embarrassment, and of the insolvency, the firm of Sharp, Shaw & Co. were entirely ignorant. The gauze with which the transaction is sought to be covered is very thin. The company use their copartner Hale to draw the funds from New York to pay the bills owing to Sharp, Shaw & Co. by them. They find (and whether before or after the drafts on New York, drawn through Hale, had been cashed, does not appear) that Hale is embarrassed, and seek to relieve themselves. They deem expedition of importance, and do not wait for even the presence of Sharp, Shaw & Co., but, in their absence, pass the check for the trifling sum of \$25,000 to Hale, who knows he is insolvent, and yet, without disclosing or intimating any warning, procures the indorsement of Sharp, Shaw & Co. of the check, and transfers the amount to their credit. What interest Hale had, or now has, in the copartnership of the Land-grant Railway & Trust Company, or the value of such interest, does not appear, except *429 cept that he had an interest. *Nor does it appear, except inferentially, whether or not Hale's conduct in getting the indorsement of Sharp, Shaw & Co. to the check, and thus endeavoring to transfer the indebtedness of a failing banker to his own company, to an indebtedness of such a banker to third parties, was an endeavor to protect the interest he had in the copartnership from loss on account of his own failure in the business of a banker. The secrecy of Robinson, of Hale, and of the other members of the copartnership, and their evidently concerted action, show that there must have been some motive actuating Hale, which had a personal advantage to himself of some kind, impelling him to his action.

The motives of the other parties are apparent. After the transfer, and Hale's failure, Sharp, Shaw & Co. use their endeavors to save all they can from Hale's estate. They cause the debt to be proven in the bankrupt court, and secure the dividend to apply. They are nowhere chargeable with laches. The Land-grant Railway & Trust Company lose nothing, and can lose nothing, by any act of Sharp, Shaw & Co. The check is not that of a third party, but their own, upon their copartner, and no complaint is made that the payees have not been diligent to protect their interest. By their own wrongful act they secured the placing of the check to Sharp, Shaw & Co.'s credit with Hale,—secured it to be so placed with full knowledge that, except they themselves pay it, there is to be a loss of part of the amount to Sharp, Shaw & Co. They part with nothing but the check upon an

insolvent bank, and with no value excepting such as that check may bring to the payees. Through the efforts of Sharp, Shaw & Co., that value has been secured. They can complain of no bad faith or want of diligence on the part of Sharp, Shaw & Co., or their assignee. The whole matter had its inception in their wrongful act in trying to impose upon Sharp, Shaw & Co. their check upon an insolvent man, and that man their own copartner and financial agent. Had Sharp, Shaw & Co. taken, and themselves credited, the check as payment, (which it is nowhere pretended they did,) yet the drawing
 *430 *and delivery, in the manner found by the referee, was such a fraudulent concealment of material facts as would have allowed a recovery in an action based upon such fraudulent suppression. And in this accounting that whole question is raised; for if Sharp, Shaw & Co. could have recovered of the Land-grant Railway & Trust Company for the fraud, the check was no payment. "No right of action can arise out of a fraud," and "no man shall set up his own iniquity as a defense, any more than as a cause of action," are hypotheses that have passed into maxims. And there is another which is near of kin to them: that "no party can create in himself a right against another, by his own fraud;" and another: that "a wrongful or fraudulent act shall not be allowed to conduce to the advantage of the party who committed it." It is observable that in this transaction the parties were not bargaining. Sharp, Shaw & Co. were not even present, except to indorse the check, which they found had conveniently been placed in Hale's Bank for them. Their action was all of a passive nature. They nowhere procured the action of this copartnership, but it had its whole inception, motive, and action in the Land-grant Railway & Trust Company and its agent; the apparent purpose being to shift Hale's debt to them, upon the shoulders of Sharp, Shaw & Co. Applying these maxims to such facts, we submit that, without other authority, it cannot be done. The referee erred in allowing and crediting the check, but should only have credited the amount Sharp, Shaw & Co., or their assignee, were benefited thereby; and the district court erred in not allowing the exception of Watkins to the report, but should have rendered a proper judgment upon the facts found. *Ferrin v. Myrick*, 58 Barb. 91; *Bradford v. Fox*, 38 N. Y. 289; *Winsted Bank v. Webb*, 39 N. Y. 325; *Smith v. Miller*, 6 Robt. 413; *Leake v. Brown*, 43 Ill. 372; *Syracuse, B. & N. Y. R. Co. v. Collina*, 3 Lans. 30; *Harbeck v. Craft*, 4 Duer, 129; 2 Pars. Cont. 622, 625; *Peter v. Beverly*, 10 Pet. 567; *Palmer v. Elliot*, 1 Cliff. 63; *French v. Price*, 24 Pick. 21; *Archibald v. Argall*, 53 Ill. 307.

On a balance struck between Sharp, Shaw & Co. and the bank, as of the day of Hale's failure, there was only the sum of \$15,-
 *431 289.26 of the check of \$25,000 their due. The facts *found show no other transaction or payment, after the crediting of the check; and after passing such check to their credit, there remained the above balance, August 17, 1869. Upon this has been

paid by Hale's assignee the sum of \$2,388.50, in June, 1872, leaving a balance, computing interest, (as should manifestly be done, at the date of the referee's report,) of \$16,736.67, over and above the amount found to be due to plaintiff in error by said referee. We ask that the judgment may be so modified that we may recover said sum of \$16,736.67, in addition to the \$3,059.41 allowed by the referee.

T. C. Sears and C. B. Mason, for defendants in error.

The effect of the decision of this court, in the case of *Land-grant Ry. & Trust Co. v. Board of Com'rs of Coffey Co.*, 6 Kan. *245, deprives the first-mentioned party of any corporate rights. As a consequence, the respective rights of the individuals composing the said trust company are reduced to novel and anomalous positions. In good faith, we assume, they undertook the enterprises which they have so commendably carried out, referred to by this court, (6 Kan. *252,) and expected and intended, in like good faith, to be entitled to the rights, and subject to the liabilities, of a corporation. By application of law they are divested of any such *status*, and the rights and liabilities of the stockholders remain to be adjudicated, unless they plainly fall within the purview of other relations which are defined by law. It is unnecessary to pursue this subject further, however, than to conclude that the most rigid rule to be applied to the existing rights and obligations of the individuals comprising the attempted corporation should be that which attaches to partners in business. If any reason can be advanced by the plaintiff in error respecting the obligations of the defendants for the payment of the sum claimed, it must flow from the peculiar business relation of the defendants and Hale at the time the liability is claimed to occur; and the intimate relations of partners in business must, in itself, create the foundation on which they predicate their claim.

*432 It cannot be claimed upon the ground of fraud or collusion of Hale and defendants in the case, for no such fact is put in issue by the pleadings, and no such finding appears in the record.

It is entirely competent for one partner to borrow money, or to buy goods, or to enter into contract, on his sole and exclusive credit, with third persons; and, on the other hand, it is equally competent for them to rely on that exclusive credit, and either to refuse to contract with the firm, or to exonerate the firm from all liability upon any contract which would otherwise bind the firm as being for their account and benefit. *Story, Partn. § 134*. To any transactions not relating to the partnership business, although made by Hale in the name of the partnership, the partners would not be bound, except by express assent. Partners cannot be bound by implication. *Mercein v. Mack*, 10 Wend. 464; *Eastman v. Cooper*, 15 Pick. 290. Again, "if a person contract with an individual partner, in a matter unconnected with the partnership business, the firm will not be bound. *Colly. Partn. § 483*, note 3. We cite these general principles for the purpose of showing that the connection of Hale and the defendants in business

as partners, draws to it no implied liability, and therefore such relations of business establish no other rule in this case than that to be applied to strangers having equal knowledge.

We proceed, then, to examine the question how far a liability attaches if a debtor silently delivers his check to his creditor, and knowing at the time the drawee of the check to be "in embarrassed circumstances." Just what condition this unhappy state of facts consists of we are left in uncertainty, and consequently a mere knowledge of that condition is difficult to define. The term "insolvency" has a technical signification, about which there can be no discussion. It is a condition which, if known to the makers of the check, would fix the liabilities upon them, unless by acts the payee waived or lost his rights after receiving the check. But mere "embarrassment" is no legal term, and has no legal signification. A man may be em-

barrassed to-day and unembarrassed to-morrow. The word, *433 taken in its ordinary meaning concerning *financial affairs, does not have any definite description of condition, but the term "insolvency" bears a precision of condition to which the law attaches a character. Nor are we able to determine what notice the defendants had of the embarrassment referred to,—whether mere rumor or otherwise. The presumption is that the decision is correct, and we confidently insist that the finding of the referee justifies no argument charging a knowledge of insolvency on the part of the defendants.

"An action does not lie against the drawer of the check until he has notice of the presentment and non-payment of the check." *Harker v. Anderson*, 21 Wend. 372. We claim that the circumstances here are equivalent in law to a presentment and payment of the check. In the first place, at the time of the transaction, the defendants had standing to their credit on the books in said bank a sum more than sufficient to pay said check; and, secondly, a portion of that balance sufficient in amount was appropriated to pay the check of \$25,000, and that, too, under the direction of the payee of the check. If the sum of \$25,000 had been paid in money when the check was presented, and the money redeposited immediately by the payee, assuredly the plaintiff would admit the discharge of the drawers. What is the effect, however, of the failure to withdraw the funds, and instead the transfer on the books of the bank, as shown by the facts? "A check is always supposed to be drawn against funds, and there is much authority for holding it to be, in some respects, an appropriation of those funds. The funds cannot properly be withdrawn by the drawer." 2 Pars. Notes, 59, note i; *Chapman v. White*, 2 Seld. 412; *Bullard v. Randall*, 1 Gray, 605. If a bill or check is sent to the drawee to be passed to the credit of the sender, and is so credited, the bill or check is discharged, and can no longer be negotiable. *Savage v. Merle*, 5 Pick. 83. "But insolvency of the drawer is almost the only case in which the drawer is a loser, so that he is dis-

charged on a check." *Harbeck v. Craft*, 4 Duer, 122. Hale being the banker of both the drawer and holder of the check, received *434 it as the *agent of the holder, and not of the drawer. 2 Pars. Notes, 77, note u.

The law imposes upon the holder of a check certain obligations, if he would have recourse against the drawer. He must present it within a *reasonable time*. This check was presented and *paid*. It is not true (see referee's findings) that the check was indorsed by S., S. & Co. "at Hale's request." S., S. & Co. kept their accounts with Hale. This transaction was precisely like those of the previous months. The exhibit attached to the record shows that the estimates for May and June were deposited about the same time in the month as this. Now, S., S. & Co. drew at least \$10,000 of this check, and, for all that appears, may have drawn out \$25,000 after the deposit. Indeed, there is nothing to show but that they could have drawn out every dollar before Hale closed his doors. How much S., S. & Co. had to their credit when this \$25,000 was deposited does not appear. There may have been \$10,000, \$20,000, or \$30,000. The referee does not even pretend that this amount of \$15,289.26 was the *balance due upon their check*. On the contrary, he distinctly says this was the balance due on their "*said bank account*," viz., their general account. To make defendants in error liable upon such a state of facts is going much further than has ever before been claimed.

The election of the assignee, Watkins, to pursue the estate of the bankrupt, Hale, (without discussing the effect of such acts and declarations upon his rights,) certainly leaves the claim where it would at present be error to find otherwise than as reported by the referee; because Watkins proved up the claim, with interest, to the date of filing the petition in bankruptcy against Hale, and received, in June, 1872, of said estate, \$2,388.50; and while the estate is not settled, this court is asked to adjudge him \$16,736.67, being the balance upon deducting the payment above mentioned. He must show in any event the funds of Hale exhausted, even if he could maintain his suit, and hold the defendants, the drawers of the check, liable.

*435 *BREWSTER, J. This is a proceeding to reverse the judgment of the district court of Wyandotte county, based upon the report of a referee. Before us are the pleadings, the findings, and conclusions of the referee, and the judgment. The testimony is not preserved. The following quotation from the report of the referee presents all the facts bearing upon the question raised and discussed by counsel:

"And I further find that at the same time I tried the issues between the several defendants herein, and took an account between the said Thomas A. Shaw, Stephen S. Sharp, and Louis Hamerslaugh, constituting the firm of Sharp, Shaw & Co., and the said Levi Parsons, Francis Skiddy, H. A. Johnson, David Crawford, Jr., August

Belmont, Shepard Gandy, and Robert S. Stevens, partners under the style of the Land-grant Railway & Trust Company, as to all matters of account put in issue between them herein; and I find that before the commencement of this action the said account of Sharp, Shaw & Co. was assigned to, and all title thereto vested in, the defendant John Q. Watkins, and on said account I find due to said Watkins, as assignee of said Sharp, Shaw & Co., \$3,059.41; and I find that the said Watkins is entitled to judgment against the said defendants Parsons, Skiddy, Johnson, Crawford, Belmont, Gandy, and Stevens for the said sum of \$3,059.41, with interest from the date of this report at seven per cent. per annum, and costs, as hereinafter stated.

"And I further find as facts in this cause that the charge of \$25,000 made by said Land-grant Railway & Trust Company, and dated August 12, 1869, (appearing upon Schedule A, hereto attached,) was for a check drawn by said Land-grant Railway & Trust Company, by their agent, A. P. Robinson, upon the bank of Hiram F. Hale, by the name of Hale & Rice, bankers, (that being the name in which said Hale did business as a banker, and the bank being solely the bank of said Hale,) payable to Sharp, Shaw & Co., or order; that said Hale then owned an interest in the copartnership called the Land-grant Railway & Trust Company, but kept said bank on his sole account, as his individual business; that said Land-grant Railway &

Trust Company were keeping funds in said bank by drawing
*436 drafts on New York in its *favor, and delivering the same to said bank, and were making monthly payments for work to Sharp, Shaw & Co., by drawing checks upon said bank; that Sharp, Shaw & Co. at the same time kept their funds in said bank; that on the twelfth of August, 1869, the said A. P. Robinson, as such agent, drew a check on said bank for \$25,000, payable to Sharp, Shaw & Co., or order, and placed the same in said bank for Sharp, Shaw & Co., who soon after took the same, and indorsed it, and caused the amount thereof to be placed to their credit on the books of the bank; that at the time said check was deposited by said Robinson, and indorsed by said Sharp, Shaw & Co., and placed to their credit, said Hale was insolvent, and afterwards, and on or about the seventeenth of the same month, stopped business as a banker; that at the time he so stopped business he was indebted to said Sharp, Shaw & Co. on their said bank account in the sum of \$15,289.26; that at the time said check was made and deposited in Hale's bank, and when the same was indorsed by Sharp, Shaw & Co., and credited to them on the books of the bank, said Hale had knowledge of his insolvency, and at the same time the said Land-grant Railway & Trust Company, and A. P. Robinson, their agent, had notice that he was embarrassed in his finances, and said Sharp, Shaw & Co. had no such knowledge or notice; that at the time said check of \$25,000 was so drawn, delivered, indorsed, and credited to Sharp, Shaw & Co. said Land-grant Railway & Trust Company had a balance in their favor,

owing by said Hale to them, standing to their credit upon the books of the bank, more than sufficient in amount to pay the said check of \$25,000; that afterwards the said Hale, having been adjudged a bankrupt in the United States district court for the district of Kansas, the defendant Watkins, after the assignment of the said demand to him, proved up in said court, as assignee of said Sharp, Shaw & Co., and as a debt due from said Hale to said Sharp, Shaw & Co., the balance of bank account so due from said Hale to them, including said check of \$25,000, as credit to them, and the same was so proved up and established at the amount of \$19,107.96, including interest to the time of filing the petition in bankruptcy; that afterwards, in June, 1872, the said Watkins received on said debt, as a dividend of assets of bankruptcy, the sum of \$2,388.50, said bankrupt's estate not having then been fully settled.

*437 "And I further report that I allowed said check of \$25,*000 as a payment by said Land-grant Railway & Trust Company to Sharp, Shaw & Co. in stating said accounts. I append hereto a schedule marked 'A,' of the accounts, both debit and credit, as kept by the Land-grant Railway & Trust Company, passed upon by me, with such charges as were rejected by me marked 'Rejected' in the margin, all the other items of the account having been allowed, which schedule is a part of this report. And I further find that the plaintiffs are entitled to recover from the defendants Shaw and Sharp the costs of recovering judgment upon the note and mortgage in their favor, and the defendant Watkins is entitled to recover the costs of stating the account and recovering the judgment in his favor. All which is respectfully submitted.

"January 2, 1873.

NELSON COBB, Referee."

We think the referee was right in his conclusions, and that the judgment must be affirmed. The authorities cited by the learned counsel for plaintiff in error are not in point. Under what circumstances the receipt of a check operates as payment is a question of wide limit, but one into which it is not necessary in this case to enter; for here the check was both received and used, and for aught that appears in the record the entire amount of money it called for also received and used. The check was drawn on the twelfth of August, was received by the payees, deposited in Hale's bank, and the amount passed to their credit. It nowhere appears what transaction took place during the ensuing five days prior to the suspension of the bank, between the bank and Sharp, Shaw & Co. Many times the amount of this check may have been drawn and used by them. The bank continued in business, and we must presume honored and paid checks as presented. Evidently there were some transactions, for while the amount of the check was \$25,000, the balance due Sharp, Shaw & Co. at the time of suspension was less than \$16,000. If Robinson, instead of leaving the check for Sharp, Shaw & Co., had drawn the

money, and given it to them, and they had then deposited it in the bank, or if they, on receipt of the check, had themselves drawn the money, and then deposited it, there would be no question as to the payment. No more can there be if, after depositing the check to *438 their credit, they drew the amount *thereof out on their own checks. Indeed, by the deposit of the check to their credit, the latter had performed its office, and had become a dead instrument. They had elected to take the bank as their debtor, rather than the defendants in error; and even if there were no subsequent transactions between them and the bank, it might well be questioned whether they could recover of the drawers. Certainly they could not without proof of the actual loss. And where a party both receives and uses a check, the presumption is that he realized the full amount thereof, and if thereafter he seeks to recover the amount from the drawers, it is incumbent on him to show that he did in fact fail to realize.

This appearing to us as a fatal objection to the plaintiff's right of recovery, it is unnecessary to consider the other questions discussed.

The judgment will be affirmed.

(All the justices concurring.)

THOMAS W. TALLMAN and others v. EMELINE M. JONES.

July Term, 1874.

1. **Instructions: Irrelevant: Effect of.** Where the trial court gives an instruction to the jury which is good law in the abstract, but which is irrelevant, and not applicable to the case under the evidence, the court does not commit such an error as will require a reversal of the judgment, unless the irrelevant instruction may have misled the jury, or unless it may in some way have prejudiced the rights of the plaintiff in error. [Kansas City, Ft. S. & G. R. Co. v. Hay, 31 Kan. 178; S. C. 1 Pac. Rep. 766.]
2. **Married Women: Contracts of.** Any married woman, under section 4 of the married woman's act, whether she previously has any separate estate of her own or not, may carry on any trade or business; and for the purposes of carrying on such trade or business may purchase on credit such property as is necessary to carry on such trade or business, and may hold the same as her sole and separate property. [Miner v. Pearson, 16 Kan. 28; Parker v. Bates, 29 Kan. 598.]
3. **Trespass: Mortgaged Property: Damages.** The mere fact that one person mortgages goods to another does not authorize any person except the *439 mortgagee, or some person claiming under him, to take the property from the mortgagor; and if any such person other than the mortgagee, or some person claiming under him, does so take said property, he is liable for more than merely nominal damages.

Error from Bourbon district court.

Action by Emeline M. Jones to recover the value of a stock of goods seized and sold by Tallman, as sheriff, on an execution issued

on a judgment against D. R. Cobb and Edward Jones, partners as Cobb & Jones. The goods were alleged to be worth \$3,000. Cobb & Jones had kept a dry-goods store in the town of Marmaton from 1864 to 1870, when they were sold out under execution by one of their creditors. Their stock of goods was bought at such sale by one Foster, who carried on business as a merchant, in the same store-room formerly occupied by C. & J., until August, 1871. Foster did not give personal attention to said business, but intrusted its management to said Edward Jones, as his agent. In August, 1871, Foster sold his stock of goods to said Emeline M. Jones, who was the wife of said Edward Jones, and said Edward from that time, as agent and clerk for his wife, remained in the store, and assisted in the management of the business. In February, 1872, Tallman, as sheriff, took the goods in said store, and sold them at sheriff's sale for \$1,481.12. The goods were seized under an execution in favor of the administrator of D. Foreman, issued upon a judgment against Cobb & Jones, which was rendered by the district court of Bourbon county, in July, 1871. At the time the sheriff made the levy said Edward Jones was in charge of said store, conducting the business thereof. It was claimed on the part of the sheriff (representing the execution creditor) that the goods were in the possession of said Edward Jones, and that they belonged to him, and not to his wife. The action was against the sheriff, and his sureties on his official bond, and was tried at the December term, 1872, of the district court, (C. W. B., judge *pro tem.*, presiding.) The jury found in favor of the plaintiff, and assessed her damages at \$1,915.50. New trial *440 *refused, and judgment on the verdict.

McComas & McKeighan, for plaintiffs in error.

The district court, among other things, gave to the jury the following instruction: "The exclusive, peaceable possession of goods and chattels, under a claim of ownership, is *prima facie* evidence of ownership, and a person in such possession may maintain an action against a mere trespasser, and recover the full value of such goods." Now, the theory of defendant in error was that she purchased these goods, and Edwards Jones continued in possession of the store as her clerk and salesman. She says she was in the store when the sheriff came in to levy, and that Mr. Jones had stepped out, while the sheriff says she was not, and that Jones was in. Our claim is that this sale from Foster was to Edward Jones, and that the name of his wife was introduced to cover up the goods from his creditors. This being the pivot of the dispute, what light does this instruction throw upon the case? None. To give it any application to the case, you must assume that this possession of Jones in the store was not in fact and truth his own possession, but that of his wife, held for her as her agent, and that the sheriff, who represents the creditors of Jones, was a mere trespasser, without any claim or color of right. Here Jones had held possession of these goods from the eleventh of August, 1871,

until they were taken on execution. She claims the possession was hers. The creditors claim that it was not hers. The theory of the court was that *this possession* itself furnished *prima facie* proof that it was her possession. This is bad logic, because the right of possession here, and the ownership of the goods, must be in the same person; and to assume the one, and argue from such assumption the existence of the other, is reasoning in a circle. Either this instruction is justly liable to this criticism, or else it simply asserts an

*441 abstract proposition of law that has no application to, and *can perform no office in, this case, except to mislead the jury. The exact converse of the doctrine of this instruction is true, namely, "possession by the husband is supposed to be in his own right until the contrary be made to appear." "In a contest with the husband's creditors, proof of the wife's interest must be shown by clear evidence." *Curry v. Bott*, 53 Pa. St. 400. "Where the husband manages the store as salesman, the presumption is that the goods belong to him. If the wife claims as her separate property against her husband's creditors, *she must satisfy the jury, by clear and indisputable evidence, that the goods in question were her own separate property.*" *Welch v. Kline*, 57 Pa. St. 428; *Quidort's Adm'r v. Pergeaux*, 18 N. J. Eq. 472; *Hurlburt v. Jones*, 25 Cal. 225; *Otey v. McAfee's Adm'r*, 38 Miss. 350; *Winter v. Walter*, 37 Pa. St. 155; *Gillespie v. Miller*, Id. 247; *Black v. Nease*, Id. 433.

Instructions asked by the plaintiff in error, and refused, present this question: Where a married woman has no separate property whatever, can she and her husband, upon their joint credit, purchase a stock of goods in the wife's name, to be paid for out of the business to be conducted by the husband, as her agent, when the wife has no separate estate; and are the goods thus purchased, and the profits and increase of the business thus carried on, exempt from the execution of the husband's creditors? If this question can be answered in the affirmative, then the ruling of the court was correct; otherwise, erroneous. We say in this case these goods belonged to the husband, and we had a right to have this hypothesis put to the jury. There are certain kinds of property owned by a married woman exempt from the control of her husband and his creditors, (chapter 62, p. 563, Gen. St. :) (1) The property owned at the time of the marriage, and the issues and profits thereof, are so exempt. (2) The earnings of any married woman from any trade or business carried on by herself are so exempt. But with these exceptions the rights of a married woman are, in this state, governed by the common law. Can a man who has failed in business buy a stock of goods jointly with his wife, upon their joint credit, pay for them out of the profits and pro-

*442 ceeds of the goods, devote his labor to carry on the *business as agent for his wife, and by this device protect the goods from his creditors? If the wife had bought these goods upon credit given to her, or if the goods were paid for in the first place out of her sep-

arate property, and if the business had been increased by the labor of the husband, the law might be different; but the doctrine of the district court was that where the wife and the husband purchased the goods in the first place upon their joint credit, and where the business was conducted and managed by the husband, *the wife having no separate estate*, and adding nothing to the stock by her labor or services, that still she might own the goods as against her husband's creditors. We think this very question is decided in the case of *Baringer v. Stiver*, decided by the supreme court of Pennsylvania, (4 Amer. Law Reg. 559.) See, also, *Wilson v. Loomis*, 55 Ill. 352; *Fisk v. Wright*, 47 Mo. 351.

In this case the goods were mortgaged by the defendant in error and her husband to L. P. Foster. If the goods in fact were purchased by her as she claimed, then under this mortgage "the legal title thereto" was in Foster, the mortgagee. Gen. St. c. 68, § 15. If the "right of possession" and "the legal title" to this property was in Foster at this time, there being no stipulation in the mortgage to the contrary, then the only interest the defendant in error could have was a mere equity of redemption, and the court should have given the instructions asked for by plaintiffs in error upon this point.

This court will take judicial notice that M. V. Voss is judge of this district, and not C. W. Blair. *Planing M. L. Co. v. City of Chicago*, 56 Ill. 304.

Hulett & McCleverty, for defendant in error.

We submit there is no error shown by the record prejudicial to plaintiffs in error. The law undoubtedly is, in Kansas, that a married woman may acquire and hold property free and clear of all liabilities of the husband. The question presented to, and decided by, the jury was, who was the owner of this stock of goods? They answered it by their verdict in favor of the defendant in error. *443 The question of *possession was a fact, submitted to the jury, and their verdict is conclusive. There was no intimation of any kind given by the court as to who had possession,—either this defendant in error, or her husband, Edward Jones.

The instructions asked by plaintiff in error, whether good law or not, make no figure in this action. The evidence shows that the defendant in error was purchaser of the original stock of goods, and all subsequent purchases. And it also shows a want of any evidence of increase or profit, either by the skill and labor of the husband, or otherwise. We submit that said instructions asked by plaintiffs in error are not law; but if they are, there was no evidence to warrant the court in submitting them to the jury.

The mortgage executed by defendant in error and Edward Jones to Foster embraced both real and personal property, and was executed by the husband and wife because required by Foster in making sale to defendant in error, and has no bearing in this case to relieve plaintiff in error from his liability. The jury having de-

cided Mrs. E. M. Jones to have had the possession of the goods taken in execution, the sheriff finds no defense in showing title in Foster.

The court will not only take judicial notice that M. V. Voss is judge of this district, but will also conclude that C. W. Blair was the lawful judge *pro tem.*, unless the contrary appear. The case cited by counsel for plaintiffs in error, (Planing M. L. Co. v. City of Chicago, *supra*,) merely decides that under their practice a bill of exceptions must contain the style and term of court allowing the same.

VALENTINE, J. The plaintiff in error, Thomas W. Tallman, who was defendant below, was sheriff of Bourbon county. He levied an execution on a stock of goods, and sold the same as the property of Edward Jones. Afterwards, Emeline M. Jones, the defendant in error, plaintiff below, and wife of said Edward Jones, sued said Tallman for the value of said goods. The real question litigated *444 was, who *did said goods belong to,—to Edward Jones, or to his wife, Emeline M. Jones? The sheriff found the goods in the possession of Edward Jones, but Emeline M. Jones claimed the same as her property. She claimed that they were in the possession of Edward Jones merely as her agent, and therefore that his possession was in fact her possession. The court below instructed the jury that “the exclusive, peaceable possession of goods and chattels, under a claim of ownership, is *prima facie* evidence of ownership, and a person in such possession may maintain an action against a mere trespasser, and recover the full value of such goods.” This is good law in the abstract, although we do not see that the instruction has any application to this case. Mrs. Jones did not have possession of the property at all, except through her agent, Mr. Jones; and Mr. Jones, who had actual possession of the property, never claimed to own the same. As against every person except Mr. Jones, or some other person claiming under him, Mrs. Jones had constructively the legal possession of the property; for as against such persons the possession of Mr. Jones was merely the possession of Mrs. Jones. But as against Mr. Jones, or some person claiming under him, Mrs. Jones did not have possession of the property at all, or, at most, she did not have that kind of possession which proves ownership. In the present case the sheriff claims under Mr. Jones by virtue of said execution and levy, and therefore has a right to rely upon Mr. Jones’ actual possession of the property; and hence we think the instruction is inapplicable to the present case. Actual possession and ownership were not united in the same person, as they should be in order to prove a *prima facie* case of ownership. But the instruction is merely inapplicable. We cannot see how it could have misled the jury, or in any other manner have prejudiced the rights of the plaintiff in error. The court below did not give the

slightest intimation as to who had the possession of said property. The court did not even intimate that the possession of Mr. Jones could, under any circumstances, be construed to be the possession of Mrs. Jones. *445 Besides, there was ample evidence besides possession, and even against the possession, of Mr. Jones, to prove *prima facie* that Mrs. Jones was the owner of the goods, and there was nothing shown to rebut this *prima facie* case. The evidence clearly shows that Mrs. Jones purchased said goods herself, and for herself, and that she purchased them from a person not her husband, and that her husband did not and was not to pay for them. She was to pay for them. She purchased them, however, on credit; and she and her husband gave their promissory notes, and a mortgage on the goods and on a certain piece of real estate to secure the deferred payment for the goods. And prior to the purchase of said goods Mrs. Jones had no separate estate of her own. In whom the title to said real estate was vested, however, is not shown. Mrs. Jones expected to pay for said goods from sales made thereof, and it was not intended or expected that Mr. Jones should pay any portion thereof. Section 4 of the married woman's act reads as follows:

"Sec. 4. Any married woman may carry on any trade or business, and perform any labor or services, on her sole and separate account; and the earnings of any married woman, from her trade, business, labor, or services, shall be her sole and separate property, and may be used and invested by her in her own name." Gen. St. 563.

And under the facts of this case and the foregoing statute the only questions to be considered are as follows: *First*. Is said section 4 confined in its application to such married women only as have separate estates, or may it apply to "any married woman" who "may carry on any trade or business on her sole and separate account?" *Second*. If said section may apply to any married woman, then may a married woman who has no separate estate prior to her entering into trade or business, purchase property to carry on such trade or business, and make that property, as well as her subsequent earnings from such trade or business, her sole and separate property? We must answer both these questions in the affirmative. The *446 statute provides that "any married woman" (and this includes all married women) "may carry on any trade or business," etc.; and if "any married woman may carry on any trade or business," then, by necessary and unavoidable implication, she must be allowed to possess and own everything necessary to carry on that trade or business. Other portions of the married woman's act provide for a married woman owning other property separate and apart from her husband. For instance, section 1 of said act provides that all property owned by a woman prior to her marriage, and the rents, issues, profits, and proceeds thereof, and all property which may come to her by descent, devise, bequest, or the gift of any person except

her husband, shall be and remain her sole and separate property. The latter part of said section 4 provides that "the *earnings* of any married woman from her trade, business, labor, or services shall be her sole and separate property." While the first part of said section 4 provides, as we have before said, by necessary and unavoidable implication, that all property necessary to carry on the trade or business of a married woman may be owned by her, and be her sole and separate property, she may never before have owned any property, and although she may have had to purchase such property on credit. Any other construction of the statute would be virtually saying that no married woman except such as previously have a separate estate of their own can engage in any kind of trade or business.

The mere fact that Mrs. Jones mortgaged said goods does not authorize any person except her mortgagee, or some person claiming under him, to take the property from her; and if any such person other than the mortgagee, or some person claiming under him, does so take said property, he is liable for more than merely nominal damages.

Counsel for plaintiffs in error say in their brief as follows: "This court will take judicial notice that M. V. Voss is judge of this district, and not C. W. Blair." What is meant by this language it is difficult to understand. There is nothing in the record, except a certain bill of exceptions, that *shows that the case was tried, or judgment rendered, by any person except the regular judge of the district court of Bourbon county. On the contrary, the record, with the exception of said bill of exceptions, would seem to show that the case was regularly tried and judgment rendered by the regular judge of said court. It is true, said bill of exceptions shows that the case was tried and judgment rendered by C. W. Blair, judge *pro tem.* of said court; but the bill of exceptions was allowed and signed by C. W. Blair, judge *pro tem.* Now, if C. W. Blair was not regularly selected as judge *pro tem.*, or if he had no authority in the case, then he could not allow and sign said bill of exceptions, and the same should be stricken from the record; and if said bill of exceptions were stricken from the record, then the plaintiff in error would not have the shadow of a foundation upon which to allege error. The whole case of the plaintiff in error in this court is founded upon said bill of exceptions.

The judgment of the court below must be affirmed.

(All the justices concurring.)

LAWRENCE GANNON v. JOHN STEVENS.

July Term, 1874.

1. **Error: Immaterial, Disregarded.** A court may erroneously allow irrelevant testimony to be introduced on the trial, and may also erroneously allow leading questions to be put to witnesses, and yet, in some cases, such errors of the court may not be of such a substantial character as to require a reversal of the judgment of such court.
2. **Evidence: Circumstantial: Competency and Admissibility.** Where a party has no direct evidence to prove a certain fact in issue, but has to resort to circumstantial evidence to prove the same, great latitude must be allowed in the introduction of the evidence, and much that would otherwise be irrelevant will, in such a case, be both relevant and competent. For instance, where it becomes necessary (as in this case) to show by circumstantial evidence who killed a certain horse, it may be shown
 *448 *that the party charged with the killing had a motive as well as opportunity to kill the horse, by showing that the horse was in the habit of trespassing, and did immediately before the killing was done trespass, upon the corn crop of the party charged with the killing.
3. **Witness: Examination of: Leading Questions.** A direct question put to a witness, although it may be leading in form,—although it may be answered by “yes” or “no,” or by a simple affirmative or negative,—if it is upon some preliminary matter merely introductory to something else, and does not call for an answer which will tend to prove or disprove any issue in the case, is generally not leading.
4. ———. Where it has been shown on the trial, as in this case, that a certain witness had testified in chief and on cross-examination on a former trial of this same case, and has since died, and where the following question was then asked the witness, to-wit: “Do you recollect her testimony in chief on the trial of that case? *Answer.* Yes:” *held*, that such question is not leading.
5. ———. But even where *nisi prius* courts allow leading questions to be asked, still, as such courts have such a wide discretion in allowing or disallowing leading questions to be asked, appellate courts can seldom reverse their decisions for allowing such questions to be asked. It can only be done where the *nisi prius* courts have manifestly abused their discretion.
6. ———. The court below permitted the plaintiff to put the following question to his own witness, and allowed the question to be answered, to-wit: “Do you recollect of testifying at Erie that your uncle had an axe on his shoulder when he was leading the horse? *Answer.* I do not recollect.” *Held*, that the court below erred in permitting this question to be asked or answered, but that the testimony embodied in the answer is not sufficiently prejudicial to the rights of the plaintiff in error (defendant below) as to require a reversal of the judgment.
7. **Evidence: Question of Competency: Supreme Court.** Where it is amply shown that a certain person, now deceased, had “testified” as a “witness” on a former trial of this same case that she was examined in chief and cross-examined, and that her “testimony” was received by the court, and the point is made specifically for the first time in the supreme court, and was not made in the district court, it is not necessary to show more specifically that the testimony of said deceased witness was given under oath or affirmation.

8. ———. The death of such former witness was probably sufficiently shown before any evidence of what she had testified to was introduced, and hence the court below committed no error on that account in allowing said evidence to be introduced. But even if her death was not at that time sufficiently shown, still it was afterwards, and during the trial, shown by evidence that proved the same beyond all doubt, and hence
 *449 it *became wholly immaterial whether the court erred in allowing said evidence to be introduced or not.

9. **Evidence: Deceased Witness.** It is sufficient to prove the *substance* of what a deceased witness testified to on the former trial, and not necessary to prove his exact words.

Error from Neosho district court.

The action was commenced before a justice, where Stevens had judgment for \$185 and costs. Gannon removed said cause to the district court by petition in error, where the judgment of the justice was reversed, and the action retained for trial as on appeal. A trial was had before a jury at the April term, 1872. The charge to the jury, omitting the formal parts, was as follows:

"(1) You are the exclusive judges of all the facts in the case, and for yourselves must say what effect the evidence should have upon your minds in the making up of your verdict. All the circumstances surrounding the several witnesses should be duly considered in weighing and deciding upon the weight of evidence.

"(2) If in your examination of the testimony in this case you should be satisfied that any witness has testified falsely and corruptly in reference to any material fact, you should disregard the whole of the testimony of such witness.

"(3) The defendant in this case is charged with a tortious act,—that of unlawfully killing plaintiff's horse. In cases of this nature all persons who aid, abet, or assist in the commission of the tortious act are regarded as principal actors, and are severally, as well as jointly, responsible to the injured party for damages sustained by such tortious act.

"(4) The plaintiff has called witnesses for the purpose of proving what Mrs. Patrick Gannon, now deceased, testified to before the justice of the peace in a former trial of the case. While such testimony is before you, and properly, yet you are to consider it with due caution, looking to the character of the witnesses who testified to the declaration of deceased, their recollection as to the facts which they attempt to detail, together with all the surrounding circumstances."

Verdict for the plaintiff for \$150 damages.

*450 *C. F. Hutchings, for plaintiff in error.

The action was brought by Stevens, claiming damages for a horse (gelding) alleged to have been killed by Gannon. Upon the trial Stevens, after testifying to the ownership, death, and value of the horse, produced as a witness a young lad, Patrick Gannon, 13 years old, nephew of defendant, who, after a thorough examination, failed

to throw any light on the matter, and spoke only of seeing defendant at one time leading a *mare*, and that he "thought it was his own mare." Although it did not appear that Stevens was taken by surprise, or had any reason to expect the witness would testify otherwise, he (Stevens) was allowed to impeach, contradict, and stultify his own witness, both by cross-examination, and by the testimony of another witness. His counsel asked the boy "if he recollected testifying at Erie that his uncle had an axe on his shoulder when he was leading the horse?" This was a direct attempt to impeach and vilify their own witness. They did not pretend that they were misled by the witness. But if they could be allowed to impeach their own witness, they could not be allowed to prejudice us by showing what he *had sworn to* before. That, certainly, was not competent testimony.

Stevens was permitted to prove by witness Miller what the testimony of one Mrs. Patrick Gannon had been before the justice when the case was originally tried. This testimony was objected to by Gannon, on the ground that no foundation had been laid for the introduction of such testimony. We invoke a careful scrutiny of the record on this point, as we think the district court erred in admitting this testimony. Let us see what foundation had been laid for the introduction of this testimony. The only evidence of the death of Mrs. Patrick Gannon was that of plaintiff, Stevens: "I knew the wife of

Pat Gannon. She testified before 'Squire Williams in this *451 case. She is dead. I did not see her die, nor *see her after she was dead. I saw people going there to the funeral of old Pat Gannon's wife. I have not seen her since." There was no evidence whatever as to the nature of the oath, if any, that was administered to her. Although four years had elapsed since the trial before the justice, the only proof of means of recollection, or capacity to reproduce her testimony, required by the court, is in the testimony of Miller, as follows: "I saw a woman at that trial *who said she was the wife of Pat Gannon*. She testified in that case, *I think*. I remember her testimony in chief and on cross-examination." Upon this foundation the witness was allowed to give, not the testimony of Mrs. Gannon, in her words, but his opinion of what her testimony proved, and was even allowed to say what she meant by her language, and construe it for the benefit of the court and jury, as witness the following: "*Miller*. She spoke about her boy, and said he was present when defendant went by with the horse and axe. *Stevens' Counsel*. "What boy did she refer to? *Miller*. It is Patrick Gannon,—the same boy that testified before Williams, and testified here in this case to-day." In the cross-examination of Miller, his *want* of means of knowledge is further shown. "The trial was in 1868. I took no minutes in writing. I have talked with the attorneys of plaintiff about the testimony of Mrs. Gannon. I think I have mentioned the case once or twice before, since it was tried," (four years before.)

Next comes Williams, the justice, who is brought to prove the same

as Miller; and, after putting to him several questions about his ability to testify "substantially," all of which he answered, "Yes," he is allowed to give his version of Mrs. Gannon's testimony. He says, however: "I cannot remember what she said on cross-examination. I do not think I have used one of the words she used when she testified before me. I could not testify whether she said it was a *horse*, or a *mare*. I do not recollect the testimony except what I used in making up my judgment. I do not recollect what she said
 *452 about bad feeling between herself and defendant; but *her actions showed it. I think there were several questions asked the witness on that trial that she did not answer."

It is well settled that where a party desires to introduce secondary evidence he must lay the foundation himself, and must show that it is the best evidence procurable. This rule is much more inflexible when the attempt is made to introduce the evidence of a deceased person, taken in a former trial, than in cases where the contents of lost written instruments are sought to be introduced. In this case the death of Mrs. Patrick Gannon was not satisfactorily shown. There was not one particle of evidence to show that any legal oath, or, in fact, that any pretense of an oath, was administered to her; and without the oath there is nothing to distinguish her statements from common hearsay. Instead of its appearing affirmatively that Miller and Williams had the requisite knowledge to enable them to testify concerning the alleged former evidence of Mrs. Gannon, it appears that they had no such knowledge, and they do not pretend to give even a "single word" that she said, but simply what they considered to be the *substance* of her testimony. It is not shown that Miller had any interest in the case, or any peculiar knowledge of such matters. He was simply an idle spectator of the trial, and, after four years, comes in, and is allowed to give his impression of what Mrs. Gannon testified to. Williams was the justice, and says he remembered only what testimony "he used" in making his judgment. Williams might conclude that Mrs. Gannon's testimony proved one thing; the jury might come to quite another conclusion, if they heard her testimony, and not Williams' conclusions on it. The rule ought to be strictly enforced concerning such testimony. The weight of the testimony of a belligerent Irish woman, who had hard feelings towards the defendant, and who refused to answer many questions, as the testimony shows Mrs. Gannon did in this case, would be materially increased when told by a sober and staid old justice; and, in fact, when you deprive the jury of the advantage of seeing witnesses face to face, and noting their personal appearance and their demeanor on
 *453 the witness stand, you deprive them of one of the surest avenues to the truth. Hence we say the rule should be a strict one that allows the statements of a witness at second hand to be used in evidence. U. S. v. Wood, 3 Wash. 440; 1 Phil. Ev. 200; Ephraims v. Murdock, 7 Blackf. 10; Com. v. Richards, 18 Pick. 434; v.13x—22

Warren v. Nichols, 6 Metc. 261. It must be shown that the witness was sworn. Sloan v. Somers, 20 N. J. Law, 66. The witness refused to answer questions, and was not fully examined at the former trial. Noble v. McClintock, 6 Watts & S. 58.

The issue was whether defendant had killed plaintiff's horse. To prove this issue on his part, plaintiff was allowed to testify that defendant was raising a crop of corn, and that said crop had been trespassed upon shortly before plaintiff's horse was killed. This was error, and prejudicial. It is by no means a logical deduction that because a man has a corn crop, or because his corn crop is trespassed upon, that he will kill or has killed a horse.

Many of the questions put to plaintiff's witnesses, on examination in chief, were so very suggestive and leading as to be incompetent for this reason alone. This question put to the plaintiff is a sample of these leading and suggestive questions: "State if any one came to you from the defendant to notify you that this horse or any stock was trespassing on his corn?" This, and all like questions, were allowed over the objection and exception of defendant.

After Stevens had closed his case, Gannon was introduced in his own behalf, and asked this question: "Did you ever lead a horse of Mr. Stevens' by Patrick Gannon's, and say you had caught the old prisoner, and would fix him?" This was for the purpose of giving a direct negative to what was alleged to be the testimony of the deceased witness. The court, however, ruled out this testimony. It requires no argument to show our right to disprove the truth of the alleged testimony of Mrs. Gannon, yet the court refused to allow us to do so. Although the court had refused to allow Mr. Gannon to

deny the alleged testimony of deceased Mrs. Gannon, the court *454 allowed the most extraordinary cross-examination of *the witness, to-wit: "Did you ever stand within five feet of any man in that neighborhood, in that or any other year, and see him strike a horse with an axe?" We know of no rule which permits the cross-examination of a *party* as to matters that it would not be competent to cross-examine a witness who is *not a party*. In this case the plaintiff was permitted to go outside of the direct and proper cross-examination, and ask defendant, Gannon, all manner of questions to make out plaintiff's case, or to prejudice the defendant before the jury.

Plaintiff, Stevens, and his witness Miller, were recalled in rebuttal, and allowed to testify concerning the testimony of Gannon before the justice, in 1868. No foundation for impeaching Gannon had been laid. If this testimony was introduced on the ground of admissions against interest, it should have been in chief, and not in rebuttal; and, in any event, the questions are so grossly leading and suggestive, and being put to a witness who had certainly drawn suspicion on himself, that they were incompetent for that reason alone. Here is a specimen: Counsel producing witness, to his witness: "State whether

or not the defendant at that trial stated that he drove the horse down to Pat Gannon's house, and caught him there?" Witness: "He did." Counsel: "State whether or not the defendant at said time and place stated that he stood within five feet of the horse at the time he was wounded, and saw him struck with an axe?" Witness: "He did."

The instructions are all in the record. We ask particular attention to these instructions. We claim that the application of the maxim, *veritas in uno, falsus in omnibus*, made by the district court, was erroneous. The jury are the exclusive judges of all the facts, and of the credibility of the witnesses. The court has no right to withdraw any competent testimony from the jury, nor to decide as to the credibility of any witness. The jury are to apply the maxim according to their own judgment. They are at liberty to believe any portion of the witness' testimony, especially if corroborated by other testimony or circumstances; and they are not, as a matter of law, bound to dis-
 *455 believe any witness. It was so *decided in *Re Santissima Trinidad*, 7 Wheat. 283; *Hargraves v. Hiller's Adm'r*, 16 Ohio, 344; *State v. Williams*, 2 Jones, Law, 257; *Mercer v. Wright*, 3 Wis. 645; *Knowles v. People*, 15 Mich. 411; *Lewis v. Hodgdon*, 17 Me. 267. We refer especially to *Mead v. McGraw*, 19 Ohio St. 55, and *Hale v. Rawallie*, 8 Kan. *136.

We claim, as applicable to the testimony in this case, that all parties "who aid, abet, or assist in the commission of the tortious act" are not liable as principals, and the court should have made some such distinction as those who *willingly or purposely* aid, abet, etc.; for if a person unwittingly and unintentionally aid, he is not liable.

And, again, whether Mrs. Patrick Gannon was dead, whether this case had been tried before a justice, whether Mrs. Patrick Gannon testified at that trial, and what she testified to, were alike questions of fact, solely for the jury; yet the court virtually instructed the jury that Mrs. Patrick Gannon was dead, and that she testified before the justice. The court might, with the same propriety, have instructed the jury what she testified to. Indeed, the court did say: "*Such* testimony is before you, and properly,"—that is, testimony is before you showing what she did testify to; and this latter remark, of course, neutralized any argument defendant may have made touching the reliability of this testimony, and acted, as it was intended, to ratify all the court had done in admitting such testimony, and destroyed all that counsel for defendant had done in cross-examination to show the improbability of a mere spectator in a justice's court remembering the testimony of a witness four years, without *memoranda* or other aid to memory. It is very evident that the jury in this case based their verdict upon the alleged testimony of Mrs. Patrick Gannon, and the instructions *of fact* given by the court; and we submit that a careful examination of the testimony in this case, in the light of human

probability and belief, will not justify the conclusion of the jury. A new trial should have been granted.

*456 *VALENTINE, J. This was an action brought by John Stevens against Lawrence Gannon, for the sum of \$250, as damages for the killing of a certain horse. The main question tried in the court below, if not the only contested question, was whether Gannon did in fact kill said horse. All other questions in that court grew out of the trial of that question. In this court the plaintiff in error (defendant below) has raised many questions founded upon supposed irregularities claimed to have occurred during the trial of the case in the court below. We do not think that it will be necessary for us to discuss all of the questions separately, for many of them may be discussed in groups, and some of them need not be discussed at all. In general terms, therefore, and without going into details, we would say that we think the court below erroneously permitted some irrelevant testimony to be introduced on the trial, and also erroneously permitted several leading questions to be put by the plaintiff below to his own witnesses. But still we think that none of these errors were of such a substantial character as to require a reversal of the judgment of the court below. Errors like these are often committed in the trial of causes in *nisi prius* courts, and yet it is seldom that any such errors are complained of in this court, and seldom that a judgment could be reversed on account of them. This case, as said before, was for killing a horse. No person except those who participated in the act saw the horse killed; and hence the plaintiff had, in the nature of things, to resort to circumstantial evidence to prove his case; and in such cases great latitude must always be allowed in the introduction of testimony. And therefore much of the evidence which the plaintiff in error supposes to be irrelevant testimony, and much that would, under other circumstances, be in fact irrelevant testimony, was, under the circumstances of this case, both relevant and competent. For instance, it was both relevant and competent for the plaintiff

*457 to show that the defendant had some motive as well as an opportunity to kill the horse by showing that the horse was in the habit of trespassing, and did, immediately before he was killed, trespass upon the defendant's corn crop. But even if said evidence was both irrelevant and incompetent, it is still strange that the plaintiff in error should now ask us, as he does, to reverse the judgment of the court below on account of the following question and answer, to-wit: "Question. State what you know about stock trespassing on that corn at the time? Answer. I don't know; I never saw any stock in his crops." The witness did not at any time state that he knew anything about the matter, and yet the plaintiff in error asks us to reverse the judgment on account of his testimony.

With regard to leading questions, we would say that many of the

questions put to witnesses which the plaintiff in error supposes were leading, were not leading. It is not every question that is put in a direct or leading form, or that may be answered by "yes" or "no," or by a simple affirmative or negative, that is leading. To ask an impeaching witness directly if he knows the general character of the witness to be impeached for truth and veracity, is not leading. And, generally, a direct question upon any preliminary matter, merely introductory to something else, and not calling for an answer which will tend to prove or disprove any issue in the case, is not leading. For instance, after it had been shown that Mrs. Patrick Gannon had previously testified in chief and on cross-examination, on a former trial of this same case, and that she had since died, the following question was asked, to-wit: "Do you recollect her testimony in chief on the trial of that case? *Answer.* Yes." This question was not leading. It did not call for any testimony which tended to prove or disprove any of the issues in the case, but simply called for the recollection of the witness,—a purely preliminary matter, introductory of what was to follow. But even where *nisi prius* courts allow leading questions to be asked, still, as such courts have such a wide discretion in allowing or disallowing such questions, appellate

*458 courts can seldom reverse their de*cisions for allowing such questions to be asked. It can only be done where the *nisi prius*

courts have manifestly abused their discretion. The plaintiff below, Stevens, introduced as a witness Patrick Gannon, a nephew of the defendant below. The witness testified at one time he saw the defendant leading a mare which he thought was the defendant's own mare. He also said in his testimony "I do not recollect that he had any axe." The plaintiff then asked the witness the following question: "Do you recollect of testifying at Erie that your uncle had an axe on his shoulder when he was leading the horse? *Answer.* I do not recollect." This question was allowed to be asked and answered, over the objections and exceptions of the defendant. Of course, the court erred in allowing this question to be asked and answered. The witness was the witness of the plaintiff; and the plaintiff did not even claim that he was surprised, or that the witness testified differently from what he had expected, or that the witness did not testify to the truth, or that the witness had the slightest prejudices in the case. The question is objectionable for at least three reasons: *First*, it is leading; *second*, it is an attempt to prove the declarations of a person not a party to the record, nor interested therein, nor in privity with any person interested therein; *third*, it is an attempt to lay the foundation for an impeachment of the plaintiff's own witness without any reason being given therefor. But still we do not think that the defendant's rights were materially prejudiced by the error of the court. The witness himself stated nothing in response to this question in contradiction or corroboration of what he had already stated. His answer really amounted to nothing. And there was no attempt to-

prove by any other witness what this witness had ever said at any other time or place.

The plaintiff introduced evidence, over the objections of the defendant, to show what Mrs. Patrick Gannon had previously testified to on a former trial of this same case. The defendant claims that the evidence was erroneously admitted for the following reasons:

First, that it was not sufficiently shown that Mrs. Gannon had *459 died since the former trial; *second*, * that it was not sufficiently shown that a legal oath had been administered to her before her testimony was given; *third*, that the witnesses proving her testimony were not sufficiently qualified therefor,—that is, that they were not able to give her exact words, but could give only the substance of her testimony; *fourth*, that it was shown that Mrs. Gannon refused to answer several questions on the former trial.

None of these reasons are sufficient. The first, second, and fourth are, in fact, superimposed upon very slender foundations. They are in fact not true. Nor were such reasons specifically urged in the court below. If such reasons had there been urged in the trial court, further evidence probably could have been supplied, and probably would have been supplied. Changing the order of the first two reasons, and taking up the second one first, we would say that it was amply proved by different witnesses that Mrs. Gannon "testified" as a "witness" at the former trial of this case; that she was examined in chief and cross-examined; and that her "testimony" was received by the court. Now, to "testify," under such circumstances, certainly means to be examined as a witness *under oath of affirmation*. See Bur-rill's, Bouvier's, Webster's, and Worcester's Dictionaries, "Testify."

Returning, now, to the first reason urged against the introduction of said testimony. Before any evidence was introduced to show what Mrs. Gannon had formerly testified to, it was shown that the plaintiff and Mrs. Gannon lived in the same neighborhood, and then the plaintiff testified as follows: "I knew the wife of Pat Gannon. She testified before 'Squire Williams in this case. She is dead. I did not see her die, or see her after she was dead. I saw people going there to the funeral of old Pat Gannon's wife. I have not seen her since." This evidence was not objected to. After it was shown what Mrs. Gannon had testified to on the former trial, the defendant, who was also a neighbor of the plaintiff and of Mrs. Gannon, and a brother-in-law of Mrs. Gannon's, became a witness, and testified as fol-

lows: "I knew Mrs. Patrick Gannon, deceased, in her life-
*460 time. I remember the trial of this case * before Esquire Williams, in Erie township. At that time Mrs. Gannon and I were on very unfriendly terms. I was present a little after she died. She sent for me before she died." We think it is evident, beyond all doubt, that Mrs. Gannon was dead at the time of the last trial of this case in the district court, and whether her death was sufficiently shown before the evidence of what she had formerly tes-

tified to was introduced, we think is now wholly immaterial; but still we are inclined to think that, for the purposes of this case, her death was sufficiently shown before any evidence of what she had formerly testified to was introduced.

As to the third reason given why said evidence should have been excluded, we would say that we think it was sufficient to prove the substance of what Mrs. Gannon testified to on the former trial, and not necessary to prove her exact words. 1 Greenl. Ev. §§ 165, 166; 1 Phil. Ev. (5th Amer. Ed., Cow. & H. and Edw. Notes,) marginal page 395 *et seq.*, note 115. This, we think, is the law, both upon reason and authority. The reasons for this being the law we think are so obvious that it is not necessary to state them. There was not a particle of evidence tending to prove that Mrs. Gannon *refused* to answer any question put to her on the former trial; and the claim that there was any such refusal is now made for the first time in this court. The evidence upon which we suppose this claim is made is the last portion of the evidence of the last witness that testified with regard to Mrs. Gannon's testimony, and is as follows: "I think there were several questions asked the witness on that trial that she did not answer." If this can be construed into a *refusal* to testify, or a refusal to answer questions, why was not the point made in the court below? Why did not the defendant move to strike out all the evidence concerning Mrs. Gannon's testimony? Or why did he not ask the court below to instruct the jury to disregard it? He is too late now to raise any question concerning it. From anything that appears in the record, the questions which Mrs. Gannon did not *461 answer may have been withdrawn by the party asking them, or the court may not have permitted them to be answered. The court below did not refuse to allow the defendant to disprove Mrs. Gannon's testimony.

The cross-examination of the defendant was a proper cross-examination; and, indeed, the defendant had a very fair trial in every respect. The application of the maxim, *falsus in uno, falsus in omnibus*, was a proper application of that maxim, according to the decisions of this court. *Campbell v. State*, 3 Kan. *488; *State v. Horne*, 9 Kan. *131. In the judgment of the writer of this opinion, however, it is unfortunate that such decisions were ever made, and he thinks they should be overruled. *Mead v. McGraw*, 19 Ohio St. 55, and cases there cited; *Paulette v. Brown*, 40 Mo. 52, 57, *et seq.*; *Blanchard v. Pratt*, 37 Ill. 243, 246; *Callanan v. Shaw*, 24 Iowa, 441, 447. I shall certainly never be in favor of reversing the judgment of the district court for *refusing* to give such an instruction as the second one *given* in this case. The instruction referred to is as follows: "If in your examination of the testimony in this case you should be satisfied that any witness has testified falsely and corruptly in reference to any material fact, you should disregard the whole of the testimony of such witness."

The following instruction was not erroneous, to-wit: "In cases of this nature all persons who aid, abet, or assist in the commission of the tortious act are regarded as principal actors, and are severally, as well as jointly, responsible to the injured party for damages sustained by such tortious act." The fourth instruction was not erroneous, or, at most, it was not so erroneous as to require a reversal of the judgment. That Mrs. Gannon was dead there can be no doubt. The evidence sufficiently showed it, and there was no conflict of evidence upon this point. Her evidence was properly presented to the jury for their consideration, and the court properly instructed the jury to consider it with due caution. They were not told to believe it or disbelieve it, nor to believe or disbelieve any portion of it; nor were they told to believe or disbelieve any portion of the evidence of the witnesses who testified with regard to it, except, possibly, they were told inferentially that Mrs. Gannon was dead, and this the defendant himself admitted and testified to as a witness on the trial of the case.

We have already given this case more time and consideration than it merits, and shall therefore consider it no further. The judgment of the court below will be affirmed.

(All the justices concurring.)

HUNTER'S ADM'R v. FERGUSON'S ADM'R.

July Term, 1874.

1. **Record: Judicial Proceedings: Presumptions.** Where a record of the proceedings of a court of general jurisdiction shows upon its face that the court had jurisdiction of both the parties and the subject-matter of the action, and where the whole of the record is introduced in evidence, all presumptions from silence on the part of the record should be construed in favor of the regularity and validity of the proceedings of the court, and not against the regularity and validity of such proceedings.¹
2. **Foreign Judgment: Record: Presumptions.** Where the statute of Alabama provides that "where any judge of the circuit court [that court being a court of general jurisdiction] is incompetent to try any case standing for trial, by reason of relationship to parties, or of having been engaged as counsel in the cause, or for any other reason, the parties to the suit must, when the same is reached for trial, nominate some attorney present in court, who must preside as judge for the trial of such cause during that term; and if the parties fail promptly to make such selection, the clerk of the court must nominate the attorney, who shall preside over and try the cause at that term,"—and the record of the proceedings of

¹ It is a general rule of law that it will be presumed, in the absence of anything to the contrary, and in favor of the regularity and validity of the official proceedings of any official body having superior jurisdiction, that whatever ought to have been done was not only done, but rightly done. *County of Leavenworth v. Higginbotham*, 17 Kan. 75. See *County of Saline v. Anderson*, 20 Kan. 801.

the circuit court of Barbour county, Alabama, in a case therein tried and determined, shows upon its face, in the following words, that "the presiding judge being incompetent to try this cause, and the parties failing to agree upon any one to preside in his place, J. G. S. was selected by the clerk to try the cause;" and where said record further shows that said court, as a circuit court, had jurisdiction of both the parties and the subject-matter of the action: *held*, that it will be presumed, in favor *463 of the regularity and validity of the proceedings of *said court, when such proceedings are attacked collaterally, that the regular circuit judge was incompetent to try said cause for some *legal reason*, and that J. G. S. was an *attorney* present in court.¹

3. —: **Presumption: Judge de Facto.** But even if it were presumed that the regular judge was competent to try the cause, and that J. G. S. was not an attorney, still, as the record shows that said J. G. S. was a special judge *de facto* for the trial of said cause, it must be further held that the proceedings are valid until reversed or set aside by a direct proceeding, and cannot be held void in a collateral proceeding.
4. **Evidence: Judicial Notice: Laws of Another State.** The statute of Alabama—section 758 (640) of the Revised Code—authorizing the selection of a special judge of the circuit court to try causes is in fact unconstitutional and void. But, as both parties in this case have agreed that said statute was and is valid and operative, the supreme court of this state cannot declare that it is not valid and operative, for said supreme court cannot take judicial notice of the laws of Alabama in cases of this kind.

Error from Franklin district court.

Action on a judgment of the circuit court of Barbour county, Alabama, for \$1,910, with interest and costs, brought by James L. Pugh, as administrator of the estate of John L. Hunter, deceased, against Calvin Leonard, as administrator of the estate of Robert Ferguson, deceased. Petition filed April 19, 1873. Answer, general denial. The record shows that on the tenth of April, 1866, Hunter, the plaintiff's intestate, brought a suit in the Alabama court above named, against one Bertram J. Hoole and Ferguson, defendant's intestate, upon a promissory note. Ferguson and Hoole were both *personally* served with the summons and complaint on April 13, 1866. The cause came on to be tried May 22, 1867, and the plaintiff therein, Hunter, obtained judgment. Hunter having died, Pugh was duly appointed administrator of his estate. Ferguson came to Kansas, and died here, and Leonard was appointed administrator of his estate. Said Alabama judgment not having been satisfied, the plaintiff brought this suit in the Franklin district court. Trial at the August term, 1873. Plaintiff offered an exemplified copy of the Alabama judgment in *464 evidence. Defendant objected "that it does not show that *the presiding judge of the circuit court of Barbour county, Ala-

¹ Where an action is tried in the district court before a judge *pro tem.*, and no question is there raised as to the power or authority of such judge *pro tem.* to hear and determine the case, but all the parties consent thereto, *held*, that such question cannot be raised for the first time in the supreme court. *Higby v. Ayres*, 14 Kan. 531. See *Garvin v. Jennerson*, 20 Kan. 372.

bama, was incompetent to try the cause in said transcript set forth, 'by reason of relationship to the parties, or of having been engaged as counsel in the cause, or for any other reason;' nor that the said John Gill Shorter, selected by the clerk of said circuit court to try said cause, was an attorney present in court, according to the form of the statute of Alabama in such cases made and provided, and that said judgment in said transcript set forth is void." The district court sustained this objection, and ruled out the record, and gave judgment against the plaintiff for costs. Before offering the Alabama record, the plaintiff read in evidence section 5 of article 6 of the constitution of Alabama, and section 758 (640) of the Revised Code of Alabama, both of which sections were then admitted by the parties to have been in full force and operation in that state on May 22, 1867, and since hitherto.

John W. Deford, for plaintiff in error.

The transcript was admissible as evidence of the record of a court of a sister state. Its legal effect or sufficiency is a different question. *Slaughter v. Cunningham*, 24 Ala. 260; *Leavens v. Butler*, 8 Port. (Ala.) 393.

The legal effect or sufficiency of the evidence is settled in *Gunn v. Howell*, 27 Ala. 663. There the court say "that the constitution of the United States, (article 4, § 1,) requiring 'full faith and credit' to be given to judgments of the courts of sister states, places them rather on the footing of domestic judgments, and not that of foreign judgments proper." When "duly authenticated and proved, the judgments of sister states are evidence *prima facie* of jurisdiction." And this is the law in Kansas, even as to courts or officers of "special jurisdiction." *Butcher v. Brownsville Bank*, 2 Kan. *80, *81; *Burnes v. Simpson*, 9 Kan. *663; Code, § 121. The fact is, however, the question of jurisdiction is *not raised* in this case, although the district court held that the Alabama record failed to show, by its silence as to certain facts, jurisdiction in the court of Barbour county. The only

point presented by the record is whether or not John Gill *465 Shorter, the *pro tem.* judge, had the right to hold that office, — a point entirely distinct from that of the *jurisdiction of the court* over the case. *Ex parte Strang*, 21 Ohio St. 616; *In re Boyle*, 9 Wis. 267. But the constitution of Alabama (section 5, art. 6) and the Revised Code of Alabama (section 758) were read in evidence. And it is insisted by defendant in error that the organic and the statute laws of that state impart no validity to the judgment sued on, because it is not recited in the judgment entry, and nowhere appears in the record, that "the *presiding* judge of the circuit court of said Barbour county was incompetent to try the cause set forth in the transcript by reason of relationship to the parties, or of having been engaged as counsel in the cause, or *for any other reason*." The sole question here is whether the judgment is *void* because it fails to recite the *cause* or "*reason*" why the presiding judge was incompetent to try

the case.. The Alabama statute expressly names two grounds, (relationship to the parties, or having been of counsel,) and then makes "any other reason" sufficient to disqualify. Who is the judge of the other reasons? Whom does the statute make the judge of the other reasons? It is said that the "other reason" must be recited, to enable the court that is called on to pass upon the validity of the judgment to decide whether the "other reason" is *sufficient*. If the *other reason* is open to the judgment of other judges than the presiding judge or the attorney who is selected as special judge by the clerk, where is the limit that would make any such judgment valid? If the "other reason" were in fact recited in the record, the sufficiency of that "other reason" is open to adjudication; and what is such a judgment worth unless it recites that the presiding judge was of kin or counsel? What becomes of the "other reasons?" But what is the manifest law of this case? It is that the presiding judge of the circuit court of Barbour county was the trier of the *question of fact* whether he was competent to try the cause or not. The language of the Alabama Code is, "When any judge of the circuit court is incompetent to try any case," etc. No one is named as the judge of

*466 when the incompetency exists, or on what ground or "reason" it exists. Who, then, is the judge? Most assuredly the presiding judge. Who else can be? Until the fact of relationship, or some other cause or reason, is ascertained, the presiding judge is alone authorized to try the case, and who *but himself* determines his competency or incompetency? Then it is manifest that the presiding judge is alone charged by the Alabama statute with the ascertainment of the fact of his incompetency. And the authorities are conclusive of the legal proposition that, when a court of general or special jurisdiction is charged by law with the ascertainment of a jurisdictional fact, the simple recital in the record that the judge did ascertain the fact is conclusive. The recital imports absolute verity. Wyatt's Adm'r v. Rambo, 29 Ala. 510. The recital that "the presiding judge being incompetent," etc., is certainly the same in substance and legal effect as the recital that "the presiding judge being incompetent for other reason than that he was related to the parties, or had been of counsel in the cause," etc. The incompetency of the judge depended upon a fact or a reason. *Why* he was held incompetent the presiding judge fails to state. It may have been relationship or kinship or "other reason." The Kansas courts are bound to presume either that the presiding judge was related, or of counsel, or that there was "other reason" for his incompetency. What "other reason" is sufficient was left to the presiding judge, and he recites he was incompetent. The Kansas courts are bound to hold that the "other reason" was sufficient to show the incompetency of the presiding judge, otherwise he would not have so stated. But if another "reason" were named in the entry, this court, much less the district court, would have no power to question its sufficiency. That would be an inquiry that the supreme court

of Alabama alone could enter upon, because such insufficient reason would make the judgment only erroneous, not void.

Again, it was objected that the Alabama record does not show "that John Gill Shorter, selected by the clerk of the circuit *467 court to try said cause," was an "attorney present in *court."

But may he not have been in fact such an attorney? Is there any presumption that the clerk violated the law by choosing an unqualified person? Is not the reverse to be presumed? "The rule by which inspection of the record is governed, is that legal presumptions do not come to the aid of the record, except as to acts or facts touching which the record is silent. In such case it will be presumed that what ought to have been done was not only done, *but rightly done.*" *Hahn v. Kelly*, 34 Cal. 391. Moreover, no objection was made at the trial to the authority of Mr. Shorter to act. In fact, the defendants, although *personally* served, chose to make default. "Jurisdiction over a party being obtained, continues until judgment; and he must therefore *take notice* of all the proceedings until that time." *Freem. Judgm.* § 142, p. 115; *Case v. State*, 5 Ind. 1; *Feaster v. Woodfill*, 23 Ind. 493; *Pepin v. Lachenmeyer*, 45 N. Y. 29, 32; *Ex parte Strang*, 21 Ohio St. 610; *State v. Douglass*, 50 Mo. 593. Unless the district court could legally infer from the *mere silence* of the Alabama record that all the officers of the Barbour county circuit court were either ignoramuses or knaves, or both, its action in excluding the transcript was erroneous.

Mason & Parkinson and Robt. McFarland, for defendant.

The transcript was not admissible as evidence of the record of a court of a sister state, since the record itself discloses the want of jurisdiction in the court rendering the judgment in Barbour county, Alabama. *Slaughter v. Cunningham*, 24 Ala. 269; *Dozier v. Joyce*, 8 Port. (Ala.) 312. The district court of Franklin county did not err in ruling out the transcript, since it was void on its face by the laws of the state of Alabama, and was properly so declared by said district court, which had the right to inquire into the jurisdiction of the court in Alabama rendering it. Section 5, art. 6, Const. Ala. Though the circuit courts of Alabama have original jurisdiction in civil and criminal cases, limited as to civil cases involving more than fifty dollars, "nevertheless, when a special authority has been conferred upon a circuit court by statute, it is, *quoad hoc*, an inferior and limited court, and must, like all other courts of limited *468 statutory jurisdiction, show upon its records every jurisdictional fact necessary to support its authority to adjudicate the subject-matter before it." *Gunn v. Howell*, 27 Ala. 675; *Wilson v. Wilson*, 36 Ala. 662; *Thatcher v. Powell*, 6 Wheat. 119; *Holt v. School Com'rs*, 29 Ala. 451; *Commissioner's Court v. Thompson*, 18 Ala. 694; *King v. Shackelford*, 13 Ala. 435; *Wilkinson v. Harwell*, Id. 662; *Mechanics' Bank v. Seton*, 1 Pet. 310. The supreme court of Alabama, in affirmation of the principle "that when a court of gen-

eral jurisdiction has a special authority conferred on it by statute it is *quoad hoc* an *inferior* and *limited court*," has invariably held that everything required by the statute essential to the exercise of the right was necessary to the jurisdiction of the court, and must appear from its proceedings in the same manner as courts created by statute are required to set out in the record of their proceedings every fact necessary to give them jurisdiction; and the absence of such facts on the record renders void their proceedings. *Couch v. Anderson*, 26 Ala. 676; *Bates v. Planters' & Merch. Bank*, 8 Port. (Ala.) 99; *Levert v. Planters' & Merch. Bank*, Id. 104; *Clements v. Branch Bank*, 1 Ala. 50; *Taliaferro v. Lane*, 23 Ala. 369.

Section 758 of the Alabama Code is more special in its nature than a statute which confers additional powers on a court as such, in this: that it confers special authority upon the parties to a cause in court, and, on their failure to exercise the power conferred upon the clerk of the court to select a special judge from among the attorneys present in court at the time when the cause is called, to try the same, when the judge of the circuit court has been engaged as counsel, or is related within certain degrees to the parties, or has an interest in the suit, etc., and is thereby disqualified and prohibited by law from presiding. The first jurisdictional fact which must exist, and which must appear of record, to vest power and authority in the parties, or in the clerk, to nominate a special judge, is the one which renders the presiding judge disqualified to preside in the case. Then, when this has been shown, the next fact which must exist and appear of record is that the person selected by the parties or by the clerk is an *attorney*. The statute is imperative on this point also. Observe how restricted the power of a special judge is over this case, even if the record of the proceedings support his jurisdiction. He cannot try any other case on the docket, and his power over the particular case is limited to that term of the court. If the case is not tried, he can only make the necessary orders and continue it. We therefore say that the transcript of the Alabama record in this cause shows upon its face that the judgment is void. (1) It shows that the judgment was not rendered by the judge of the circuit court of Barbour county. (2) It does not show that the circuit judge had been counsel in the case, or was related to either of the parties, or that he had an interest in the subject-matter of the suit, and thereby rendered incompetent and disqualified by law to preside on the trial, and thus vest authority and power in the parties to the suit, or in the clerk of the court, where the parties fail to select—to nominate—some attorney to try the case. (3) It does not show that John Gill Shorter was an *attorney*. (4) Even if the record did show that John Gill Shorter was an attorney, still he would not, as special judge, have jurisdiction of the case, as the fact which disqualified the circuit judge nowhere appears on the record; and if the fact which in law disqualified the circuit judge to preside had ap-

peared of record, the failure of the record to show that John Gill Shorter was *an attorney* would have rendered his judgment void for want of jurisdiction also.

The judgment entry, shown by the transcript, made by John Gill Shorter in the cause, while pending in the circuit court of Barbour county, Alabama, between Hunter, plaintiff, and Ferguson and Hoole, defendants, and the judgment rendered by said John Gill Shorter, are void; for, in the language of Chief Justice MARSHALL in the case of *Thatcher v. Powell*, 6 Wheat. 119: "When a court exercises an extraordinary power under a special statute which prescribes its course, that course ought to be strictly pursued, and *the facts which give jurisdiction* ought to appear on the face of the record, otherwise the proceedings are not *merely voidable*, but absolutely void, as being *coram non judice*."

VALENTINE, J. This was an action founded upon a supposed *470 judgment claimed to have been rendered by the circuit *court of Barbour county, Alabama. The defendant in error (defendant below) denies the validity of said judgment. The court below held it to be void; and the only question now presented to us is whether it is void or not. The only ground upon which it is claimed to be void is as follows: It is claimed that the judgment was not rendered by the regular judge of the circuit court of said county, nor by any other person authorized to render judgment in that court. The journal entry of said judgment reads as follows:

"[Title.]

JUDGMENT.

"MAY 22, 1867.

"The presiding judge being incompetent to try this cause, and the parties failing to agree upon any one to preside in his place, John Gill Shorter was selected by the clerk to try the cause; and thereupon came the plaintiff by attorney, and the defendants, being called, came not, but made default. It is therefore considered by the court that the plaintiff recover of the defendants the sum of \$1,910 for his damages, and also the costs in this behalf expended, for which let execution issue."

Section 758 (640) of the Revised Code of Alabama reads as follows: "When any judge of the circuit court is incompetent to try any case standing for trial, by reason of relationship to parties, or of having been engaged as counsel in the cause, or for any other reason, the parties to the suit must, when the same is reached for trial, nominate some attorney present in the court, who must preside as judge for the trial of such cause during that term; and, if the parties fail promptly to make such selection, the clerk of the court must nominate the attorney who shall preside over and try the cause at that term."

It was admitted in the court below that said section was in full force and operation in Alabama at the time of the rendering of said judgment, and since hitherto. It is claimed that said judgment is void for the following reasons: *First*, the record thereof shows upon its face that the judgment was not rendered by the regular judge of said circuit court; *second*, it fails to show any specific disqualification on the part of said regular judge; *third*, and it fails to show that John Gill Shorter was an attorney present in court. Now, said section 758 (640) of the Alabama Code is a sufficient answer *471 *to the first objection, for under that section it was not necessary that the regular judge should try said cause; hence we need to consider only the second and third objections, and we shall consider both of these together.

The circuit court of Alabama is a court of record, with general original jurisdiction. This is shown by section 5, art. 6, of the constitution of Alabama, (read in evidence in the court below,) by the record of the proceedings of the said circuit court, and by the certificates of the clerk and judge of said court who authenticated said record. The said circuit court had jurisdiction as a circuit court of the subject-matter of the action in which said judgment was rendered. It had jurisdiction of both of the defendants in that action by personal service of the summons upon each of them; and the whole of the record of all the proceedings in that action was introduced in evidence in the court below in this action. Hence all presumptions from silence or absence on the part of the record of said judgment should be construed in favor of the regularity and validity of the proceedings of the said circuit court, and not against them. *Galpin v. Page*, 18 Wall. 350. It is a rule of universal application that, whenever a record of a court of general or superior jurisdiction is merely silent upon any particular matter, it will be presumed, notwithstanding the silence, that whatever ought to have been done was not only done, but that it was rightly done. *Hahn v. Kelly*, 34 Cal. 392. This is the universal doctrine of the courts. Hence we think it ought to be presumed, in accordance with the express declaration of the record of said judgment, that the presiding judge of said court was incompetent to try said cause, although the record does not disclose the facts which rendered him incompetent; and we think it ought to be presumed that John Gill Shorter was an attorney present in court, although the record does not show that he was an attorney. The Alabama decisions, referred to by defendant in error as applicable to this point, have really no application whatever. They amount simply to this: . Whenever some special matter not coming within *472 the ordinary jurisdiction of *the circuit court, but belonging of right to some other court possessing only special and limited jurisdiction, is conferred upon the circuit court, to be by it heard and determined because of some disqualification on the part of the

judge of the court of special and limited jurisdiction, the circuit court will for such special matter become merely a court of special and limited jurisdiction, just like the court to which such special matter rightfully belongs; and therefore every fact necessary to give such circuit court jurisdiction of such special matter must affirmatively appear upon the face of the record of the proceedings of such circuit court, just as it should appear upon the face of the record of the proceedings of such court of special and limited jurisdiction, or such proceedings will be held to be void for the want of jurisdiction. That is, the record of the court of general and superior jurisdiction must, for this special matter, be just as full, with regard to jurisdictional facts, as the record of the court of special and limited jurisdiction. The record of the two courts for the special matter must be alike.

In the present case, however, the subject-matter of the action in which said judgment was rendered, does not belong to any court of special and limited jurisdiction. No court of special and limited jurisdiction could adjudicate upon it. But it belongs rightfully to the circuit court, and to no other court. The authority to hear and determine the subject-matter of said action is not a special authority conferred upon the circuit court, but it comes within its general and ordinary jurisdiction. It is not determined by some special statutory mode of procedure established for some court of special and limited jurisdiction, but it is determined by the ordinary mode of procedure established for the circuit court. The case is tried just as any other case is tried in the circuit court, except that it is tried before a special judge or judge *pro tem*. The record is made up in the same manner; the proceedings are under the control and within the custody of the same officers, and the record of the proceedings are authenticated in the same manner. The court, although temporarily presided *473 over by a special or *pro tem*. judge, is still *essentially the circuit court. It is not a court exercising merely a special and limited jurisdiction, but it is a court in the exercise of a general and superior jurisdiction, although presided over temporarily by a special judge; and therefore all the proceedings of said court should be examined and construed in the same manner as the proceedings of the circuit court are usually examined and construed. If otherwise, however,—if all presumptions from silence on the part of the record are to be construed against the regularity and validity of the proceedings of the circuit court in such cases,—then all such presumptions are not only to be drawn against the record of a court of general and superior jurisdiction, but they are also to be drawn against the intelligence, the care, and diligence, or the good faith, of the regular officers of that court. It must be presumed, against the officers, the judge, the clerk, and the sheriff, that they allowed a usurper to intrude into the judge's office, to take possession of all the paraphernalia of the court, and to preside over its deliberations. Such pre-

sumptions should not be allowed. On the contrary, we think all presumptions should be in favor of the regularity and validity of the proceedings, and in favor of the intelligence, diligence, and good faith of all the officers. We would refer to the following authorities as applicable to this point: *State v. Carroll*, 38 Conn. 449; S. C. 12 Amer. Law. Reg. (N. S.) 165; *Feaster v. Woodfill*, 23 Ind. 493, 497; *Starry v. Winning*, 7 Ind. 811, 314.

In the case of *Horton v. Pool*, 40 Ala. 629, 682, Judge BYRD, of the supreme court of Alabama, in delivering the opinion of the court, says: "The record should have shown affirmatively that the person chosen to preside on the trial of the cause in the court below was an attorney of the court. Code, § 640. But, without determining whether the record so shows, we are satisfied that there is no error shown by the bill of exceptions of which the appellant can legally complain." This is all there is said upon the subject in his decision.

The supreme court of Alabama, by this decision, substantially *474 says that, although the record may be silent as to whether a special judge trying the cause is an attorney or not, yet that, even where the record is attacked directly on an appeal, no error in the record is affirmatively shown of which the party attacking the record can complain. What would the court have said if the record had been attacked collaterally, as in the case now before us? It is supposed that the court would have said that the judgment was void. The court in that case affirmed the judgment of the court below, although the record was silent as to whether the special judge trying the cause was an attorney or not. And whoever heard of an appellate court affirming a void judgment? Whoever heard of an appellate court making a void judgment valid by affirming the same? Even on appeal the appellate court will not examine to see whether the judge trying the cause was legally the judge, unless the question was raised in the trial court. *State v. Anon.* 2 Nott & McC. 27; *Feaster v. Woodfill*, 23 Ind. 493. *A fortiori*, a court will not examine such a question when the judgment is attacked collaterally.

But, for the purposes of this case, suppose that the regular judge of the said circuit court of Alabama was entirely competent in every respect to try said cause, and suppose that John Gill Shorter was not an attorney present in court, then is the judgment void? Is it a nullity when attacked collaterally, as in this case? We think not. The laws of Alabama, as admitted by the parties, provide for such an officer as a special judge *pro tem*. John Gill Shorter was regularly selected and regularly installed as such officer for the trial of said cause. He took possession and control of the office for that purpose. He was duly recognized by all the officers of the court, the parties present in court, and others, as such officer. A record of his proceeding was regularly kept and preserved as in other cases, and such record was, at the time it was made, and still is, recognized as a part of the records of said court. And the present judge and clerk of said

court duly authenticate the very transcript of said record, which was offered in evidence in this case, which was held to be
 *475 *void by the court below. John Gill Shorter was in fact, beyond all doubt, a special judge *de facto* of said court. And as such judge *de facto* we do not think his proceedings can be attacked in the collateral manner in which they are now attempted to be attacked. They must be held valid and binding until attacked by some direct proceeding instituted for the purpose of attacking them. This doctrine, we think, is universally recognized and maintained. *State v. Carroll*, 38 Conn. 449; *S. C. 12 Amer. Law Reg. (N. S.)* 165; *Feaster v. Woodfill*, 23 Ind. 493, 497; *Case v. State*, 5 Ind. 1; *Starry v. Winning*, 7 Ind. 311, 314; *Jones v. State*, 11 Ind. 357; *Taylor v. Skrine*, 3 Brev. 516; *State v. Anon.* 2 Nott & M. 27; *In re Boyle*, 9 Wis. 264; *State v. Bloom*, 17 Wis. 521; *State v. Douglass*, 50 Mo. 593; *People v. Bangs*, 24 Ill. 184; *Clark v. Com.*, 29 P. St. 129; *Ex parte Strang*, 21 Ohio St. 610; *Pepin v. Lachenmeyer*, 45 N. Y. 27, 32; *People v. White*, 24 Wend. 520; *State v. Alling*, 12 Ohio, 16.

We have considered said section 758 (640) of the Alabama Code as valid and operative, because the parties to this suit agreed that it was, and nothing was introduced in evidence which tended to show that it was not valid and operative. It is in fact, however, unconstitutional and void, and the supreme court of Alabama has recently held it to be unconstitutional and void. *Ex parte Amos*, decided by the supreme court of Alabama, July 30, 1874. We cannot take judicial notice of the constitution or laws or judicial decisions of Alabama, or of any other state. They must be proved by the introduction of evidence. *Gen. St. 700, § 370*; *Porter v. Wells*, 6 Kan. *455; 1 *Greenl. Ev. § 489*; 2 *Phil. Ev. (5th Amer. Ed. Cowen & H. and Edw. Notes)*, original page 428, note 1. It is true, for the purpose of construing our own laws or of determining what our own laws are, we take judicial notice of everything that can in any manner aid us in such construction or determination, for we are bound to know what our own laws are without any proof thereof. And, as we are bound to take ju-

*476 dicial notice of *what our own laws are, we are bound to take judicial notice of everything that will in any manner aid us in determining what our own laws are. For this purpose, and so far as they are applicable, we may take judicial notice of the existence and history of the laws of every country and of every age. We may, indeed, take judicial notice of everything that can be known or understood of every law that has ever been passed, of every decision that has ever been promulgated, of every transaction that has ever occurred, of every event that has ever transpired, and of every fact that has ever existed. But except for the purpose of construing our own laws, and of determining what they are, we can know but very little except through the medium of evidence. Except for that purpose we can know the laws of other states only as they are proved to us, like other facts. Hence we cannot take judicial notice (against

the agreement of the parties) that said section 758 (640) of the Alabama Code is unconstitutional and void. We have, however, examined the constitution of Alabama, and we agree with the supreme court of that state that said section 758 (640) is unconstitutional and void so far as it attempts to authorize the selection of a special judge of the circuit court.

The judgment of the court below must be reversed, and cause remanded for further proceedings.

(All the justices concurring.)

DANIEL GILTENAN v. B. W. LEMERT.

July Term, 1874.

Quieting Title: Title of Occupant: Adverse Title. A party in the quiet, peaceable, and rightful possession of real estate, claiming title thereto, has such an interest therein, although his title may be ever so defective, that he may maintain an action to quiet his title and possession as against any adverse claimant whose title is weaker than his, or who has no title at all. [Morrill v. Douglass, 14 Kan. 301.]

*477 *Error from Neosho district court.

The case is stated in the opinion.

Hutchings & O'Grady, for plaintiff in error.

The court erred in sustaining the demurrer to plaintiff's evidence. A demurrer to evidence does not alter the rule that *the jury* are the exclusive judges of the facts. The court upon a demurrer to evidence cannot weigh the testimony, and decide upon the preponderance. The only question to be decided by the court is whether there is an *entire failure* of proof on any material question raised in the pleadings, and necessary, under the law, to be supported by some proof in order to justify a recovery.

The plaintiff had shown an exclusive and continuous possession of the land since before the action was commenced. The deed from Chouteau (who had prior possession, coupled with an equity relating back to September 29, 1865, and which had ripened into a complete legal title at the commencement of this action) was certainly evidence that plaintiff's entry was lawful, and at the least must be construed to be license from Chouteau to enter. This possession was "an incipient or inchoate title," which would "in time ripen into a complete, perfect, and absolute title," and plaintiff could "maintain an action to quiet possession" against the defendant, who "had not a paramount right,"—in fact, who had not shown even the remotest right, but who "claimed adversely" in his answer. At the time of passing on this demurrer, so far as the court was informed or the

record shows, Lemert's claim to this land was a mere idle and vexatious claim, without any foundation whatever. The patent showed the absolute legal title to be in Chouteau. That he obtained *478 his title *as a "head-right," under the fourteenth article of the treaty, is recited by the patent itself. Now, then, if no other force is given to the deed from Chouteau to Giltenan, it must be conceded that it was license from Chouteau to Giltenan, authorizing him to enter, and was given after the equity of Chouteau attached. Giltenan, then, had certainly made this case,—he was in possession of the land by written license, and consent of the owner of the fee, and a mere stranger, without a shadow of right, questioned his possession. The possession of Giltenan made out a *prima facie* case. "It is a maxim that the party in possession is presumed to have a valid title." "It is *prima facie* evidence of seizin in fee." Quiet and exclusive possession of real estate give the party holding the same a "right against every person who cannot establish a title." "This is the general rule, in respect to which there is no exception, and it has been established by a world of authorities, both in this country and in England." Tyler, Eject. pp. 70-72; Brenner v. Bigelow, 8 Kan. *496.

Stillwell & Baylies, for defendant in error.

Did the court err in sustaining the demurrer of the defendant to the evidence of plaintiff? In other words, did all the evidence introduced support the petition, and entitle the plaintiff to the relief asked? The plaintiff based his right to relief on the ground that he held the legal title to, and was in the quiet and peaceable possession of, the premises. Proof that the plaintiff held the legal title alone would not sustain the action. *Eaton v. Giles*, 5 Kan. *24. Nor would proof of bare possession, without some claim of right thereto, be sufficient, (*Nash*, Pl. & Pr. 654; *Seney*, Code, 417, note b;) and we submit whether, in any case, possession without the legal title would be sufficient to sustain the action. In this case the right to possession, under the pleadings, depending upon plaintiff's holding the title, in order to make out a *prima facie* case it was necessary for the plaintiff to show both possession, and the right to possession, in himself. This he failed to do. The *479 only evidence of any title in him *was that shown by the deed of Gesso Chouteau, bearing date August 3, 1867, and a patent from the government to Chouteau, of date June 10, 1870. The patent from the government showed the legal title to the premises in controversy to be vested in Chouteau on the tenth of June, 1870. The deed of August 3d, from Chouteau to plaintiff, was incompetent as evidence, and the objection of defendant to its introduction should have been sustained. The deed was executed nearly three years before the patent, and, in order to be a proper instrument of evidence, it should have been sufficient in itself to vest in the grantee any subsequently-acquired title of the grantor. *Comp. Laws* 1862, p. 354,

§ 4. It contains no covenants whatever. It does not warrant the title. It is an ordinary quitclaim deed, and did not operate, either under the statute or by way of estoppel, to vest in the plaintiff any after-acquired title of Chouteau. *Simpson v. Greeley*, 8 Kan. *586; *White v. Brocaw*, 14 Ohio St. 339; *Bruce v. Luke*, 9 Kan. *201.

It does purport to convey "all the interest he may acquire by virtue of a head-right as an Osage Indian half-breed, or by virtue of priority of settlement" on the land. This language can give no extra effect to the deed. It only shows that the grantor intended to convey such right as then was vested in him, by virtue of rights then existing. There is no covenant as to his having any right by virtue of priority of settlement. It was a conveyance, then, in the present only, and could pass only such interests as the grantor then had. It does not purport to convey any greater interest than the grantor then had, in the meaning of section 4 of Compiled Laws above referred to. Hence, on the face of this instrument, showing as it did that the grantor did not have, nor undertake to convey, the legal title, and its execution being long anterior to the patent to Chouteau, it was not a proper subject of evidence.

Again, plaintiff, having introduced the patent in evidence, was bound by its recitals. Claiming title through the grantee in the patent, he cannot deny that its recitals are true. The patent *480 shows that Gesso Chouteau was designated as one of *the half-breeds to have a head-right under the fourteenth article of the treaty between the government and the Osage tribe of Indians of September 29, 1865; that this selection included the lands in controversy in this action; and that his selection was approved by the secretary of the interior, June 15, 1869. We submit, therefore, that as the evidence of plaintiff already introduced at the time the deed was offered showed that Chouteau was a member of a tribe of Indians, and that no title to the lands in controversy was vested in him until the issuance of the patent, that he had no legal capacity to convey, and the deed bearing date August 3, 1867, was void in its inception, and passed no right or interest in the premises to plaintiff. The plaintiff, then, having shown title in Chouteau, and not connecting himself with the title, had no such possession as the law will countenance. The case is within the rule laid down in *Wood v. Missouri, K. & T. Ry. Co.*, 11 Kan. *323. It can make no difference in its application whether the trespass is upon lands of the government or of an individual.

VALENTINE, J. This was an action to quiet title to certain real estate. Both parties, by their pleadings, claimed to own the property, and to have the right of possession thereto. A trial was commenced in the court below before the court and a jury. The plaintiff below (who is also plaintiff in error) introduced parol evidence showing that he was in quiet and peaceable possession of the property. He also introduced in evidence a quitclaim deed to himself for the land, exe-

cuted August 8, 1867, by one Gesso Chouteau, a half-breed Osage Indian. He also introduced in evidence a patent for the land, issued June 10, 1870, by the government of the United States to said Chouteau. This patent was issued under the provisions of article 14 of the treaty with the Osage Indians of September 29, 1865. 14 U. S. St. at Large, 689. When all this evidence was introduced, the plaintiff rested his case. The defendant then demurred to the evidence, and *481 dence, and *the court below sustained the demurrer, and rendered judgment for the defendant; and of this ruling the plaintiff now complains.

We are inclined to think that the court below erred,—that the case should not have been taken from the jury. A party in the quiet, peaceable, and rightful possession of real estate, claiming title thereto, has such an interest therein, although his title may be ever so defective, that he may quiet his title and possession as against any adverse claimant whose title is weaker than his, or who has no title at all. Gen. St. 747; Code, § 594. Now, according to the evidence, if the plaintiff did not own this property, then Chouteau owned it. There was not a particle of evidence tending to prove that any one else owned it. There was no evidence tending to show that the defendant had the least interest in the property. Hence it would have been proper for the jury to have found that the plaintiff held the property peaceably, quietly, and rightfully, under Chouteau, although possibly the legal title may still be in Chouteau. If Chouteau was satisfied to allow the plaintiff to hold possession of the property, and to claim title thereto under said quitclaim deed, no one else could complain. Except as against Chouteau, or some other person rightfully claiming under him, the plaintiff's title was and is sufficient. It will stand against the balance of the world. This case differs widely from the case of Wood v. Missouri, K. & T. Ry. Co., 11 Kan. *328. In that case the plaintiff was merely a trespasser upon government land; in this, the plaintiff is neither a trespasser, so far as the evidence shows, nor is he located upon government land.

The judgment of the court below must be reversed, and cause remanded for further proceedings.

(All the justices concurring.)

*482 *J. P. BROWN and another v. E. C. HOLMES.

July Term, 1874.

1. **Replevin: When Action Accrues: Demand and Refusal.** The gist of the action of replevin, under our Code, is the wrongful detention, and this relates to the time of the commencement of the action. Where demand and refusal are necessary to make the detention by the defendant wrongful, such demand and refusal must be prior to the commencement of the action, and evidence of a subsequent demand is properly rejected. [Moses v. Morris, 20 Kan. 213; Bailey v. Bayne, Id. 659; Smith v. Woodleaf, 21 Kan. 720.]
2. **Chattel Mortgage: Description of Mortgaged Property.** A chattel mortgage in which the description of the property mortgaged is as follows: "23 head of beeves, four year old Texas cattle; 572 three year old Texas cattle; 29 two year old Texas cattle,—said goods and chattels now being in the possession of the said party of the first part, in Morris county, Kansas,"—is not void for uncertainty.¹
3. **Trial: Order of Evidence: Saving Questions.** In the trial of an action of replevin, proof of the title of the plaintiff naturally precedes proof of a wrongful detention by the defendant; and where the evidence of plaintiff's title is ruled out, it is unnecessary for him, in order to preserve that question for review in this court, to offer evidence of a demand and refusal, or of any other facts going to show a wrongful detention by the defendant.
4. —: **Order of Proceeding: Presumption.** Where testimony which, in the natural and logical order of a trial, ought to be the first presented, is offered and rejected, it will be presumed that it was so rejected because of some supposed intrinsic defect therein, and not by virtue of the court's control over the order in which evidence shall be introduced. [Taylor v. Mason, 28 Kan. 384.]
5. —: **Replevin.** Where plaintiff in a replevin action offered evidence of a demand and refusal made subsequently to the commencement of the action, which was properly rejected, and then offered evidences of his title to the property, which were competent and sufficient therefor, but which were also rejected, the error in rejecting these evidences will not be adjudged immaterial because of a failure to offer evidence of a demand and refusal prior to the commencement of the action.
6. **Agister's Lien.** The lien for keeping and wintering cattle is paramount to the lien of a chattel mortgage on such cattle. Case v. Allen, 21 Kan. 217.]²

Error from Chase district court.

¹Sufficiency of description in chattel mortgages, see Sims v. Mead, 20 Kan. 124; Muse v. Lehman, 30 Kan. 514; S. C. 1 Pac. Rep. 804; Griffiths v. Wheeler, 31 Kan. 17; S. C. 2 Pac. Rep. 842; Corbin v. Kincaid, 7 Pac. Rep. 145.

²If a person who has a lien for the keeping and feeding of cattle claims to detain them in his possession on more than one ground, but expressly makes mention of his lien and charges, as one of his reasons for such detention, said declaration on his part will not be considered a waiver, or an abandonment of his lien. Brown v. Holmes, 21 Kan. 687. See, also, Kelsey v. Layne, 28 Kan. 218.

Replevin, brought by Brown and another, to recover the possession of ninety-two head of cattle. Plaintiffs claimed the cattle under a chattel mortgage given to them by F. Ledrick, dated October 31, 1871, duly executed and registered in Morris county, where the cattle then were. These cattle were part of 624 head mortgaged to *488 plaintiffs to secure Ledrick's note of that date for \$6,142.90, due sixty days after date. The action was commenced in May, 1872, against Holmes, then in possession of the cattle in Chase county, who retained them upon a redelivery bond. Defendant, who was in default for want of an answer, applied to the court at the September term, 1872, for leave to answer, whereupon, "said motion being considered by the court, leave was given the defendant to file an answer *instantly*, and the cause to stand for trial at this term of court." To this order plaintiffs excepted. The answer was filed, and contained—*First*, a general denial; *second*, an allegation that the property had been taken from defendant's possession since the commencement of the action upon an execution against Ledrick, the mortgagor. Trial at the September term, 1873. Plaintiffs offered in evidence the chattel mortgage from Ledrick to themselves, which, on defendant's objection, the court refused to receive. The district court rendered judgment in favor of defendant and against plaintiffs for costs.

E. S. Waterbury, for plaintiffs.

Defendant's objection to the introduction of the mortgage was "that said mortgage is so general in its terms, and uncertain in the description of the property mentioned therein, as to be void for uncertainty, immaterial, irrelevant, and incompetent." The triple climax which closes the objection doubtless refers to the *uncertainty* in the description of the property; for that the mortgage was *incompetent* on other grounds does not clearly appear, and that it was *irrelevant* can hardly be claimed after defendant's admission that he got the cattle from Ledrick, and had no doubt they belonged to plaintiffs under their mortgage. Besides that, the mortgage and petition are consistent in the description of the property, and the identity of the cattle in question with those in the mortgage, could be shown by parol. *Lawrence v. Evarts*, 7 Ohio St. 194; *Harding v. Coburn*, 12 Metc. 333. But we understand the only question raised by the *484 objection is whether the mortgage is "void for uncertainty," "fatally defective" in the description of the property, and obnoxious to the rule in *Golden v. Cockril*, 1 Kan. *259; the hint directing attention to some source of information beyond the words of the parties, and enabling third parties to identify the property, aided by inquiries, which the mortgage indicates is found in the last clause of the description,—"*said goods and chattels now being in possession of the said party of the first part, [Ledrick,] in Morris county.*" *Golden v. Cockril*, *supra*; *Lawrence v. Evarts*, 7 Ohio St. 194; *Conkling v. Shelley*, 28 N. Y. 360; *Gardner v. McEwen*, 19 N.

Y. 123. But however defective the description, the defendant was not thereby prejudiced. He himself identifies the property. He has both actual and constructive notice of the mortgage, and has no doubt of its binding force. Neither is he a third person, or innocent purchaser, to complain of these defects, but the agent of Ledrick. If the mortgage was good against Ledrick, it was good against his herder or agister.

But it is urged by defendant that the error in excluding the mortgage is immaterial, because plaintiff could not recover without proof of a demand before suit commenced, and that we have failed in this. We answer that the record does not profess to show all the evidence offered, nor can it therefrom be inferred that other evidence of a demand and tender was not or could not be offered to support our case beyond what the record shows. Why not as well urge that the record shows no proof of the value of the cattle, or that they were not taken on execution, etc.? Indeed, if we had offered the mortgage alone, and, that being erroneously refused, our basis of title rejected, and nothing before the court with which to connect other evidence, we might have appealed directly to this court upon that error, leaving the proof of other material facts to be offered upon that trial after the validity of our title had been established.

The petition and affidavit were filed May 15, 1872, and the property was taken under the writ the following morning. Witness Munkers went, as agent of plaintiffs, to demand the cattle from *485 the defendant, and pay or tender his *charges for wintering them, and met and conversed with defendant about the cattle on the same morning, but before the property was taken, or any papers served on Holmes. The sheriff was with Munkers, and had the summons and writ of replevin to serve in case Holmes would not give up the property voluntarily. In that connection Holmes said "he had no doubt the cattle belonged to J. P. Brown & Co. under their mortgage; that he himself had no claim upon them, except for wintering them, but that other parties claimed to have a bill of sale of the cattle from Ledrick, and they had ordered him not to turn them over to Brown & Co." Having shown the foregoing facts upon the trial, the plaintiffs offered to prove that Munkers then demanded the cattle from Holmes as agent for plaintiffs, and tendered his charges for wintering them, but the court refused the evidence upon the defendant's objection that it was immaterial, and that the demand and tender should have been made before the filing of the petition as well as before service of summons. This was the middle of May. Winter was over. Holmes was still keeping the cattle. Why? Was it to secure his pay for wintering? We would have shown that we offered to pay him, and still he refused to deliver them over; and thus we would have shown, in connection with his other admissions, that his possession of the cattle was that of an agent of those who claimed the cattle in defiance of our title, and that such possession

was wrongful against us. Now, we ask, cannot the admission by the defendant of a material fact be received, though made after the petition is filed? and would not this admission show the character of the defendant's possession generally, as well before as after the filing of the petition?

Was a demand necessary? The mortgage recites that the cattle were in Ledrick's possession at the date of the mortgage. The date of the mortgage is October 31st, and of the registering, November 1st. The defendant "took the cattle of Ledrick to winter them,"

afterwards, of course. The defendant was no more entitled to *486 a demand than Ledrick would have been *had he retained the property. "The mortgagee of personal property shall have the legal title thereto, and the right of possession. Gen. St. 585, § 15. He is like one who buys and pays for an article which is to be delivered on payment. It is sufficient if he be ready to receive, and payment and delivery are immediate and concurrent acts. 2 Kent, Comm. 476, 497; 1 Pars. Cont. 571, note u. The language of the statute is not that the mortgagee shall have the right to demand possession, nor that he shall have the right of possession after demand; but his right of possession is complete under the mortgage. If the defendant had the right to retain the cattle until they were demanded, then both plaintiff and defendant had a complete right of possession at the same time, which is absurd. If the plaintiff has a complete and perfect right of possession, but the defendant has the possession, then we insist that the defendant's possession cannot be rightful. We prove the wrongful detention by the defendant when we show he withholds what belongs to us, namely, possession. Had we consented to the defendant's holding the property, the inference of wrong would have been repelled; but the record does not warrant that assumption. Whatever may have been the rights of Ledrick, while uninterruptedly and by sufferance of plaintiffs he retained the property, the case changes when he sends them out of the county, to be kept and held for keeping by a stranger. He had no right to pledge the property to our prejudice, nor to put them out of his hands.

But we submit that the evidence was admissible, even to prove a conversion, as in a case of rightful possession, since it was made before service of process, or any interference with the property by the officer, and while such service might be withheld, and the case dismissed by order of the plaintiff if the defendant should comply with the demand. Suppose you suddenly learn that the custodian of your property, living at a distance, is about to wrongfully dispose of it, shall you consume the time necessary to go and make a formal demand, *487 and thus enable him to accomplish his purpose, or *assume, on the other hand, the hazard of proving an overt act of conversion? The danger in such cases often requires the promptest action. If it be objected that the plaintiff could not truthfully make

the required affidavit till after the demand and refusal, we reply that the refusal is but the expression of a purpose that may have been formed long before; that the defendant may be a wrong-doer before he declares it. We understand the question to be an open one, so far as this court is concerned, and the view here intimated is not inconsistent with *Arthur v. Wallace*, 8 Kan. *267.

There was error in permitting defendant to file his answer out of time. The petition was filed May 15, 1872. The order of delivery was issued at the commencement of the suit, and made returnable May 25th. The summons was returnable on the same date with the order of delivery. But defendant appeared in the action by filing a motion on the sixteenth of May, and filed an answer July 8th, which answer was stricken from the files as being too late. On the eleventh of September there were filed affidavits in support of a motion for leave to answer, and on the same day defendant's motion for leave to answer was sustained. Plaintiffs had previously asked judgment for default of answer, which the court refused. The second answer was filed on the eleventh of September. The record shows the answer to have been filed out of time, and the question is upon the sufficiency of the showing in the affidavits to warrant the court in permitting the answer to be so filed. Our objection to the affidavits is chiefly that they fail to show that Holmes had any valid defense to set up. The affidavits state that he has "a defense," which is but an opinion derived from facts which are not shown, and are unknown to the court. The affidavits prove nothing beyond the negligence of the defendant's attorneys. The statute governing is section 106 of the Code, that "the court may, in his discretion," etc. If this means, not an arbitrary, but a sound judicial discretion, exercised upon a fair showing of the propriety of the act, we submit that no force was given to this qualification in the statute.

*488 *R. M. Ruggles*, for defendant in error.

The first error alleged is as to the leave given defendant to file an answer. The action of the court was of course based on the right given by section 106 of the Code; and by this section there is especially given to the court, in all cases, the right to do just what the court did do in this case. The whole matter, by the very language of this section, is entirely confided to the discretion of the court. This court has often decided that when a statute leaves a matter to the discretion of a court, this court will not review an exercise of such discretion by the court below, unless such discretion is greatly abused. See *Douglas v. Rinehart*, 5 Kan. *392, *398.

The next alleged error is the rejection of certain evidence offered by plaintiffs. The first evidence offered by plaintiffs and rejected by the court, to which the plaintiffs excepted, was the question asked of plaintiffs' only witness, Munkers. The question was as follows: "State whether, as the agent of plaintiffs, you demanded the cattle in question from the defendant." This question was objected to by

defendant on the ground that to be material it should be shown to have been made *before* the commencement of the action. To a correct appreciation of this question we must go back a little. The only witness called by the plaintiffs, Munkers, gave the following testimony immediately preceding the question asked him, above quoted: "I know the plaintiffs, J. P. Brown and W. C. Kinsolving; they are partners, doing business as J. P. Brown & Co. I know the defendant, E. C. Holmes. I went to the defendant, Holmes, on the sixteenth of May last, with written authority of the plaintiffs to demand from defendant the cattle in question, and pay or tender to him his charges for wintering the cattle through last winter. Met the defendant on that day nine miles west from Cottonwood Falls, in Chase county, and had a conversation with him about the cattle. He said that he took the cattle from F. Ledrick to winter them; that he had no doubt they belonged to J. P. Brown & Co., under their mortgage,

*489 and that he had no claim on the cattle except for *the wintering of them; that there were other parties claimed to have a bill of sale of the cattle from Ledrick, and that they had ordered him not to turn them over to J. P. Brown & Co. This was on the same day, or on the next day after, the suit was commenced; that is, the petition had been filed, but no papers served. The sheriff was with me, and had the summons and writ of replevin to serve in case Holmes would not give up the property voluntarily." Then comes this question: "State whether, as the agent of the plaintiffs, you demanded the cattle in question from defendant." Now, we contend that there can be no dispute but that this question was put by plaintiff to show a demand made *after* the commencement of the action; for the witness had already testified that he went to defendant to make this demand on the sixteenth of May,—the same day, or the day *after*, the action was commenced,—and from the record we find that the petition was filed on the fifteenth of May, and the summons and writ of replevin were issued on the fifteenth of May. Therefore, by section 57 of the Code, the plaintiffs had commenced this action on the fifteenth of May; and by the testimony of this witness we find that the day *after* the commencement of this suit he went to make the demand. Now, we submit that if it was material for the plaintiffs, in order to make out their case to show a demand at all, (and if it was not, plaintiffs were not prejudiced by the refusal of the court to permit the question to be asked,) they must have shown such a demand *before* the commencement of the action.

Of course, the necessity of showing a demand at all could only arise in case the defendant had a rightful possession of the property until such a demand was made. Now, we say that the testimony of plaintiffs' own witness disclosed the fact that defendant had a rightful possession of the cattle. He had received them from F. Ledrick (the owner at the time, so far as the record discloses) to winter. He had kept them during the winter, and had a lien upon them for his charges

for so keeping them. Now, we submit that the defendant could not wrongfully detain the possession of these cattle from the plaintiffs, or any one else, until his charges had first been paid, and a demand made of him for them; and therefore, until there had first been a tender of these charges, and a demand made by the party entitled to the possession, he could not have wrongfully detained the possession, and the wrongful detention must exist at the time of the commencement of the action; for if it does not exist at the time of the commencement of the action, how can the plaintiff make the affidavit required by section 177 of the Code, and which was made in this case?

The next alleged error is the refusal of the court to receive in evidence a certain chattel mortgage. We have three reasons to give, each showing conclusively that there was no error in the refusal of the court below to receive this chattel mortgage in evidence: The first is that there is nothing in the record to show how, in the remotest way possible, the introduction of this chattel mortgage as evidence was material to any of the issues framed in the case. The only way we think it could possibly have been material was as evidence of the title of the plaintiffs to the property in question; but as the record does not show that it was offered for that purpose, it is going outside the record to raise even this presumption. *Second.* But to give the plaintiff the benefit of this presumption, what did it or could it have availed him to prove his title to the property in question, and his right of possession to it in order to maintain his action, without proving the wrongful detention of that property by the defendant? He must, in order to sustain his action, plead and prove this wrongful detention by defendant. *Wilson v. Fuller*, 9 Kan. *190, *191. And as the record nowhere shows that he proved a wrongful detention of the property by defendant, it could be no error that prejudiced him in the least for the court to refuse to permit him to prove his right of possession and title; as that, without proving the wrongful detention by defendant, would have given him no right to a judgment in the action, and therefore he could not have been prejudiced by the action of the court. *Third.* As against a third party, at least, this mortgage was absolutely void by reason of the uncertainty of the description of the property sought to be conveyed by it. This court laid down the correct rule in the case of *Golden v. Cockril*, 1 Kan. *259, in declaring void a chattel mortgage, when the description in that chattel mortgage was fully as definite and certain as the description in this chattel mortgage under consideration; and unless this court now overrules its former decision, it must declare this mortgage void for the uncertainty of its description. And see *Blakeley v. Patrick*, 67 N. C. 40; *McCord v. Cooper*, 30 Ind. 9; *Bullock v. Williams*, 16 Pick. 33; *Montgomery v. Wight*, 8 Mich. 143.

BREWER, J. This was an action of replevin in the district court of Chase county, brought by plaintiffs in error to recover the possession of certain Texas cattle claimed by them by virtue of a chattel mortgage given by one Ledrick, the owner. The defendant asserted no title, but simply claimed a lien for wintering the cattle. Three errors are alleged.

Plaintiffs sought to prove a demand for the possession and a tender of the charges for keeping the cattle, made after the commencement of the action, but the court ruled out the testimony. We see no error in this. Under our Code the gist of the action of replevin is the wrongful detention, and this relates to the time of the commencement of the action. *Town of Leroy v. McConnell*, 8 Kan. *273, *276; *Wilson v. Fuller*, 9 Kan. *176. If demand and refusal were necessary to make the detention by the defendant wrongful, they had that effect only from the time they were made; and if defendant's possession was rightful at the time of the commencement of the suit, the action failed, and could not be upheld by proof that this rightful possession was changed into a wrongful one by a subsequent demand and refusal. Such testimony would therefore be improper. On the other hand, if the defendant's possession was wrongful, a subsequent demand and refusal were unnecessary, and the testimony was immaterial. In either case there would be no error in ruling it out. We

may say, in passing, that from the facts as disclosed in the *492 record we think the defendant's *possession was rightful. He

had a lien for the wintering of the cattle, and was entitled to the possession until his charges therefor were paid. This lien was paramount to the rights of the chattel mortgagee, as well as those of the mortgagor; nor would the fact that the mortgagor had, as is claimed, been guilty of a breach of duty towards the mortgagee in removing the cattle from the county in which the mortgage was given and filed, into another, affect the validity of this lien.

Plaintiffs offered their mortgage in evidence, but the court refused to receive it. It is insisted that this "mortgage is so general in its terms, and uncertain in the description of the property mentioned therein, as to be void for uncertainty." The description is as follows: "23 head of beeves, four year old Texas cattle; 572 three year old Texas cattle; 29 two year old Texas cattle: * * * said goods and chattels now being in possession of the said party of the first part, [Ledrick,] in Morris county, Kansas." We think this sufficient, within the rule laid down in *Golden v. Cockrill*, 1 Kan. *259. In that case the language of Mr. Justice Swan, in *Lawrence v. Evarts*, 7 Ohio St. 194, is quoted approvingly, where he says: "The principle to be deduced from these cases is that any description which will enable third persons to identify the property, aided by inquiries which the mortgage itself indicates and directs, is sufficient." And among the descriptions which seem to have met the approval of the court are these: "All the mules the mortgagor had in the territory of Kansas,

or the same then in the care of H. C. Branch, in Leavenworth county, Kansas." The similarity between the last description and that in the present case seems to render unnecessary any further discussion of these questions.

But counsel insist "that there is nothing in the record to show how, in the remotest way possible, the introduction of this chattel mortgage as evidence was material to any of the issues framed in the case."

We think counsel are mistaken in this. True, the pleadings *493 do not disclose how plaintiffs *obtained their title, but the

affidavit filed for the writ alleges that they claimed the cattle by virtue of this chattel mortgage; and so much of the testimony as is in the record shows that defendant knew of the existence of this chattel mortgage, and had himself received from the mortgagor the cattle to winter. Again, counsel contend that proof of title in the plaintiffs would avail nothing without proof of "the wrongful detention of the property by the defendant," and as no proof of the wrongful detention was made, the error was immaterial. If it appeared affirmatively that there was no wrongful detention by the defendant, it might properly be held that any error in rejecting proof of title was immaterial. But in the trial, proof of title logically precedes proof of wrongful detention; and if, when offered, the evidences of title are rejected, it is unnecessary for the plaintiffs to proceed further, and attempt to show a wrongful detention, for if the plaintiff has no claim to the property, it matters not whether the defendant or some one else has. We are aware that the trial court has considerable discretion in deciding upon the order in which evidence shall be introduced on a trial, and may, in some cases, properly refuse to let certain evidence in until other testimony has been offered. In every such case, however, the reason for the decision should be given, or the dependence of the testimony rejected upon that not offered be apparent. When testimony, which in the natural order of things ought to be first presented, is rejected, it will be presumed that it was so rejected because of some supposed intrinsic defect therein. In this case no objection was made upon the ground that other testimony ought first to be offered. It was that the mortgage was void for uncertainty,—was immaterial, irrelevant, and incompetent. This was the objection that was sustained. True, the plaintiffs first attempted to prove demand and refusal, and failed, and then offered this mortgage; but it did not follow that because they had failed to prove a demand at one time they could not prove one at another, and were not prepared to do so as soon as they had established title in themselves. We think, *494 there*fore, that the court erred in ruling out this mortgage, and that the error was material. For this error the judgment must be reversed, and the cause remanded for new trial.

It does not seem to us that the record discloses any abuse of discretion in permitting the defendant to file his answer out of time. *Sprattly v. Putnam Fire Ins. Co.*, 5 Kan. *155.

(All the justices concurring.)

ALEXANDER PATTERSON v. JAMES H. CARRUTH.

July Term, 1874.

1. **Taxation: Tax Sales: Effect of Injunction.** Under the laws of 1860, when lands had been duly advertised for sale at the regular sale-days, and had not been sold on those days by reason of injunction or other judicial proceedings, they could have been sold at any time after the dissolution of the injunction or restraining order, upon ten days' notice.
2. ———: **Tax Deed: Recitals.** A deed, therefore, otherwise regular, and reciting a sale made more than ten days after the date of the first regular sale-day, is *prima facie* valid. [Morrill v. Douglass, 17 Kan. 293; Jordan v. Kyle, 27 Kan. 192.]¹

Etror from Miami district court.

Ejectment, brought by Patterson, to recover the possession of a quarter section of land in Miami county. Carruth answered, claiming title in himself, and setting up such claim under a tax deed issued on the seventh of December, 1863, by the county clerk of Miami county, upon a tax sale of said lands made on the third of September, 1860, for unpaid taxes of 1859. Reply, general denial. The second trial was had at the September term, 1873, of the district court, (J. B. S., judge *pro tem.*, presiding.) The plaintiff having shown a regular chain of title from the patentee to himself, rested. The defendant then showed the entry of the land, August 11, 1858, offered his tax deed reciting the assessment of said land in 1859, *495 and *the sale in 1860, as above stated. Plaintiff objected, but the tax deed was admitted in evidence. Finding and judgment for defendant.

W. T. Johnson and Sherry Baker, for plaintiff.

The tax deed offered in evidence by the defendant was erroneously admitted by the court. The general law governing the assessment and collection of taxes, in force at the time of the sale, (Comp. Laws, 866, § 86; Id. 873, § 70,) provides that the sale should be held on the first Tuesday of May, or the first Tuesday of September. In the year 1860, the first Tuesday of May was the first day of the month, and the first Tuesday of September was the fourth day of the month, —of which this court will take judicial notice. The tax deed recites that the sale was "*begun and held* on the third day of September, 1860." This could not be true under any special or general act then in force; and a sale at any other time than that authorized by law is a nullity. Blackw. Tax Titles, 268; Moore v. Brown, 11 How. 414; Ronkendorf v. Tay, 4 Pet. 349; Essington v. Neill, 21 Ill. 139; Hope

¹A tax deed is not void because it recites that the sale was made on May 6, 1870, "at the sale begun and publicly held on the first Tuesday of May, 1870," when in fact May 6, 1870, was Friday, and the first Tuesday of May, 1870, was the third day of the month. Harris v. Curran, 83 Kan. 599; S. C. 4 Pac. Rep. 1044. See Norton v. Friend, *post*, *532.

v. Sawyer, 14 Ill. 254; Wilkins' Heirs v. Huse, 10 Ohio, 139; Northop's Lessee v. Devore, 11 Ohio, 359; Park v. Tinkham, 9 Kan. *615. The tax deed offered in evidence by the defendant in error is therefore void on its face, and could not start the statute of limitations to running. Taylor v. Miles, 5 Kan. *508; Moore v. Brown, *supra*; Lain v. Shepardson, 18 Wis. 59.

B. F. Simpson, for defendant in error.

BREWER, J. The only question in this case is as to the validity of a tax deed; and the one single objection to the deed is that it shows upon its face that the sale was made at a time not authorized by law. Of course, if this be the case, the deed was void, and, under the circumstances appearing in the record, would not start the statute of limitations to running. *Entrekin v. Chambers*, 11 Kan. *368. The *496 sale in this case was for taxes of 1859, and was made on the third day of September, 1860. The deed recites that the sale was begun and publicly held on that day. This was the first Monday, and not the first Tuesday, of the month. The sale, therefore, was not upon a day named in the statute as one of the sale-days. But we find introduced into the tax law, for the first time, in 1860, this provision: that if lands duly advertised for sale at either of the regular sale-days are not sold because of injunction or other judicial proceedings, they may, after the dissolution of the injunction or restraining order, be sold at any time on ten days' notice. Laws 1860, p. 219, § 70. Under this authority a sale might, in certain cases, be legally held on any day more than ten days after the first sale-day, —the first Tuesday of May,—and a deed reciting a sale at such time would, if otherwise regular, be *prima facie* valid. Of course, such a deed could be shown to be void by proof that the sale on the regular sale-day had not been stopped by injunction or other judicial proceeding; but in the case before us no such proof was offered, and the case stands upon the *prima facie* showing of the deed alone. The case of *Entrekin v. Chambers*, 11 Kan. *368, is not in point here, as the sale in that case was in 1859, and before the provision heretofore noticed was in force.

There being no other objection made to the deed, the judgment will be affirmed.

(All the justices concurring.)

v.13k—24

ST. JOSEPH & D. C. R. Co. v. CHARLES T. CALLENDER.

July Term, 1874.

1. **Eminent Domain: When Appropriated.** Full compensation must be first made in money, or secured by a deposit of money, before any right of way can be appropriated to the use of a corporation.¹
2. ———: **Appeal: Judgment.** This imperative rule of the constitution is not relaxed by the fact that the land-owner has appealed from the assessment of his damages by the commissioners, nor by the fact that on such appeal he has recovered a judgment for the amount thereof.
- *497 *3. ———: **No Right to Land nor Possession until Payment.** Where such judgment for damages is not paid, and it appears that pending the appeal the railroad company entered upon his land and constructed its road, and it does not appear that the land-owner had any actual knowledge of such entry and occupation, or in any manner consented thereto, a judgment in favor of the land-owner, in an action of ejectment for the recovery of possession, will not be reversed. [Central Branch U. Pac. R. Co. v. Atchison, T. & S. F. R. Co., 28 Kan. 465.]

Error from Washington district court.

The case is stated in the opinion.

Doniphan & Reid and *J. D. Brumbaugh*, for plaintiff in error.

The proceedings to condemn were commenced under sections 10 and 11 of the charter of the company, (Acts 1857, p. 196,) which have been fully complied with. The defendant, upon his appeal, obtained a judgment for a large sum of money, and cannot now be permitted to go back and eject the party, and then collect his judgment at law. There is no testimony to show the judgment is not good.

The owner having stood by for nearly two years, and permitted the expenditure of large sums of money in improving the property, will not be permitted to reclaim the property. *Goodin v. Cincinnati & W. C. Co.*, 18 Ohio St. 169. The defendant in error had taken his option to obtain compensation by appeal, and acquiesced in the occupation of the land.

The district court seems to have ruled for defendant in error simply because plaintiff in error filed no bond, under section 2, p. 156, Laws 1870, after the appeal was taken, January 15, 1872. We claim that under our charter we could not be compelled to file any bond, and that the provision regarding a bond was merely intended to
 *498 aid the road to be *built, and not to delay the work by injunction or dilatory proceedings, and it was optional with the company to file such bond in case either an action of injunction or ejectment was commenced against it while the road was building.

¹ See, also, *City of Kansas v. Kansas Pac. Ry. Co.*, 18 Kan. 331; *St. Louis, L. & D. R. Co. v. Wilder*, 17 Kan. 247; *Blackshire v. Atchison, T. & S. F. R. Co.*, post, *514.

Here, as shown by the pleadings, the road was completed and running over the land long before the appeal was taken.

The plaintiff in error is operating a railroad over the land in controversy, and it has thereby become a public highway. *Oleott v. Supervisors*, 16 Wall. 678. It would be against public policy to prevent carrying passengers and mails over the road.

All the right the railroad could get would be an easement, (*Kellogg v. Malin*, 50 Mo. 498;) and ejectment will not lie for an easement, (*Washb. Easem. & Serv.* 660, 663; *Wilklow v. Lane*, 37 Barb. 244; *Redfield v. Utica & S. R. Co.*, 25 Barb. 54.)

The essentials of ejectment, to entitle a plaintiff to recover, were, at common law, title, lease, entry, and ouster. We have no lease, but title. Entry and disseizin are still necessary. *Adams, Eject.* 18. Disseizin is the turning out. *Tyler, Eject.* 79. The right to a fee and easement can exist in the same estate. Each can sue to vindicate its rights: one to enforce its seizin, and the other to prevent disturbance of easement. *Washb. Easem. & Serv.* 660. The easement is not affected by a judgment in favor of a stranger against the owner of the separate estate, in ejectment. *Washb. Easem. & Serv.* 660; *Hancock v. Wentworth*, 5 Metc. 446; *Ketchum v. Johnson's Ex'rs*, 4 N. J. Eq. 371. Where the legislature authorizes an act to be done, the courts will not hold it a trespass if the law has been pursued. 1 *Amer. Railway Cases*, 166, 167.

A party may renounce his constitutional rights, and waive his claim. *Sherman v. McKeon*, 38 N. Y. 274; *Baker v. Braman*, 6 Hill, 47. The proper and only remedy on the part of defendant in error is to enjoin the use of the property when the suit in the district court upon the appeal is finally determined. *Peterson v. Ferreby*, 30 Iowa, 327. It seems, from the authorities in reference to ejectment against railroad companies, that the action cannot be maintained after the land-owner has permitted the road to be built and operated for the benefit of the public. The judgment in favor of the defendant in error in the district court is still in force, and binding upon plaintiff in error.

J. W. Rector and *W. D. Webb*, for defendant in error.

"No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or secured by a deposit of money, to the owner." *Const. Kan. art. 12, § 4*; *Williams v. New York Cent. R. Co.*, 16 N. Y. 97; *Gray v. First Div. St. P. & P. R. Co.*, 13 Minn. 315, (Gil. 289;) *Stewart v. City of Baltimore*, 7 Md. 500; *Carli v. Stillwater & St. P. R. Co.* 16 Minn. 260, (Gil. 234;) *Sedg. Const. Law*, 526. The plaintiff in error should have deposited the amount of the judgment in the court below, at least; but a bond should have been executed to defendant in error immediately upon the taking of the appeal, and only upon the execution of such bond could the railroad company hold possession or use the land. *Laws 1870, c. 74, pp. 155, 156.* This not

having been done, either injunction or ejectment will lie. *Eidemiller v. Wyandotte City*, 2 Dill. 376; *Henry v. Dubuque & P. R. Co.*, 10 Iowa, 540; *Childs v. Shower*, 18 Iowa, 259; *Moss v. Oakley*, 2 Hill, 269; *McClinton v. Pittsburg, Ft. W. & C. R. Co.*, 66 Pa. St. 404; *Shepardson v. Milwaukee & B. R. Co.*, 6 Wis. 605; *Powers v. Bears*, 12 Wis. 214; *Loop v. Chamberlain*, 20 Wis. 135.

BREWER, J. The facts in this case are briefly as follows: In June, 1871, the plaintiff in error commenced proceedings to condemn the right of way through lands of defendant in error, situate in the county of Washington. Commissioners were duly appointed, who assessed the damages at \$66.10. This amount was deposited with the county treasurer. All the proceedings were regular, and conformed to the statute. Dissatisfied with the award of the commissioners, Callender appealed to the district court, and in August, 1872, obtained a verdict and judgment for \$1,200. Notwithstanding the appeal the railroad company entered upon Callender's land, constructed its road, track, etc.,—is now using it for the running of its trains. Upon the taking of this appeal by Callender no bond was filed by the company, as required by section 1 of chapter 74 of the Laws of 1870, *500 and no other *money has ever been paid or deposited than the \$66.10 awarded by the commissioners. The judgment of the district court remains unsatisfied. In March, 1873, Callender commenced an action of ejectment to recover the possession of the land taken by the company. The district court rendered judgment in his favor, and of this judgment plaintiff in error complains.

Upon the facts above stated, was Callender entitled to recover? The constitution, article 12, § 4, provides that "no right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or secured by a deposit of money, to the owner." The amount of compensation to which Callender was entitled has been finally determined to be \$1,200. This has not been paid or secured by a deposit of money. The right of way has not, therefore, been appropriated to the company, and Callender is still the owner, and entitled to the possession. As against this, it is insisted that Callender has obtained and still holds a judgment for the damages, and that if permitted to recover in this action he will have both the land and judgment for damages for its appropriation; that he stood by for nearly two years, and permitted the company to occupy and expend large sums of money in improving this land, and therefore it is too late for him now to question its right to occupy; that he elected to pursue his remedy for damages, and must abide by that election. So far as regards the first part of this objection, it is enough to say that the recovery of possession would operate as a satisfaction of the judgment for damages, and any attempt thereafter to enforce its collection would be restrained, and satisfaction ordered to be entered of record; nor could the plaintiff

assign his judgment so as to subject the company to double loss. Either his assignment would be so far a guaranty to the assignee of an irrevocable right to enforce the collection of the judgment as to estop him from disturbing the company's possession, or else the assignee would take the judgment subject to the risk of having it satisfied by the assignor's recovery of possession. This judgment is simply the final determination, in the manner pointed out by the statute, of the amount to be paid for the right of way. By payment the right of way passes to the company. Without it, nothing passes.

In regard to the latter part of the objection, it may be remarked that the record shows no formal assent to, nor even any actual knowledge of, the occupation by the company. The evidence is not preserved, and we have simply the pleadings, findings, and judgment. True, the court finds that Callender was the owner, and in possession prior to the entry by the company; but this may mean that constructive possession that follows title, or it may mean possession by tenant. It does not necessarily import actual occupation, or actual knowledge of the company's entry and improvement. Now, a party ignorant of another's entry upon his land, and expenditure of money and labor in improvements thereon, can hardly be said to have so acquiesced in such entry and improvement as to be estopped from thereafter setting up his own rights to the land. But conceding that possession, as stated in the findings, means actual occupation, and implies actual knowledge, and still we think the doctrine of estoppel will not help the plaintiff in error. Both the company and the land-owner act with knowledge that the right of way cannot be appropriated until full compensation therefor has been first made in money, or secured by deposit of money. Of course, this deposit must be such as secures full compensation. A deposit of \$66.10 does not secure full compensation for \$1,200 damages. The company initiates the proceedings, and summons the land-owner before a tribunal for the assessment of his damages. All the proceedings are in conformity to law, and the assessment is made,—an assessment in this case, as appears from the verdict of the jury, grossly inadequate to the actual damages sustained. All that the land-owner can now litigate, so far as these condemnation proceedings are concerned, is the amount of damages. There is no secret defect in those proceedings which he is now for the first time springing upon the company, ignorant of its existence. He concedes that all is regular. He initiates no new proceedings, but simply pursues those already initiated by the company. If he does not appeal, the company acquire the right of way, and he must be content with the award of the commissioners. Hence it seems hardly fair to say that he elected to pursue a mere claim for damages, and waived all his rights to the land. By his appeal, however, he gives notice to the company that the amount awarded is not full compensation, and that

more must be paid before any right of way is appropriated. If after this notice, and without his consent, the company sends its workmen onto his land, and builds its road, what room is there for the application of the doctrine of estoppel? There is no misrepresentation—no concealment—on the part of the land-owner. The company acts with full knowledge of his rights and claims, and its own obligations. It was a trespasser *ab initio*, and ought rather to atone for the trespass than to attempt to make that trespass a means of wresting the land-owner's property from him without compensation. The case of *Dater v. Troy T. & R. Co.*, 2 Hill, 629, is strongly in point. There the act incorporating the company authorized it to condemn the right of way, provided for the appointment of commissioners, and the assessment of damages, and declared that if, upon the making of such assessment, the amount thereof was deposited to the credit of the land-owner, and notice thereof given to him, the company should then become seized of the land in fee-simple. It also authorized an appeal from the assessment of the commissioners to the chancellor. Commissioners were appointed, the assessment made, the amount deposited, and notice given,—all in conformity to the statute. The company then entered and took possession of the land. *Dater* appealed, and on the appeal a larger amount was awarded him. This amount not being paid, he brought ejectment, and the action was sustained.

See, also, *Loop v. Chamberlain*, 20 Wis. 135; *Henry v. Du-buque & Pac. R. Co.*, 10 Iowa, 540; *Richards v. Des Moines V. R. Co.*, 18 Iowa, 259; *McClinton v. Pittsburg, Ft. W. & C. Ry. Co.*, 66 Pa. St. 404.

We are aware of decisions seemingly adverse to the views here expressed. Among them are *McAulay v. Western Vt. R. Co.*, 33 Vt. 311; *Goodin v. Cincinnati & W. C. Co.*, 18 Ohio St. 169, and a late case, *Provost v. Chicago, R. I. & P. R. Co.*, decided by the supreme court of Missouri, and reported in 1 Cent. Law J. 509. Yet these cases are not exactly parallel with this. In the opinion in each of those cases, stress is laid on the fact that the land-owner had full knowledge of the acts of the company in entering upon his land and constructing the road. In the first case the occupation had been continued some eight years before the action was brought. The land-owner had, prior to any occupation to the company, signed an agreement to take stock of the company in payment of his damages, (an agreement which he subsequently seemed anxious to avoid,) in reference to which the court says: "He does not seem to have insisted that the first appraisal should be deposited during the pendency of the appeal, and before the work proceeded further. His great desire seems to have been that the damages should be agreed upon, and that he should be released from all claim under the written agreement to accept stock. To this extent his remonstrances were loud, and sufficiently intelligible. It appeared, also, that after the damages had been finally ascertained the stock therefor was duly tend-

ered and refused." It would seem a reasonable inference from the facts, as stated in that case, that the land-owner had waived his right to insist upon prepayment. In the second case the plaintiffs were stockholders in a canal company. A railroad company desired the bed of the canal for its railway track, and, the canal company being much embarrassed, the president of the railroad company bought up a majority of stock at very low rates, put in a new board of directors in the interest of the railroad company, and then the directory of the two companies, by agreement, and without referring the matter to any commissioners or jury, fixed the damages to be paid to *504 the canal company at a *grossly inadequate sum. The railroad company took possession of the canal, constructed its road, and was in full possession, operating its trains, etc., when the plaintiffs brought their action, asking that the pretended sale or condemnation be set aside, and the railroad company be enjoined from further use of the canal-bed. The supreme court, conceding the invalidity of the sale, held that the plaintiffs were too late to obtain relief by injunction, though they might proceed to obtain full compensation. Quoting from a prior opinion, the court says: "Before a stockholder can be entitled to a remedy by injunction against such departure from the original objects of the incorporation, he must have shown himself prompt and vigilant in the assertion of his rights as such stockholder. It will not do for him to wait until the mischief of which he complains is accomplished, fortunes expended, and great public interests created. If he does, he must be held to have acquiesced in the change, or to content himself with some other form of remedy." *Prima facie*, the transfer of the canal-bed was valid. The regular officers of the canal company had executed the proper conveyances. Upon the faith of this apparently valid transaction, improvements had been made, and large sums of money expended. The invalidity of the transfer grew out of the bad faith of the officers of the canal company. If the stockholders did not interfere at the first possible moment to prevent the wrong attempted by their officers, and to prevent innocent parties from expending money on the faith thereof, it might well be that equity would refuse to interfere further than to secure them adequate compensation. The case from Missouri is more nearly parallel. Indeed, the only important difference is that in that case it appears that the land-owner was present all the time, and had full knowledge of the company's operations in entering upon and constructing its road-bed over his land. His failure to object to this was held a waiver of his right to recover possession, though it was said that "a court of equity would unquestionably interfere, if necessary, and place the road in the hands of *505 receivers until the damages were paid from the *earnings."

It may be remarked, in reference to each of these cases, that the constitutions of those states have no such stringent imperative provision as is found in ours. At any rate, we cannot assent to the

doctrine that, while litigating, in a proceeding which the company has instituted, the amount of damages to which he is entitled from the appropriation of his land to its use, the land-owner must also resist, by force or judicial proceedings, the entry upon his land, or lose the plain remedy which ordinarily accrues when another party is found in wrongful possession thereof.

The judgment of the district court will be affirmed.
(All the justices concurring.)

ST. LOUIS, K. C. & N. RY. CO. v. G. W. PIPER.

July Term, 1874.

1. **Common Carrier: Railroad Company as Carrier of Stock: Contract: Negligence.** The St. Louis, Kansas City & Northern Railway Company, owning and operating a line of railroad from Kansas City to Mexico, and there connecting with another road running to Chicago, made a contract to "forward" certain cattle from Kansas City to Chicago, stipulating therein that the shipper should "take care of the cattle while on the trip," and that "it, and connecting lines over which such freight might pass, should not be responsible for any loss, damage, or injury which might happen in loading, forwarding, or unloading, by suffocation, * * * or by any other cause, except *gross* negligence," and that "it and such connecting lines should be deemed merely *forwarders*, and not common carriers, and only liable for such loss * * * as might be *gross* negligence only, and not otherwise." *Held*, that said St. Louis, Kansas City & Northern Railway was liable as a *carrier* for the transportation the entire distance, and was responsible for any loss or injury occurring from *ordinary* negligence, whether such negligence was on its own or connecting line.¹

2. **Trial by Court: General Finding: Conflict of Testimony.** Where the case in the district court was tried before the judge without a jury, *506 and *no special findings of fact were made, but only a general finding, and judgment for the plaintiff, and there was some testimony tending to show negligence, this court will not reverse the judgment, although such testimony was not very conclusive, and although there was strong conflicting testimony. [Winstead v. Standeford, 21 Kan. 272.]

Error from Douglas district court.

The case is stated in the opinion.

Pratt & Ferrey, for plaintiff in error.

The contract in nowise tended to show a liability on the part of the railway company for loss or damage happening beyond its own line. By its terms the St. Louis, Kansas City & Northern Railway Company undertook simply the duties of a forwarder,—at least, be-

¹See the full note of cases, on the liability of common carriers, to the case of Missouri Val. R. Co. v. Caldwell, 8 Kan. 166.

yond its own line. These duties it performed by delivering the cattle at Mexico to the Chicago & Alton Railway Company, the next connecting carrier in the line of transit from Kansas City to Chicago, by way of Mexico and Louisiana. *Roberts v. Turner*, 12 Johns. 282; 2 Redf. Rys. 114; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318.

The railway company not being by law a common carrier beyond its own line, no reasons of public policy can intervene to prevent its stipulating, in the contract by which duties are assumed beyond its line, for such exemptions from liability as may be agreed upon. In

the contract in question it was expressly agreed that this company should only be liable for such loss, damage, or injury as might be occasioned by *gross negligence*, and not otherwise.

If this court should construe this contract as imposing upon this company a liability for damage occurring beyond its own line, still there could be no recovery in this case without showing that the damage sustained was caused by gross negligence of this company, or of the connecting line; and upon the party claiming to recover devolved the burden of showing negligence. *Kansas Pac. Ry. Co. v. Reynolds*, 8 Kan. *623. There was no proof of negligence of any degree or kind. The delay at Louisiana was caused by the formation of an ice gorge in the Mississippi river, and was simply an act of God. The unloading the cattle at Louisiana, and not taking them over the river the night of the arrival there, was, beyond any question, because Piper thought that the cattle had been a long time without water and feed, and did not wish to go on without feeding and watering them. On the direct examination of Piper he testified as follows: "When we got to Louisiana the cattle had been on the train 25 or 26 hours, which is considered a long time without feed." On his cross-examination he says: "I talked with Murray about sending the cattle on that night. He expressed himself anxious for me to stay over at Louisiana. I told him that the cattle had not been fed or watered for a long time, and he said he had rather I stayed over there than go on that night. He did not tell me I had better go over the river that night." This testimony of defendant determines two facts: *First*, that Piper thought that his cattle ought not to go beyond Louisiana without being fed and watered; *second*, that Murray, the agent of the Chicago & Alton Railroad Company at that point, did not refuse to transport the cattle over the river that night, but simply expressed his preference that Piper should stay over at Louisiana that night. The inference is obvious that if Piper had desired to go on that night he could have done so. What evidence is this of gross negligence, or of any negligence whatever, on the part of the railway company?

But, on examination of the testimony of Murray and Piper, the conclusion is irresistible that the cattle were unloaded and delayed over night at Louisiana simply because Piper would not go on until the cattle should have been fed and watered. To do this necessitated their being taken to the stock-yards and un-

loaded, and consequently detained till the train should leave for Chicago on the following day. The ferry-boat made but one trip after that. The fact that a delay occurred, and that the cattle in consequence lessened in weight or value, or that the price in market declined in the mean time, raised no presumption of negligence. *Ban-kard v. Baltimore & O. R. Co.*, 34 Md. 197; S. C. 6 Amer. Rep. 321.

If this contract had imposed all of the duties and liabilities of a common carrier upon plaintiff in error, both upon and beyond its own line, and contained no stipulations of exemption from liability, defendant in error would not be entitled to recover under the evidence. A common carrier is not an insurer as to time of delivery. His duty is to deliver in a reasonable time, and what is a reasonable time is to be determined from all the circumstances attending the carriage. If the carrier has used reasonable diligence, and there is a delay, he is excused, even if the delay is not caused by act of God. *Angell, Car.* §§ 283-289; *Story, Bail.* § 545a; *Parsons v. Hardy*, 14 Wend. 215; *Wibert v. New York & E. R. Co.*, 12 N. Y. 245; *Conger v. Hudson River R. Co.*, 6 Duer, 376.

After the obstruction in the river at Louisiana the carrier was not bound to send the cattle to Chicago by another route. 68 Pa. St. 302.

Thacher & Stephens, for defendant in error.

It is claimed by the motion for a new trial that the judgment is not sustained by sufficient evidence. The evidence and the written contract show that plaintiff in error, though employing a connecting line, was nevertheless a common carrier from the point of shipment to the terminal point. *Hill Manuf'g Co. v. Boston & L. R. Corp.*, 104 Mass. 122. The contract was one to "forward" the cattle, which means the same as "transport" or "carry." *Mercantile Mut. Ins. Co. v. Chase*, 1 E. D. Smith, 121. The clauses of the contract which plaintiff in error relies on to shield itself from liability are as follows:

"And that the party of the first part, and connecting lines
*509 *over which such freight may pass, shall not be responsible for any loss, damages, or injury which may happen to said freight in loading, forwarding, or unloading; * * * by any accident in operating the road, or delay caused by storm, fire, failure of machinery or cars, or obstruction of track from any cause, or by fire from any cause whatever; or by any other cause, except gross negligence; and that said party of the first part, and such connecting lines, shall be deemed merely forwarders and not common carriers, and only liable for such loss, damage, injury, or destruction of such freight as may be caused by gross negligence only, and not otherwise." While it may be an open question in this state whether common carriers will be permitted to limit their common-law liability, yet it cannot be doubted that courts more and more look with aversion on such contracts, and are disposed to construe such exemptions strictly. *Missouri Val. R. Co. v. Caldwell*, 8 Kan. *244; Alb.

Law J., April 26, 1873, p. 265. But the damage in the case at bar resulted from the grossest negligence, if not fraud, of plaintiff in error. It undertook to transport these cattle to Chicago by railroad, when it knew there was great danger of its being unable to do so, and yet concealed this fact from the shipper. The loss happened on account of this existing difficulty in crossing the river. Moreover, when the peril was first made known to Piper at Mexico, he urged the agent of the plaintiff in error to send him to Chicago by one of two routes, on which there was no obstruction, and so fulfill its contract. This the agent declined to do, but forwarded the stock to a point where he had good reason to believe there would be great difficulty in carrying out the contract. Moreover, the record shows inexcusable delay and negligence in not seizing the first opportunity after the cattle had been rested to send them on to their destination. No reason whatever is given why the cattle were not taken over the river the next morning, when the ferry-boat passed over. The company knew of the increasing hazard and danger from delay, and yet took no measures to expedite the cattle forward.

Then, too, it delayed several days in sending them over on
 *510 the private ferry. It could have done *so several days sooner than it did. Besides, it is disclosed that the carrier was urged to send the cattle by some other route after they reached Louisiana, as it could have done by sending them a three-hours ride back to Mexico. Now, the court, sitting as a jury, found that these acts, or failures to act, on the part of plaintiff in error amounted to a clear violation of its contract. This being the decision of the court on evidence clearly competent, and fully tending to establish the facts necessary to such a determination, it is difficult to see how any wrong has been done plaintiff in error.

BREWER, J. On the twenty-seventh of November, 1872, Piper shipped from the stock-yards at Kansas City, by the railway of plaintiff in error, a lot of cattle to Chicago. The shipment was under a written contract, of which the following is a copy:

"This agreement, made this twenty-seventh of November, 1872, between the St Louis, Kansas City & Northern Railway Company, party of the first part, and G. W. Piper, care Hugh, Reeves & Sturgis, party of the second part, witnesseth that the party of the first part will forward for the party of the second part the following freight, to-wit, two cars of cattle, 35 head, M. or L., from Kansas City to Chicago, at the rate of \$70 per car, which is a reduced rate, made expressly in consideration of this agreement; in consideration of which the party of the second part agrees to take care of said freight while on the trip, and load and unload the same at his or their own risk and expense; and that the party of the first part, and connecting lines over which such freight may pass, shall not be responsible for any loss, damage, or injury which may happen to said freight in loading, forwarding, or unloading; by suffocation, or other injury caused by

overloading cars; by escapes from any cause whatever; or by any accident in operating the road; or delay caused by storm, fire, failure of machinery or cars, or obstruction of track from any cause, or by fire from any cause whatever; or by any other cause, except gross negligence; and that said party of the first part, and such connecting lines, shall be deemed merely forwarders, and not common *511 carriers, and only liable for such loss, damage, in*jury, or destruction of such freight as may be caused by gross negligence only, and not otherwise; and the said party of the second part agrees to assume all risk of damage or injury to or escape of the live-stock, which may happen to them while in the stock-yards awaiting shipment. It is also further agreed between the parties hereto that the person or persons riding free under this contract in charge of the stock do so at their own risk of personal injury, from whatever cause. Charges, \$28.50."

The transportation was delayed; the cattle were injured; their value in the Chicago market was depreciated; and the shipper was put to extra expense for feed, etc.,—for all of which he brought his action before a justice of the peace of Douglas county. He recovered a judgment of \$300 before the justice, from which the company appealed. In the district court he recovered a judgment of \$280.15, and of this the plaintiff in error now complains.

Upon the record two principal questions arise, and the first is, what liabilities were assumed by the plaintiff in error by this contract? It is insisted by counsel that the company, except as to its own line, was simply a "forwarder," and that its responsibility ceased when it delivered the cattle in good condition to the connecting line. We think this is a mistake. The company contracted "to forward the cattle from Kansas City to Chicago;" and the word "forward," as here used, seems to us to mean the same as "transport" or "carry." *Mercantile Mut. Ins. Co. v. Chase*, 1 E. D. Smith, 121. Having contracted to carry the cattle to Chicago,—a contract it was competent to make, even though the carriage involved transportation beyond its own line,—it became responsible as a common carrier, except so far as it limited that responsibility by special contract. A common carrier may, by contract, limit its common-law liability, but not so far as to discharge itself from loss occasioned by its own negligence, and this means ordinary negligence. By this contract, therefore, the plaintiff in error was only responsible for such injuries as resulted from its own negligence; but in this respect negli- *512 gence on the part of any of the par*ties employed in the transportation was imputable to it. In this case the burden of proving negligence is on the part of the shipper. *Kansas Pac. Ry. v. Reynolds*, 8 Kan. *624; *Kallman v. United States Exp. Co.*, 3 Kan. *205.

And this brings us to what, in our judgment, is by far the most serious question in the case: Does the testimony show negligence

on the part of the carriers? The case was tried before the district judge without a jury. There were no special findings of fact, but only a general finding for plaintiff. That finding finds all the facts necessary to sustain the judgment,—finds, therefore, negligence on the part of the carrier. There is a direct and serious conflict in the evidence, and if the testimony of the company's witnesses was accepted as true, the company was not responsible; and even the plaintiff's evidence makes but a scanty showing of negligence. Still, the rule is well settled that limits the inquiry in this court to questions of law, and leaves questions of fact to be settled by the trial tribunals, to be disturbed only in cases of manifest error. The reasons of this rule have been often given, and its application enforced in very doubtful cases. See, among others, *School-district v. Griner*, 8 Kan. *224; *Ulrich v. Ulrich*, 8 Kan. *402; *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. *354. And in this case there was some evidence pointing to negligence. The cattle were shipped via Mexico and Louisiana, to cross the river at the latter place. The transportation across the river at that point was by ferry. The road of plaintiff in error stopped at Mexico, and it could thence either ship by Louisiana, to cross on a ferry, or by Quincy, to cross on a bridge. When the cattle reached Mexico the agent there was aware of trouble in crossing at Louisiana, on account of ice, and was requested by Piper, if there was any doubt about the crossing, to send the cattle by Quincy. The agent, however, forwarded them to Louisiana. When the cattle reached the latter place they were unloaded, put into the stock-yards, and kept all night. The next morning the ferry-boat ran on a bar, and was fast for several days. About eight days thereafter *513 the cattle were taken out of the yards, crossed on a private ferry, driven fourteen miles, and then loaded on the cars and forwarded to Chicago. The cattle were some twenty-six hours in transportation from Kansas City to Louisiana, while the ordinary running time between the two places was sixteen to eighteen hours. Eight or nine hours were consumed in stoppages between Kansas City and Mexico, and the regular stock train had already left the latter place when these cattle reached there. After a delay of some three hours the cars was sent forward by a passenger train. Both the stock and the passenger train crossed that night at Louisiana. The agent there knew of the ice gorge in the river, and the uncertainty of crossing, and the probability of the ferry being stopped, and still caused the cattle to be unloaded and kept on the west side of the river, instead of crossing them, as he could have done, that night. The private ferry was running some three or four days before the cattle were crossed. It seems, then, that but for the delay in the running of the train from Kansas City to Louisiana,—and no explanation is given of this delay,—the cattle would have crossed the river, and been forwarded without loss or trouble to Chicago; that at Mexico, where the line of the plaintiff in error stopped, the agent knew of the doubt

as to crossing at Louisiana, and still chose to forward the cattle by that route instead of by one which avoided all danger; and that, at Louisiana, the agent, fully aware of the condition of the river, caused the cattle to be unloaded, and kept on the west side, instead of crossing them, thereby assuming the risks of the interruption of the ferry. We are not prepared to say that there was manifest error in finding from the facts, of which the foregoing is a general statement, that the company was guilty of negligence, and therefore the judgment must be affirmed.

(All the justices concurring.)

*514 *J. R. BLACKSHIRE and others v. ATCHISON, T. & S. F. R. Co.

July Term, 1874.

Eminent Domain: Proceedings: Deposit by Railroad Company not Payment. Money deposited by a railroad company with a county treasurer for the damages awarded by commissioners in condemnation proceedings, remains with the treasurer at the risk of the company pending those proceedings; and if the land-owner appeal from the assessment of the commissioners, and recover a judgment in the district court, the company is not entitled to have the amount thus deposited credited upon the judgment.¹

Error from Chase district court.

The case is stated in the opinion.

R. M. Ruggles, for plaintiff in error.

J. Safford, for defendant in error.

BREWER, J. In December, 1870, the defendant in error instituted proceedings to condemn the right of way through the land of Blackshire, one of the plaintiffs in error, situate in the county of Chase. The amount of damages awarded by the commissioners was \$577.50, and this amount was duly deposited by the company with the treasurer of the county. Blackshire appealed from this assessment of damages, and recovered a judgment in the district court for \$2,400. This judgment was brought by the company to this court, and af-

¹See *St. Joseph & D. C. R. Co. v. Callender*, ante, *496; *St. Louis, L. & D. R. Co. v. Wilder*, 17 Kan. 247; *City of Kansas v. Kansas Pac. Ry. Co.*, 18 Kan. 334; effect of appeal, *State v. Forner*, 33 Kan. 233; *S. C. 4 Pac. Rep. 357*; *State v. Curtis*, 29 Kan. 386; dismissal of, *Kansas City, Ft. S. & G. R. Co. v. Hammond*, 25 Kan. 209; provisional occupation by railroad—appeal, validity of statute, *Central Branch U. P. R. Co. v. Atchison, T. & S. F. R. Co.*, 23 Kan. 458; interest acquired, *Kansas Cent. Ry. Co. v. Allen*, 23 Kan. 285; competency of evidence, *Kansas Cent. Ry. Co. v. Allen*, 24 Kan. 33; farm crossings, *Kansas City & E. R. Co. v. Kregelo*, 32 Kan. 603; *S. C. 5 Pac. Rep. 15*.

firmed. Atchison, T. & S. F. R. Co. v. Blackshire, 10 Kan. *477.

Blackshire thereupon caused an execution to be issued on such *515 judgment, and placed in the hands of F. E. Smith, the sheriff of Chase county, the other plaintiff in error. The company tendered to the sheriff the full amount of the judgment, interest, and cost, less the amount theretofore deposited with the county treasurer, in full satisfaction of the judgment and costs. This tender the sheriff declined to accept, and thereupon the company brought its action to restrain any further proceedings for the collection of the judgment. A temporary injunction was granted by the judge of the district court restraining the collection of \$577.50 on said judgment, being the amount deposited as heretofore indicated. A motion was made to dissolve this temporary injunction, which was overruled, and now the question is presented for our consideration: To whom does the money belong when deposited with the treasurer, and at whose risk does it remain there? We think it belongs to the company, and remains at its risk. The right of way over the land does not pass until the damages, as finally ascertained, are paid in money, or secured by deposit in money. Const. art. 12, § 4. See, also, St. Joseph & D. C. R. Co. v. Callender, *ante*, *496, (lately decided by this court.) By the appeal of the land-owner the assessment of the commissioners is vacated, even as the appeal from the judgment of a justice of the peace vacates that judgment. There is then existing no determination as to the amount of compensation to which the land-owner is entitled. The parties still disagreeing, the company can get nothing until the amount of compensation is settled, and either paid or secured by a deposit of money. Until this question of compensation is settled, and payment made, the company can abandon the route selected, and select another. The fact that it has instituted condemnation proceedings does not compel it to carry them to a close, and pay the amount awarded. If it finds the assessment of the commissioners, or the award of the jury, so large as to render it expedient to go round a farm, instead of through it, it can decline to pay, and leave the land-owner undisturbed in his possession. In the case

of Carli v. Stillwater & St. P. R. Co., 16 Minn. 260, (Gil. 234,) *516 it was held that "the title to this land taken does not vest in the railroad company until the time for an appeal from the award of the commissioners has expired without such appeal, but remains in the original owner; and a quitclaim deed of the premises, executed by such owner to a third person, after the award of the commissioners is filed, and within the time allowed for an appeal, conveys the premises to such third person; and the right to the damages passes to him as incident to his ownership, and he may take an appeal from the award of the commissioners within the time allowed by the statute." Upon the same principle a conveyance by the land-owner of the premises through which the right of way was sought, intermediate the taking of the appeal and the judgment,

would pass the title, and with it the right to the damages. *Stacy v. Vermont Cent. Ry. Co.*, 27 Vt. 39; *Baltimore & S. R. Co. v. Nesbit*, 10 How. 395.

Again, suppose the assessment of the commissioners had been \$2,400, that amount deposited, and then the verdict of the jury only \$577.50, could the land-owner elect to take the \$2,400? Would he have a right to go to the treasurer, and collect the \$2,400 there deposited? Would it for a moment be claimed that it had *all* passed beyond the power of the company to recover back? Or, again, if pending the appeal, and before the trial in the district court, the land-owner had actually received the deposit from the treasurer, would he be permitted to further prosecute his appeal? Could he take the amount of the assessment of the commissioners, and at the same time litigate its sufficiency? Clearly, it seems to us, the acceptance of the money would be an affirmance of the assessment, and a waiver of any errors in it; while, if the money were his, it seems he should be privileged to take it without losing his right to full compensation for the right of way appropriated. But it is argued that the money is subject to his order; that by the constitution the right of way can be appropriated, if compensation is secured by a deposit in money; that the law has designated the county treasurer as the depository;

that the company has deposited this money with the legally-
*517 named depository,—has set it *apart as a fund for the sole purpose of being applied to payment of all damages that have been, or may be, awarded the land-owner; and that it is unjust to require the company, not merely to place its money in the hands of the law, but to become responsible for its safe continuance there. So far as the justice of the case is concerned, it is not more unjust that, in case of loss, the company should lose the money, than that the land-owner should lose his land. Indeed, as the company is the moving party, and is seeking to take from the land-owner, it is more just that it should carry all risks pending the proceedings. While it is true that the right of way may be appropriated if full compensation therefor is secured by a deposit of money, yet that deposit must be adequate security for full compensation. A deposit which is only partial security amounts to nothing. When the time for appeal has expired, then the right of way is appropriated, even though the land-owner has not received the money, and from that time the money remains with the treasurer at his risk. The deposit with the treasurer is security for the assessment of the commissioners, but the appeal vacates that assessment. The amount of damages is thenceforth an unknown quantity, and how can it be said to be secured by the deposit? We have considered and disposed of this case upon the substantial question involved in it, leaving undecided the minor questions of practice raised by counsel on either side.

The case will be remanded to the district court, with instructions to vacate the temporary injunction.

(All the justices concurring.)

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*O. B. TAYLOR v. JOHN HOSICK, Adm'r, etc.

July Term, 1874.

1. **Parties: Proper: Necessary.** Where an administrator, in pursuance of an order by the probate court, sells certain lands, belonging to the estate which he is administering, and the purchaser does not pay the purchase money; and the administrator reports all the facts connected with the sale to the probate court; and the court, without notice to the purchaser, confirms the sale; but afterwards, and without notice to the purchaser, sets the sale aside, and orders a new sale; and the administrator then sells the land a second time, and to a second purchaser; and the second sale is confirmed; and the administrator executes to said second purchaser a deed for the land; but said second purchaser neglects and refuses to pay the purchase money, and the administrator then sues him therefor: *held* that, although the first purchaser may be a proper party to the action, he is in no sense a necessary party.
2. **Filing Pleadings: Discretion of Court: Leave to Reply.** Where the plaintiff was in default for want of a reply, and the case was called for trial; and the court allowed the plaintiff to file a verified reply, putting in issue the truth of the new matter alleged in the defendant's answer; and immediately proceeded with the trial, over the objections of the defendant; but the defendant gave no reason why he did not wish to go to trial: *held*, that the whole matter was within the sound judicial discretion of the court, and, as the defendant gave no reason why he did not wish to proceed with the trial, the court did not abuse its discretion by allowing the reply to be filed, and immediately proceeding with the trial. [Grant v. Pendery, 15 Kan. 242; Wright v. Bacheller, 16 Kan. 266; Rice v. Hodge, 26 Kan. 168.]
3. **Administration: Letters: Irregularly Granted.** Where a probate court has jurisdiction to appoint some person administrator, and makes an appointment by issuing letters of administration to a person not a relative or creditor of the deceased, and without citing any of the relatives or creditors to appear and either take or renounce the administration, *held*, that although the appointment may have been erroneous, yet that the letters of administration cannot be attacked collaterally, and especially not by a person who is neither a relative, nor a creditor of the deceased. [Brubaker v. Jones, 23 Kan. 412.]
4. —: **Notice of Sale of Realty.** Where the probate court orders that notice of an application for an order to sell lands belonging to an estate shall be given to "all persons interested," etc., by publication in a newspaper, and notice is so published, and is directed to "all persons interested," etc., without giving the names of those interested, and the probate court afterwards considers the notice sufficient, and in pursuance thereof orders the sale to be made, *held*, that this court will consider the notice as sufficient.
- *519 *5. **Probate Court: Power to Set Aside Administrator's Sale.** The probate court has power to set aside an administrator's sale of real estate, where the same ought to be set aside; and where an administrator sells real estate, and the purchaser does not pay the purchase money, and the report of the administrator shows all the facts connected with the sale, and the probate court, without notice to the purchaser, confirms the

sale, and the purchaser then not only neglects, but refuses, to pay the purchase money, the court may then, in its discretion, and without notice to the purchaser, set aside the sale, and order another sale to be made.

Error from Leavenworth district court.

The case is stated in the opinion.

Clough & Wheat, for plaintiff in error.

Taylor's answer to the amended petition was, first, a general denial. A second defense, among other things, stated that Mitchell left no wife or child, or other descendants, surviving him, but that he did leave surviving him several brothers and sisters, residents and inhabitants of said county, and that neither of them ever renounced administration of said estate, and that they were not any of them ever cited for that purpose; and that said Mitchell left several creditors, citizens, residents, and inhabitants of said county; and that said Hosick was not next of kin to or of said Mitchell, nor a creditor; and that said probate court never had or acquired jurisdiction to appoint Hosick. A third defense was that one P. F. Meagher claimed that he and Mitchell were partners, and bought said lots with their partnership funds, and continued doing business as such till the death of Mitchell, and that said business is still unsettled; and that said Meagher was not cited or required by said probate court to give bond as surviving partner, and that Meagher was an inhabitant of said county; that Hosick, as such administrator, on the sixth of November, 1869, in pursuance of the orders of the probate court, sold said undivided half of said lots 29 and 30 to said Meagher for \$325, and that said probate court had approved and confirmed said sale to said Meagher, and ordered said Hosick, as such administrator, to make a deed to said Meagher therefor as said purchaser thereof; and that Meagher claims that he paid said \$325 to said Hosick, and is entitled to such deed; and that Meagher was in possession as such partner and purchaser, etc. By a fourth defense Taylor set up defects in the proceedings under which the property was sold. This answer was filed on the third of January, 1872. More than a year afterwards, to-wit, on the fifth of March, 1873, said Hosick, with leave of said district court, filed a verified reply to said answer, and then Taylor asked to have the counter-claims, causes of action, and for relief, set up in his said answer, taken as true against his co-defendant, Meagher; but the court overruled his motion in that respect, and dismissed the case as to Meagher. And then, on that fifth of March, the cause was called for trial, but Taylor announced that he was not ready, and objected to the trial then being proceeded with; but said court overruled his objection, and the trial was then proceeded with, and was concluded on that day.

From the findings of the court it appears that Hosick, as administrator, sold said lots to said Meagher; that afterwards such administrator petitioned said probate court to set said sale aside, and for

leave to resell, because said Meagher had refused to pay the purchase money aforesaid; and that said probate court then ordered that said administrator proceed and sell the interest of the deceased in and to the undivided half of said lots, but that said order was made without any notice to or appearance by Meagher. As we understand that order, the sale to Meagher was not set aside, but said probate court, without notice to Meagher or any other person, *521 *on Hosick's application, concluded it would be a good thing to resell said undivided half of said lots, and therefore ordered Hosick to do so. We submit said probate court had not power or jurisdiction to make that order. We claim that it could not have set said sale aside at that time, after having as aforesaid confirmed said sale to Meagher, otherwise than in a proceeding instituted under sections 568 to 576 of the Code of 1868. But whether it could or not, we submit that after so confirming said sale, and ordering said Hosick, as such administrator, to make a deed of the property sold to said Meagher, it could not again order the property sold. As the said Hosick complied with the requirements of law in the matter of so selling said lots, when said probate court so confirmed said sale said Meagher became entitled to a deed from said Hosick for said undivided half of said lots. Of course, there is no power in the probate court to make or direct a second sale of real estate of a decedent after having confirmed the first sale, and ordered a deed to the purchaser. The statute only authorizes the sale of a decedent's real estate; it does not authorize the probate court to sell lands a second time because of non-payment of purchase money.

And we further submit that even if said probate court had pretended to set said sale to Meagher aside, its order in that respect would have been void, both for want of notice to Meagher, and because the power of that court in the premises was exhausted by the orders in pursuance of which the property had been sold to Meagher. Whether Meagher had paid the purchase money to Hosick or not was immaterial, and furnished no reason for ordering a resale. *Ferguson v. Tutt*, 8 Kan. *370. And if we are right in claiming that such non-payment of the purchase money was not a sufficient reason for ordering a resale, it follows that said order of the eleventh of November, 1869, ordering a resale, was void, because the petition that day filed on which said order was made does not present or show such a case as is required to give that court jurisdiction to order a sale of land, and no power was ever given it to order a resale after con-

*522 firmation. *That orders of sale of the probate court are void unless a sufficient petition therefor is presented to it, see *Magee v. Rice*, 27 Tex. 491; *Haynes v. Meeks*, 20 Cal. 312; *Fitch v. Miller*, Id. 352; *Gilliland v. Sellers' Adm'rs*, 2 Ohio St. 223; *State v. Warren*, 28 Md. 338, 355; *Washington v. McCaughan*, 34 Miss. 304; *Beal v. Harmon*, 38 Mo. 435; *Snyder's Appeal*, 36 Pa. St. 166; *Lamson v. Schutt*, 4 Allen, 359; *Hall v. Chapman's Adm'rs*, 35 Ala.

553; *Ackley v. Dygert*, 33 Barb. 176; *Davenport v. Young*, 16 Ill. 548; *Hollingsworth v. Barbour*, 4 Pet. 466. If Meagher did not pay so soon as he ought to have done, the only remedy for such non-payment was a suit for the purchase money in any court having jurisdiction of the subject-matter thereof.

It further appears from the findings that said lots were resold to Taylor, December 18, 1869, and that Hosick delivered the deed to Taylor; but it appears that Taylor has not asserted any right to said lots, nor any interest therein. We submit that this last-mentioned sale is void because of the objections to the said order for a resale, and for the reason that Hosick had already once sold the same property under the order of thirtieth September, 1869, and thus exhausted his power in that respect. If for any reason said sale to plaintiff in error is void, then Hosick could not recover the purchase money. *Williams v. Morton*, 38 Me. 47; *Jones v. Smith*, 22 Mich. 360; *Hamilton v. Lockhart*, 41 Miss. 460; *Baines v. McGee*, 1 Smedes & M. 219; *Esty v. Snyder*, 41 Ill. 363.

We claim that the judgment in favor of Hosick, as such administrator, and the judgment dismissing the suit as to Meagher, ought to be reversed for error occurring at and before the trial. We submit that, under the circumstances of this case, Meagher was a proper party defendant, and that justice required that any rights and claims of his to said undivided half of said lots 29 and 30 should have been determined in the action before rendering judgment against Taylor for the purchase money thereof. The question involved in the action was whether Hosick, as such administrator, sold the property to Taylor; which he did not do if the sale to Meagher remained a valid sale, nor if said lots were partnership property of Mitchell and Meagher, and, of course, Meagher was a necessary party to a complete determination or settlement of those questions. Not only so, but if the judgment in favor of Hosick remains unreversed, those two *523 questions, including the question as to whether Meagher did or did not pay for the property so sold to him, or made improper default in the performance of his contract of purchase or not, remains an open question as to and so far as Meagher is concerned. And we submit that justice requires that those questions should be settled and determined as to Meagher before Taylor is required to pay.

Under section 118, p. 455, Gen. St. 1868, the probate court, on the ninth September, 1869, required that all persons interested in said estate be notified of the application made by Hosick for the sale of said property by publication, etc. The notice is simply "to all persons interested,"—to no one by name; and therefore we submit it was not such a notice as required by the order of ninth of September, and therefore we submit that the order of sale made on the thirtieth of September was void. There is no notice to or appearance by Meagher shown. *Hargis v. Morse*, 7 Kan. *415; *Higginbotham v. Thomas*, 9 Kan. *328, *390.

Hosick was permitted to give evidence of his appointment and qualification as administrator, but the court refused to permit Taylor to sustain his second defense by proof, or to collaterally attack the appointment of Hosick. We submit that the probate court has not power to appoint any person it chooses, administrator, in cases where the decedent has relatives residing in the county of his residence, until after those first entitled to administration have been cited, as required by section 12, p. 432, Gen. St. 1868. By said second defense it is, among other things, alleged that Hosick was neither creditor, next of kin, nor any relative of the decedent, and that said probate court did not acquire jurisdiction to make the appointment. There is nothing in the case to show that Hosick was in anywise interested in the estate, and there was no allegation in the petition of any citation or renunciation by those first entitled to administration. Hosick's appointment was void, and it was competent for Taylor to show it, and we rely thereon as a reason why the sale to him was void. In this connection, see *Cook v. Carr*, 19 Md. 1, 4; *Freedman v. Thompson*, 41 Miss. 49; *Holderman v. Graham*, 41 Ill. 363; *Crosby v. Leavitt*, 4 Allen, 410; *Adams v. Adams*, 36 Ga. 236; *Alfred v. McKay*, Id. 440; *Kearney v. Turner*, 28 Md. 408.

*324 *Hosick failed to reply within time, but waited until the case came on for trial, and then put in a verified general denial, with leave of the court, to which Taylor excepted; and the court then, on that same day, caused the trial to be proceeded with on the issues between Hosick and Taylor. We submit that it is contemplated by the Code and its amendments (see sections 105, 128, 313-315, Code, and sections 3-5, pp. 277, 278, Laws 1871) that a defendant should have a few days' time in which to prepare for trial after the filing of a reply; and we submit that it was an extreme abuse of the discretion of the court, and a great irregularity in its proceedings, for it to permit said reply to be filed out of time, and then on the same day to force Taylor to a trial of the issues made by the filing of that verified reply. Of course the presumption of law is that Taylor was thereby prevented from having a fair trial. *Mallory v. Leiby*, 1 Kan. *97, *102; *Irwin v. Paulett*, Id. *418.

Hurd & Birnie, for defendants in error.

VALENTINE, J. This was an action brought by John Hosick, administrator *de bonis non* of the estate of David N. Mitchell, deceased, against O. B. Taylor, for \$700 and interest. The principal facts upon which the action is founded are substantially as follows: David N. Mitchell, a resident and property holder, died intestate in Leavenworth county, March 7, 1868. On June 24th next following, the probate court of said county appointed John Hosick administrator *de bonis non* of the estate of said Mitchell. On September 30, 1869, the probate court, on the application of the administrator, or-

dered certain real property belonging to the estate, among which was the undivided half of lots 29 and 30, in block 78, in Leavenworth city, to be sold for the purpose of paying certain debts due from the estate which could not otherwise be paid. In pursuance of said *525 order said lots were sold November 6, 1869, *P. T. Meagher being the purchaser, and the sale was confirmed on the same day. But Meagher neglecting and refusing to pay the purchase money, the probate court, on November 11, 1869, on the application of the administrator, ordered the property to be again sold. The property was this time sold to O. B. Taylor, December 18, 1869, for \$700. On the same day the sale was confirmed by the probate court, and immediately the administrator executed a deed to Taylor for the property, and delivered it to him on the same day; but Taylor has never yet paid the purchase money for the property. Hence this action was brought and is now prosecuted by Hosick, as administrator, against Taylor, for the recovery of said purchase money. At first Hosick filed his petition in the court below against Taylor alone, but afterwards he filed an amended petition, making both Taylor and Meagher parties defendant. Taylor filed an answer to this amended petition, setting up new matter. The court gave Hosick and Meagher until January 20, 1873, to reply to this answer. They did not, however, reply within that time. Indeed, Meagher never filed any pleading of any kind, except a demurrer to the plaintiff's petition, which demurrer was sustained by the court. On March 5, 1873, the case was called for trial. Hosick's petition had not been amended since the court had sustained Meagher's demurrer thereto, and neither Hosick nor Meagher had replied to Taylor's answer. The court then dismissed the action as against Meagher, and both Hosick and Taylor excepted. The court then allowed Hosick to file a reply to Taylor's answer, verified by affidavit, and Taylor excepted. The court then proceeded with the trial of the case, over the objection of Taylor, and Taylor excepted. During the trial Taylor raised the following questions: That Hosick's letters of administration were not rightfully granted, and therefore all that Hosick had done as administrator was void; that the notice of the application for the sale of said property to pay debts was insufficient, and therefore that all the subsequent proceedings connected therewith, including both sales, were *526 *void; that the first sale was valid and subsisting when the order for the second sale was made, and therefore that the order for the second sale and the second sale itself were both void. All the rulings of the court below on these various questions were against Taylor, to which rulings Taylor duly excepted, and now assigns the same for error in this court. Although Meagher may have been a proper party to this action, we do not think that he was in any sense a necessary party. He has no possible interest in the \$700 in controversy between Hosick and Taylor; and there is no possible

defense which Meagher alone, or Meagher and Taylor together, could interpose to defeat Hosick's claim, which Taylor alone could not, with at least equal propriety and equal effect, interpose.

2. The court, in its discretion, had a right to allow said verified reply to be filed after the time for filing the same had elapsed; and also, in its discretion, as we think, had a right to immediately proceed with the trial. The reply was only a general denial, simply putting in issue the truth of Taylor's answer; and if Taylor was then as ready to prove the facts alleged in his answer as he ever could be, it would not seem that there could be much reason for him to complain of the ruling of the court. But he did not claim that he could ever be any better prepared to prove his answer than he then was; nor did he claim that he could ever be better prepared to disprove the allegations of the plaintiff's petition than he then was. Indeed, he did not even claim that he could ever be any better prepared in any respect for trial than he then was. He gave no reason why he did not wish to proceed immediately with the trial. Hence we think there was no abuse of judicial discretion in proceeding immediately with the trial.

3. The probate court unquestionably had a right to appoint some person administrator. The facts already stated gave the court jurisdiction. But it is claimed that the court should have appointed a brother, sister, or creditor of the deceased; or that the court *527 should have cited all the brothers, sisters, and creditors of the deceased to appear, and take or renounce the administration, before the court could appoint Hosick. As the brothers and sisters of the deceased were his nearest kin living, the court should have done as Taylor claims; and if the court did not do so, then the brothers, sisters, or creditors of the deceased would, in a proper proceeding, have a right to complain. But still these are not jurisdictional matters. Even if the probate court erred in the appointment of Hosick, still the appointment is valid until set aside by proper authority, and in a proper proceeding. The appointment cannot be attacked collaterally, as Taylor now attempts to do, and especially not by himself, who is neither a relative nor a creditor of the deceased. Letters of administration can be attacked collaterally only when the probate court for some reason has no jurisdiction to make the appointment, and never when the court has merely committed an error by appointing one person (who is eligible) when the court should have appointed some other person.

4. It is claimed that the notice of the application for the sale of the said property was insufficient, because, as Taylor claims, it did not follow the order made by the probate court. The order was "that all persons interested in said estate be notified of said application by publication of a notice in some newspaper," etc. The notice published under this order was directed to "all persons interested in the estate of David N. Mitchell, deceased," etc. Taylor claims that the

notice should have given *the names* of all the persons to whom it was directed. The probate court, however, considered this notice to be sufficient, and in pursuance thereof ordered both the first and the second sale thereunder. We therefore think it was sufficient. Gen. St. 455, c. 37, § 118.

5. We think the order of the probate court directing that the property should be sold a second time was valid. It is claimed that said order was and is void—*First*, because the first sale was valid, *528 and because the probate court has no *power in any case to order a second sale to be made; *second*, because no notice of the application for the order was previously given to Meagher; *third*, because the first sale was not set aside before the second sale was ordered, but is still subsisting and in full force.

First. It must be recollected that Meagher, the purchaser at the first sale, never paid the purchase money. The administrator substantially reported this to the probate court when he made his return of the sale. The administrator did not report that "the purchase money had been paid," but, on the contrary, reported "that the parties are now ready to pay said sum of money upon delivery to them of deeds," etc., plainly showing that the purchase money had not yet been paid when he made his report. And upon this return the probate court confirmed the sale. Now, a court that has power to confirm a sale, as the probate court in this state has, (Gen. St. 457, § 132,) we should think undoubtedly has the power to refuse to confirm in cases where the sale should not be confirmed; and when a court has erroneously or unadvisedly confirmed a sale, it undoubtedly has the power to set the confirmation aside; and when the court has rightly either refused to confirm a sale, or has set the confirmation aside, it undoubtedly has the power to order another sale. These propositions seem to us self-evident. The court in every case undoubtedly has the right to treat the sale as not a completed sale, or indeed substantially as no sale, until the purchase money has been paid or tendered. And if the court should at any time before that time be of the opinion that the sale should be set aside, it would undoubtedly have the power to set it aside merely for reason that the purchase money had neither been paid nor tendered. Until the purchase money is paid or tendered, the whole matter probably rests in the discretion of the court; and the court may, as it chooses, (exercising a sound judicial discretion,) hold the sale as valid, or set it aside.

Second. No notice was ever given to Meagher, or to any one *529 else, that the sale would be confirmed; and as Meagher *never completed his purchase by paying, or offering to pay, the purchase money, he had no right to expect, certainly none to demand, that the sale should ever be confirmed. He forfeited his rights by refusing to pay the purchase money; and as the sale was confirmed without notice to Meagher, and as he had no right to ask that it should be confirmed, it might properly be set aside without any notice being

given to him. Of course, if Meagher had at any time, before or after the confirmation, paid or tendered the purchase money, then the sale could not have been set aside without notice to him, and without some good reason for setting it aside being given. In cases of this kind we think it is better for the administrator and probate court to have the power to either set aside the sale and sell again, or to sue the purchaser for the purchase money, as they may think best.

Third. We think that the first sale was in fact set aside. It is true that it was not done in very explicit terms, but the petition of the administrator asked that the sale should be set aside, and a new sale ordered, and the court, in pursuance of said petition, ordered the new sale.

The judgment of the court below is affirmed.

(All the justices concurring.)

L. H. JOHNSON v. EPHRAIM BROWN.

July Term, 1874.

Sunday: Contracts. Under the Sunday laws of this state, a contract made on any day to perform any kind of labor on Sunday, save "the household offices of daily necessity, or other works of necessity or charity," is void; but a contract made on Sunday to perform labor on any other day is valid.¹

Error from Lyon district court.

Johnson sued Brown before a justice of the peace, to recover *530 ten dollars alleged to be due upon a contract for the *services of plaintiff's horse. Brown's answer was—*First*, a general denial; *second*, "that the supposed contract for the services of said stallion, set forth in plaintiff's bill of particulars, was made on the first day of the week, commonly called Sunday, and the services of said stallion were had or performed on the first day of the week, commonly called Sunday, wherefore said supposed contract was and is void, and of no effect." The evidence was clear that *the contract was made on Sunday*. The testimony was conflicting whether *the services of the horse* were had on Sunday, or on some other day. The justice instructed the jury as follows:

"(1) If you find from the evidence that the plaintiff and defendant, on a Sunday, made a contract, and that such contract contemplated and required that the services of the horse were to be done *on Sunday*, then such contract would be void, and plaintiff could not recover.

"(2) But if you believe from the evidence that the plaintiff and

¹A contract to sell cattle is valid, though made on Sunday, *Birks v. French*, 21 Kan. 288; service of order of attachment on Sunday is illegal and wrongful, *Morris v. Shew*, 29 Kan. 661.

defendant made a contract for the services of the horse, * * * and that such *services were rendered* * * * *on any other day than Sunday*, * * * the fact that *the contract was made on Sunday* will make no difference, and it will be your duty to find for the plaintiff."

The jury found for the plaintiff, and the justice rendered judgment on the verdict. Brown removed the case to the district court by petition in error, and that court, at the March term, 1873, reversed the judgment of the justice, and ordered that the case stand for trial in such court as upon appeal. From such order of reversal Johnson now appeals, and brings the record here by petition in error for review.

R. M. Ruggles, for plaintiff in error.

Bachelor & Skinner, for defendant in error.

BREWER, J. The question in this case is whether a contract made on Sunday is valid. The services contracted for were not necessarily, or by the contemplation of the parties, to be rendered, and *531 were not in fact rendered, on Sunday; for *while there is a conflict in the testimony as to when the services were rendered, the verdict of the jury, under the instructions, settles that they were not rendered on Sunday. At common law a contract on Sunday was valid; but in England, and in every state of the Union, have been enacted what are familiarly known as Sunday laws, for the prevention of labor and business upon that day. Most of these statutes prohibit both labor and business; and under the latter term the making of contracts has in many states been decided to be within the prohibition. Our own statute simply prohibits labor. It reads:

"Sec. 255. Every person who shall either labor himself, or compel his apprentice, servant, or any other person under his charge or control, to labor or perform any work, * * * on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor," etc. Gen. St. c. 31, p. 373.

In this it closely resembles the statutes of New York, Ohio, and Missouri, and the decisions in those states place the making of a contract outside the limits of the prohibition. *Merritt v. Earle*, 29 N. Y. 120; *Kaufman v. Hamm*, 30 Mo. 387; *Bloom v. Richards*, 2 Ohio St. 387. In the latter case is a lengthy and able opinion from Judge THURMAN, pointing out the distinction between the terms "labor" and "business," as well as discussing generally the subject of Sunday laws. We refer to that opinion as a clear and convincing argument that the making of a contract is not within the prohibition of a statute like ours. The thing prohibited is labor, and a contract made on any day to perform labor on Sunday, save "the household offices of daily necessity, or other works of necessity or charity," is a contract to do a thing prohibited, and therefore void; but a contract made on Sunday to perform labor on any other day is valid.

The order of the district court will be reversed, and the case remanded, with instructions to affirm the judgment of the justice.
(All the justices concurring.)

*539

*H. B. NORTON v. PATSEY FRIEND.¹

July Term, 1874.

Taxation: Tax Sales: County as Purchaser: Deed Reciting Illegal Sale Void. A certain tax deed recites, among other things, that at a certain tax sale held in Lyon county, May 6, 1863, "the treasurer of the county of Lyon having offered to pay" for the land described in said tax deed "the whole amount of the taxes, interest, and costs then due and remaining unpaid on" said land, "and payment of said sum having been by Lyon county made to the said treasurer, the said property was stricken off to said county at that price;" and there is nothing in said deed, nor in the evidence, that shows or tends to show that the land could not have been sold to some other person for said sum, provided the treasurer had not made his said offer. *Held*, that the said sale and the said deed are both void. [Magill v. Martin, 14 Kan. 80; Babbitt v. Johnson, 15 Kan. 254; Larkin v. Wilson, 28 Kan. 516.]

Error from Lyon district court.

The case is stated in the opinion.

Almerin Gillett, for plaintiff in error, contended that the tax deed was in proper form,—the form prescribed by statute,—was duly executed, witnessed, acknowledged, and certified, and should have been received in evidence.

Ruggles & Plumb, for defendant in error.

The objections to this deed are, first, that it shows the sale of two separate tracts of land together "in lump." The land is described as "the north-west *quarter* of section No. 9, and the south-west *quarter* of section No. 9, all in township 20, range 12." These tracts join, and together form the west half of a section; but they are none the less *two separate tracts of land*, as described in the deed. Each description is that of a legal subdivision, according to the United States survey; and if both were to be sold together as *one*
*533 *tract*, then the proper *description to indicate that union of the two tracts would have been "the west half of section No. 9," or "the north-west and south-west quarters of section 9." The use

¹ A tax deed need not be in the exact form prescribed by the statute, but the form should be so varied that the deed will, in every case, state the exact truth. *McCanalin v. McGuire*, 14 Kan. 284; *Bowman v. Cockrill*, 6 Kan. 190; omission to state amount for which the sale certificate was assigned by the county does not invalidate deed, *Morrill v. Douglass*, 14 Kan. 294. See *Patterson v. Carruth*, *ante*, *494.

of the word "all," following the description of the last tract, shows that more than one tract was intended. Suppose the description had been of town lots, and said "lot No. 63, on Congress street, and lot No. 65, on Congress street, all in the town of Emporia," both lots in fact joining,—and even suppose both to have been assessed, and rightfully, to the same person,—would there not be a clear indication that *two tracts* of land had been sold together? If the two quarters as above set out describe but a single tract, then an entire township or county might be lumped together, and sold in the same manner. The statute requires a *separate* listing, taxing, and sale of each tract of land. General Tax Law, §§ 11, 22, 23, 25, 30, 31, 33, 39, 42, 46, (chapter 107, Gen. St.) That a sale "in lump" avoids the deed, if shown on its face, see *Boardman v. Bourne*, 20 Iowa, 134; *Pitkin v. Yaw*, 13 Ill. 253; *Spellman v. Curtenius*, 12 Ill. 413. In the case of *Spellman v. Curtenius* the land was assessed as "the S. W. & S. E. sec. 9, T. 8 N., R. 8 E., 150 acres," and the court held that such a description was that of a single tract of land; which presents quite a different case from the one here, as will be readily seen.

The deed recites the sale as having taken place "at the adjourned sale of the sale begun and publicly held on the first Tuesday of May," while there could not be in point of law an "adjourned" sale held in May, or at any other time. A *subsequent* sale, to take place in September, was provided for, but this sale took place in May. If not the regular sale, then it could not be legally held, and that it was not we here call the deed to witness.

The land was not sold or bought in the manner prescribed by law. The deed recites that the treasurer of Lyon county "*having offered to pay*," etc. The treasurer is not authorized, as such, to bid, except upon certain conditions specified in the law, and is not authorized to *534 "offer to pay" *anything whatever. The deed further recites that "*payment of said sum having been by Lyon county made to the said treasurer, the said property was stricken off to said county at that price.*" This is a transaction wholly unknown in the law; for in the only case in which lands can be bid off for the county, the county is not required to pay anything whatever to the treasurer. It looks as though the county was speculating in tax titles. These recitals cannot be held to be evidence that the land could not be sold for the "amount of tax, penalty, and charges thereon," and was therefore "bid off by the county treasurer for the county for such amount." Section 42, p. 867, Comp. Laws; Gen. St. § 112, c. 107. The treasurer can only bid off for the county in the absence of other bidders, and the deed should show that there were no other bidders, and that in consequence of such lack of bidders the county treasurer had bid it off for the county for the amount of taxes, etc., then due. These are conditions precedent, without which the treasurer has no authority in the premises, and as such they ought to be shown. *Bush v. Davison*, 16 Wend. 554.

The county had no authority to enter the list as a competitor against private parties for the purchase of lands sold for taxes. It is necessary that the deed should show that the land was duly sold, as the statutory form requires it. In the case of sales to the county, the form must be "substantially" that prescribed in the case of sales to individuals; that is, it must show that the land was properly sold. But even if the deed would be good if the treasurer had failed to make any mention whatever of the circumstances of the sale, yet as the deed sets out, first, what he did do, and that being illegal, how can the court strike all that out, and in its stead insert other and different words, or at least a legal presumption, establishing an entirely different conclusion?

The statute provides that a deed substantially in the form therein stated shall be *prima facie* evidence of the regularity of the proceedings up to the execution of the deed. Upon sound reason, and *535 according to the authority of this court in *the case of Bowman v. Cockrill, 6 Kan. *311, that means that the form is to be varied according to the varying facts required to be recited, covering the same points, however; that is, stating the various steps taken and necessary to show the authority to make a deed. Take the case under consideration: In the case of a sale to a private party the statutory form requires a statement that the land sold was the "least quantity bid for." This is designed to secure competition in bidding, to prevent combinations, and to protect the rights of the owner by preventing a sacrifice of the whole of his estate where a part only is necessary. So, in the case of a sale to a county, substantially the same averment must be made, to-wit, "that the land was bid off by the county treasurer for the county for the reason that it could not be sold for the amount of the tax, penalty, and charges thereon." Such a construction is in harmony, not only with the language of the statute, but also with the intent of the legislature in enacting it.

The deed does not show a proper and legal assignment of the certificate of sale.

VALENTINE, J. This was an action of ejectment, brought by the defendant in error against plaintiff in error to recover the possession of certain lands and tenements situate in Lyon county. The defendant below (plaintiff here) answered, admitting his possession of the premises in question, and denying title of plaintiff. On the trial plaintiff offered in evidence a patent from the United States government to herself for the land in controversy, and rested. The defendant, then, to maintain the issues on his part, offered in evidence a tax deed, of which the following is a copy:

"Know all men by these presents, that whereas, the following described real property, viz., the north-west quarter of section No. nine, and the south-west quarter of section No. nine, all in township No.

twenty, of range No. twelve, situated in the county of Lyon and state of Kansas, was subject to taxation for the year 1862; and
 *536 whereas, the taxes *assessed upon said real property for the year aforesaid remained due and unpaid at the date of the sale hereinafter mentioned; and whereas, the treasurer of said county did, on the sixth day of May, 1863, by virtue of authority in him vested by law, at adjourned sale of the sale begun and publicly held on the first Tuesday of May, 1863, expose to public sale, at the county-seat of said county, in substantial conformity with all the requisitions of the statute in such case made and provided, the real property above described, for the payment of the taxes, interest, and costs then due and unpaid on said property; and whereas, at the place aforesaid, the treasurer of the county of Lyon and state of Kansas, having offered to pay the sum of nine dollars and ten cents, being the whole amount of taxes, interest, and costs then due and remaining unpaid on said property, for the N. W. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of section 9, township 20, range 12, which was the least quantity bid for, and payment of said sum having been by Lyon county made to the said treasurer, the said property was stricken off to said county at that price; and whereas, the said Lyon county did, on the fourth day of August, 1868, duly assign the certificate of the sale of the property as aforesaid, and all its right, title, and interest to said property, to H. B. Norton, of the county of Lyon and state of Kansas; and whereas, the subsequent taxes of the years 1863 and 1864, amounting to the sum of twenty dollars and sixty-two cents, have been paid by the purchaser as provided by law; and whereas, two years have elapsed since the date of said sale, and the said property has not been redeemed therefrom, as provided by law: now, therefore, I, J. L. Williams, county clerk of the county aforesaid, for and in consideration of the sum of ninety-one dollars and sixty-seven cents, taxes, costs, and interest due on said land for the years 1862, 1863, and 1864, to the treasurer paid as aforesaid, and by virtue of the statute in such case made and provided, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said H. B. Norton, his heirs and assigns, the real property last hereinbefore described, to have and to hold unto him, the said H. B. Norton, his heirs and assigns, forever; subject, however, to all the rights of redemption provided by law.

"In witness whereof, I, J. L. Williams, county clerk as aforesaid,
 *537 said, by virtue of the authority aforesaid, have hereunto *subscribed my name, and affixed the official seal of said county, on this fourth day of August, 1868.

"[Seal.]

J. L. WILLIAMS, County Clerk.

"Witness: O. Y. HART."

The execution of said deed was duly acknowledged and certified, and said deed was duly recorded.

The plaintiff below objected to the introduction of this deed on the ground that the same was irrelevant, incompetent, and immaterial, and showed on its face that it was void, which objection was sustained, to which ruling of the court the defendant excepted. The defendant offering no further testimony, the court then proceeded to render judgment for plaintiff. Defendant then moved for a new trial upon the ground of error occurring at the trial and excepted to by him, and that the decision was not sustained by sufficient evidence, (expressly waiving his right to demand a second trial under statute,) which motion was overruled, to which ruling defendant excepted.

The defendant in error (plaintiff below) now claims that the said tax deed is void for the following, among other, reasons: The deed shows upon its face that the land was not struck off to the county because it could not be sold to other bidders for the amount of the taxes, penalty, and charges thereon, but that the county, through the county treasurer, entered the list as a competitive bidder, made the first bid on the land, offering itself to pay for the land the amount of the taxes, penalty, and charges thereon, and thereby prevented others from making that bid, or, indeed, from making any bid as advantageous to themselves as that bid would have been, and thereby the county got the land. This claim seems to be true; and if true, it will invalidate the deed. The statute provides that "if any parcel of land cannot be sold for the amount of tax, penalty, and charges thereon, it shall be bid off by the county treasurer for the county for such amount." Comp. Laws 1862, p. 867, § 42; Laws 1866, p. 277, § 72; Gen. St. p. 1047, § 88. And this is the only law that

*538 authorizes county treasurers to bid off "lands at tax sales for the county, and this law does not authorize the county treasurer to offer to pay anything for the land, and the county is not required to pay anything therefor when the land is so struck off to the county. The deed, however, recites in this case that "the treasurer of the county of Lyon, * * * having offered to pay" for said land said "amount of taxes, interest, and costs then due and remaining unpaid on" said land, "and payment of said sum having been by Lyon county made to said treasurer, the said property was stricken off to said county at that price." There is nothing in the deed, nor in the evidence, that shows, or tends to show, that the land could not have been sold to some other person for the same price, provided the treasurer had not made his said bid or offer. Hence we think that said sale, and the tax deed founded thereon, are both void. The statute does not authorize counties or county treasurers to enter the lists as competitive bidders; nor does the law authorize counties or county treasurers to bid at all at tax sales unless the land cannot be sold to other bidders for the amount of the taxes, penalty, and costs then due thereon. Before a county or a county treasurer can bid at all, the treasurer must wait until all others have failed or refused to bid on the land the required amount. This does not seem to have been

done in the present case. A tax deed should follow the form given by statute only so far as it can do so truthfully, and where it cannot do so truthfully, it should state the facts as they really exist. The form given by statute is for tax deeds for land sold at tax sales to individuals, and when this form is used for a tax deed for land sold to a county, the form of the deed should be so modified as to correspond with the law and the facts of the case.

The judgment of the court below is affirmed.

(All the justices concurring.)

*589

*CITY OF LEAVENWORTH v. D. P. STILLE.

July Term, 1874.

1. **Municipal Corporations: Contract for Grading Streets: Special Taxes: Liability.** In 1866 D. P. Stille, under a contract with the city of Leavenworth, graded a certain street. Afterwards the city levied a special tax on certain real estate belonging to Stille's wife, and occupied by himself and wife as a homestead, and on other real estate abutting on said street, to pay for said grading, but did not provide any means for collecting said tax. Stille then commenced an action against the city to recover compensation for said grading. *Held*, that Stille had a right to insist that the tax levied on his wife's property, as well as on the other property, should be collected and paid to him, and therefore that, as the city failed to provide any means for collecting said tax, said action may be maintained as well for the grading done in front of his wife's property as for that done in front of other property.
- [2. **Homestead: Interest of Husband or Wife.** The interest of the husband in the homestead, the legal title of which is vested in the wife, is a mere right of occupancy, with a restriction on the wife's power of alienation.]

Error from Leavenworth district court.

Action commenced by Stille, in March, 1869, to recover from the city \$20,229.35, with 7 per cent. interest thereon from the twenty-third of May, 1866. In December, 1865, Stille agreed with the city to grade Fifth street, from Spruce street to Thornton street, in a certain specified manner, under the superintendence and control of the city engineer. By the same contract the city agreed to pay him 43 cents per cubic yard for the grading, and to levy a special tax therefor upon the adjoining lots and parcels of ground, as the work progressed; and it was in and by said contract further agreed that Stille should look exclusively to such special tax for his pay, if the city levied a legal tax therefor. The grading was done and accepted, and the acceptance confirmed. Certificates were issued to Stille for such grading, from time to time, as the work progressed; and the city, by ordinance passed September 4, 1866, levied a special tax on certain lots and pieces of ground to pay said sum of \$20,229.35, that sum hav-

ing been ascertained as the cost, under the contract, of the work done; and on the second of November, 1866, the city treasurer sold the lots or parcels of land against which such certificates were issued, *540 and said special taxes remained unpaid; *said sale being made under the supposed authority of ordinance No. 90, passed June 24, 1863, which was the only ordinance by which the city pretended to authorize a sale of lots and lands for such unpaid special taxes. This ordinance No. 90, so far as it pretended to authorize such sale, was held void in *Paine v. Spratley*, 5 Kan. *525; *City of Leavenworth v. Laing*, 6 Kan. *274; and *City of Leavenworth v. Mills*, *Id.* *288.

To plaintiff's petition the city answered, setting up several defenses, of which those material here are as follows: *First*, plaintiff performed a part of the work, but did not perform all of said work; *second*, that plaintiff had assigned and transferred to A. A. Higinbotham all the certificates issued to him for such grading, except those issued against his own and his wife's property, and as to such assigned certificates plaintiff was not the real party in interest; *third*, that for the distance of more than half a mile along the west side of said Fifth street plaintiff had graded the abutting lots to the width of thirty feet, leaving an equal width of said street along the east side thereof ungraded; *fourth*, that plaintiff had fraudulently procured a much larger estimate of work completed than he had performed, and for such excess had fraudulently procured certificates to be issued to him, which certificates were void. Another of the defenses set up in the answer is as follows: "And for a further defense the defendant states that at the time of the grading of said Fifth street mentioned in said petition, and for a long time prior thereto, the plaintiff and his wife, Elizabeth M. Stille, were the owners and resided upon lots 13, 14, 15, and 16, of Clark's addition of outlots, containing together twenty acres, more or less, said lots fronting on said Fifth street, and the east half of them being liable for the special tax for grading said Fifth street; that said property was prior to said grading aforesaid of but little value except as farming land, as it was inaccessible from the business portion of the city except by way of Fifth avenue and rear of 'Seigle Garden,' so called, some two miles or more, in a roundabout way; that the said plaintiff, by petition and false representations to the city council, and against the protest of a large majority of *541 the property owners who were liable of *being taxed for the grading of said Fifth street from Spruce street to Thornton street, induced the city council to order the grading of said Fifth street, as last aforesaid, a distance of three-fourths of a mile beyond where there were any persons residing on or near said Fifth street, except one or two families besides this plaintiff, and where more than four-fifths of the grading and filling on said street was done, and whereby this defendant was obliged to expend large sums of money in the building of bridges and the construction of sewers to accom-

modate said plaintiff. And defendant further says that while the legal title of a portion of said above-mentioned lots 14, 15, and 16 was, at the time the plaintiff performed the work above described, and for which this suit is brought, in said Elizabeth M. Stille, wife of the plaintiff, yet, in truth and in fact, the lots above mentioned were the property of the plaintiff, and bought with his money. And for a further defense, defendant says that the said plaintiff, as said contractor, received and accepted the certificates issued for doing all of said work, including those issued to him against the lots and tracts of land above mentioned in Clark's outlots owned by himself; and also those owned by his wife, Elizabeth M. Stille, for whom he acted as agent,—in full and complete satisfaction for the work done by him as aforesaid in grading said Fifth street, from Spruce street to Thornton street."

A demurrer was interposed by plaintiff to these two defenses, and the demurrer was sustained. The action was tried at the November term, 1869, of the district court. The district judge gave his opinion in writing. The following are the material parts of such opinion:

"The conclusions I have reached in this case are that the court must dispose of the case under an instruction to the jury to find a special verdict. * * * Really, there is but one new point in this case. All the other points raised, as far as I recollect, have been raised in other cases of a similar nature, and determined uniformly by this court in a certain way. This new question is as to the liability of the city to the contractor, where the tax is legal. In this case, according to the uniform ruling of this court, the evidence shows that the city did not levy a legal tax.

"The evidence shows that an ordinance was passed declaring *542 the improvements of Fifth street to be necessary, and *ordering the work to be done; that the city engineer totally failed to do his duty as prescribed by the ordinance in such case. The ordinance says he shall forthwith, after the passage of any ordinance declaring it necessary for the work to be done, make a plat of the street to be improved, together with the adjacent property liable to be taxed, and he shall prepare plans and specifications for doing the same. The ordinance contemplated that this shall be done before the city advertises for bids. The evidence shows that the engineer wholly failed to comply with the ordinance. Indeed, he made no effort to discharge that duty; and, so far as there have been cases before me, the evidence invariably shows that the city engineer has paid no attention to the ordinances requiring him to do that. So, it seems to me, if the city keeps an engineer in its employ who, as I might say, willfully disregards his express duty, the city ought to be held responsible for willful negligence in keeping such an officer in its employ. * * * It is one of the principal objects in having a plat and plans and specifications prepared and on file in the engineer's office that bidders may bid intelligently, so they may know what amount of earth is to be excavated. Prices for work vary very much,

according to circumstances, and a person could not probably bid in the work unless he had some knowledge before him. This requirement is for the interest of the property owners, and their benefit, and the court ought to see that that duty is performed.

"The charter contemplates that the clerk shall not advertise for bids until those plans and specifications are prepared; yet the city clerk advertises the next morning in the newspapers that bids will be received until a certain day. And he does that without taking the trouble to find out whether there are plans or specifications on file or not. In all cases the advertisement says the work is to be done in accordance with plans and specifications on file in the engineer's office, when the city clerk could have found out by stepping in the next door that there were no such plans and specifications on file. It seems to me, if I would be governed by the invariable rule, and the principles followed by courts in determining the validity of tax titles and taxes, the departure from the prescribed mode would be sufficient to invalidate the tax. It is not form without substance; it has in it something of substance. * * *

*543 "The city may levy this tax in either of three ways: It *may levy it on the property, according to its value, without regard to improvements; or according to its value generally, taking into consideration its condition, improved or otherwise; or it may levy it on the property according to its area. I think there can be no question but two of these modes are constitutional. * * *

"Here the power to improve streets is conferred on the city council. The particular mode in which that power shall be exercised is not prescribed or regulated by the statute, but is left to the city authorities. Then there is a provision in our city charter, in substance, that in no event shall the city be liable for any work or improvements done under the provisions of this act, but that the contractor shall look exclusively to the special tax for pay, provided the city shall levy a legal tax. What is a reasonable interpretation of this clause? What is the evident meaning of the language of that proviso? It seems to me it is equivalent to saying, if the city levies a legal tax, the contractor shall look to it for his pay; if they do not, the city shall be liable.

"Counsel have admitted to the court that they have failed to sustain the various charges of fraud and collusion alleged against the plaintiff. It seems to me it cannot be held that the taking of these tax warrants or certificates of sale amount to a satisfaction of his claim against the city, for the reason that these certificates are void. The proof shows that the plaintiff was not and is not the owner of the lots described in those certificates to which I have alluded, and in which the assessments undertaken to be levied have not been paid; so the evidence fails to show he sustained any such relation to the property that he was under any obligation to pay it. The proof shows the property belonged either to Levi Clark or plaintiff's wife; and, in

either case, he would have the right to recover. The mere fact that the property belonged to his wife would not prevent his recovering from the city. I shall therefore instruct the jury to find for the plaintiff, and assess his damages at thirty-three hundred dollars."

The jury, in accordance with said instructions, returned a verdict in favor of Stille for \$3,300.

*544 **H. Miles Moore* and *E. Stillings*, for plaintiff in error.

Stille in his petition alleges against the city as grounds for a recovery that the city failed to have plats made, and appraisement, etc., and to levy a legal tax. There was no allegation in the petition of any failure to make sale. The tax was levied in the language of the law, so that if the facts alleged why the tax was not legal fail to show such to be the case, we suppose the petition did not even state a cause of action. As we understand the case made by the petition, the reasons there given why plaintiff should recover have all been decided in the case of *City of Leavenworth v. Mills*, 6 Kan. *288, and that according to that decision the tax in this case was a legal tax. The further question decided in that case, as to whether the city ordinance authorized the sale, has not been made in this case. If the petition did not state facts sufficient to constitute a cause of action, of course the several demurrers to the answer should have been overruled.

Stille had sold all the tax warrants except those affecting his own or his wife's property. The evidence shows that he was in possession of the property, claiming it as his own, and that he took this contract for the purpose of enabling himself to pay the taxes on this property by doing the work himself; and after thus presenting himself before the city council as the owner of this property, and getting the contract, and collecting or selling, and having collected by others, the taxes on all other property, except that of which he was possessed, he sued the city to collect this tax, and the court instructed the jury to find for the plaintiff. We submit that it was the duty of Stille to pay the taxes, and that any purchase by him of the land was in fact a payment. If this be true, the question should have gone to the jury whether the transaction of striking this property off to Stille (at the city treasurer's tax sale for said special taxes) was not in fact a payment. If it was incumbent on him to pay as well as receive the amount, the debt was of course satisfied when made. That it

*545 was his duty to pay those *taxes, we refer to *Cooley v. Waterman*, 16 Mich. 366; *Bernal v. Lynch*, 36 Cal. 136; *Barrett v. Amerein*, Id. 322; *Bassett v. Welch*, 22 Wis. 175; *Douglas v. Dangerfield*, 10 Ohio, 152; *Voris v. Thomas*, 12 Ill. 442; *Gardiner v. Gerrish*, 23 Me. 46; *Warren v. Fish*, 7 Minn. 432, (Gil. 347.) And in such a case a purchase by him would be simply void, even if it had been admitted to be his wife's property; but this was a question on which there was evidence both ways, and one which it was proper that a jury should decide.

The instructions of the court to the jury show clearly the grounds of its decision, and, with the exceptions of two tax warrants, and the mixed question of possession and ownership of the land on which this tax had been levied, present the questions in the case as they arose on the evidence. The decision so made, and the reasons for it, we understand to be overruled in the Case of Mills, above referred to. The case itself presents to the court one of the extreme cases of human depravity which it so often becomes the duty of courts and lawyers to witness. Stille had urged the city to do this work, and, after receiving the benefit of it in the greatly enhanced value of his property, and after directly and indirectly collecting \$18,000 off the parties who resisted the doing of this work because it was a burden, and no benefit to them, he brings this suit to recover of the city his share of the tax, and thereby compel those of whom he has already collected to contribute to pay his share of this improvement, made for his particular benefit more than that of any other person.

Clough & Wheat, for defendant in error.

We claim that Stille was, as matter of law, entitled to the verdict returned,—not only to that verdict, but to one much larger in amount. If the assessment of special taxes to pay for the grading of Fifth street is illegal, the judgment in favor of Stille against the city should be affirmed, it being immaterial whether the right to such judgment is founded on the contract to pay, or by force of the proviso in section 11, p. 129, Laws 1864, the work having been done, and *546 no legal tax levied with provision to collect the same; or, as a matter entirely independent of the contract, because Stille did work for the city, which it accepted, and by its ordinance admitted the value of. *Kearney v. City of Covington*, 1 Met. (Ky.) 339; *Maher v. City of Chicago*, 38 Ill. 264; *City of Louisville v. Hyatt*, 5 B. Mon. 199; *Phillips v. City of Hudson*, 31 N. J. 143; *Payne v. Mayor of Brecon*, 3 Hurl. & N. 572; *Chapman v. City of Brooklyn*, 40 N. Y. 372; *Cumming v. Mayor of Brooklyn*, 11 Paige, 596; *Baldwin v. City of Oswego*, 41* N. Y. 132, 136; *Corbin v. City of Davenport*, 9 Iowa, 239; *Fisher v. City of St. Louis*, 44 Mo. 482.

We suppose that it is not material to inquire whether Stille's right of action for any of the tax levied was transferred to A. A. Higginbotham by the contract between him and Stille, because the tax apportioned against the lots 13, 14, 15, and 16, in Clark's addition of outlots, and lots 11, 12, 13, 14, 15, and 16, in Henry's addition, (mentioned in and excepted from the last-mentioned contract,) as required by section 5, p. 127, Laws 1864, as shown by the city engineer's estimate, amounted to the sum of \$4,003.54, which, less such sum, if any, as should be deducted therefrom, would amount to more than the sum of said verdict as rendered. It was the general duty of the city and its officers to determine where Fifth street was located; and under the contract, as well as by the requirements of law, it was the duty of the city and its officers to determine when and how,

and in what manner, it would have Fifth street graded. Stille did the work under the directions of the officers of the city, where the city and its officers claimed the street was. And the city having induced him to spend his time, labor, and money in grading the street where it directed him to, could not afterwards be heard to say he did not do his grading in the street. *City of Leavenworth v. Laing*, 6 Kan. *274; *Sleeper v. Bullen*, 6 Kan. *800; *Mayor v. Sheffield*, 4 Wall. 189; *Kearney v. City of Covington*, 1 Metc. (Ky.) 839.

If it shall be claimed that Stille had not performed the conditions and requirements of the contract on his part, then we refer to section 10, p. 129, Laws 1864, from which we see that the engineer's acceptances aforesaid, and the confirmations thereof by the city council, were final and conclusive evidence that the (work) improvement was done by Stille in accordance with the terms of the contract; and that, because of the acceptances and confirmation, no court *547 could, in any case, inquire into the question whether the improvement so accepted was done in accordance with the terms of the contract or not. *Porter v. Purdy*, 29 N. Y. 106; *Evansville R. Co. v. City of Evansville*, 15 Ind. 419, 423; *Columbia B. L. Co. v. Meier*, 39 Mo. 53; *City of Camden v. Mulford*, 26 N. J. Law, 49; *County of Knox v. Aspinwall*, 21 How. 539.

Of course, if Stille was, as a matter of law, entitled to a verdict for as much as \$3,300, it is entirely immaterial what defenses, if any, existed against the whole, or any part of the remainder, of the claim by him set forth in his petition. Of course, it was competent for Elizabeth, the wife of Stille, to own lots. And Stille did not pretend to do, and could not himself do, any act which would prejudice her in any matter connected with the special tax, any more than though she had not been his wife. Section 17, p. 699, Comp. Laws; *Moore v. Wade*, 8 Kan. *380; *Going v. Orns*, Id. *85; *Gatling v. Rodman*, 6 Ind. 292; *Maher v. City of Chicago*, 38 Ill. 266. The city agreed with Stille to levy a legal tax, and provide means for enforcing and collecting the same, against all the lots and pieces of ground within the proper distance, (each tract its proper share,) and it was not material to the effect of that contract whether his wife owned a portion of the same or not.

The pretended sale certificates were void. Among other reasons, because the city had not, after the passage of the act of 1864, authorized a sale of the lots; and such certificates of sale being void, it was not, even as to such of the lots as had been illegally sold, necessary to have produced the sale certificates. *City of Leavenworth v. Laing*, 6 Kan. *274; *Fisher v. City of St. Louis*, 44 Mo. 482.

VALENTINE, J. This was an action, brought by D. P. Stille, against the city of Leavenworth, for services rendered by him in grading a certain street. The contract was made, and work done, under chapter 69, Laws 1864, p. 124, §§ 3-11. Nearly every substantial ques-

tion involved in this case has been decided by this court in the case of *Leavenworth City v. Mills*, 6 Kan. *288. Indeed, every substantial question except one has been decided either in that case, *548 or in the cases of *Leavenworth City v. Laing*, 6 Kan. *274, and *Sleeper v. Bullen*, 6 Kan. *300. That question is whether Stille can recover for grading done by him in front of his wife's property, occupied by himself and wife as a homestead. This is the only question we shall discuss; and, indeed, it would seem that this question should need but little or no discussion; for in this state husband and wife have the power and the right to own property separate from and independent of each other, and each may contract and be contracted with, sue and be sued, with reference to his or her separate property, in the same manner, to the same extent, and with like effect, as though they were not married, except that they must join in the conveyance of their real estate, whether held separately or jointly. It is true, the husband has some interests in his wife's real estate which they occupy as a homestead, and that no other person has any such interest; but such interest is merely a right of occupancy, with a restriction upon the wife's power to alienate the property. It is no estate. The whole estate is vested in the wife, and at her death it descends to her heirs, or, if alienated before death, the consideration therefor belongs to her. See *Jenness v. Cutler*, 12 Kan. *515 *et seq.* Therefore everything that benefits such real estate is really a benefit to the wife, and all taxes that may be levied thereon are really taxes against the wife. And as the husband and wife have, or may have, separate interests in this state, we can see no good reason why the city could not levy taxes on the real estate of the wife (although it be occupied as a homestead) to pay the husband for grading a street in front of such real estate; nor can we see any good reason why the husband may not, if he chooses, insist upon such a thing being done. The question in such a case is, simply, whether the husband or the wife shall own and control the money due for the grading,—whether the money shall be collected from the wife and paid to the husband, or whether the wife shall be allowed to retain the money. In this state, where husbands and wives are allowed to hold separate property and carry on separate business, we see no good reason why said money may not be *549 collected from the wife and paid to the husband. If the husband should sue some person on a promissory note, no one would claim that such person could plead in set-off a promissory note against the wife. As we have before said, the husband has some interest in the real estate of the wife occupied by themselves as a homestead, but the interest is not such as renders the husband *individually* liable for any taxes that may be imposed thereon. Therefore, when the husband sues the city for a debt due to himself *individually*, the city cannot plead in set-off taxes due on the real estate of the wife, although such real estate be occupied as a homestead by the husband and wife.

There are some other questions suggested. Stille petitioned, along with others, for the grading to be done. He sometimes, in speaking of said real estate, called it his. It is claimed that he did not do the full amount of the grading that he agreed to do, and that some of it was not in the street; but it was done where the city engineer instructed that it should be done, and just as the city engineer instructed that it should be done; and the city engineer afterwards inspected and accepted the work, and made a report thereof to the city council, and the city council regularly confirmed the engineer's report, and levied a tax to pay for the grading. As to the effect of such confirmation, see Laws 1864, p. 128, § 10. But the city never provided any means for the collection of said tax. It is true, the city treasurer sold some of the property on said street to pay said tax, but the sale was unauthorized and void. Stille sold and assigned a large portion of his claim against the city for grading; but deducting that from his claim, and deducting all that Stille has ever received or been paid on his claim by any person or from any source, and deducting everything else that ought to be deducted, and still he ought to recover at least the amount allowed him by the court below, provided, however, that he is entitled to recover anything. We do not choose to discuss this case in its moral aspect; for, whether the plaintiff is entitled to recover or not in a strictly moral point of view, we think he is legally entitled to recover.

The judgment of the court below is affirmed.

(All the justices concurring.)

*550 *DAVID G. SWARTZ v. J. C. REDFIELD and others.¹

July Term, 1874.

1. **Bills and Notes: Indorser: Demand and Notice.** The indorsement of a note after maturity is, in effect, the drawing of a new bill, payable on demand; and, to hold the indorser, demand and notice of non-payment are essential. [Shelby v. Judd, 24 Kan. 161.]
2. ———. Where the indorsers of an overdue note are, at the time of the indorsement, prosecuting an action thereon against the maker, which action is continued, and thereafter terminated adversely to them, on the ground that their interest in the note had ceased, *held* that, in order to charge them on their indorsement, demand and notice were essential.

¹Presentment, notice, and protest, see note to Hume v. Watt, 5 Kan. 28; indorsement, see Fuller v. Scott, 8 Kan. 27; and note; defenses, burden of proof, French v. Gordon, 10 Kan. 279; and note; deposit of money to pay, see note to First Nat. Bank v. Tree, 24 N. W. Rep. 566; alteration of note, Fuller v. Green, 24 N. W. Rep. 911; and note; gratuitous payment of note by third party, Martin v. Victor M. & M. Co., 8 Pac. Rep. 171.

Error from Allen district court.

The action below was by Swartz as plaintiff, on a promissory note and indorsements. The note is as follows:

"\$987.

HUMBOLDT, KAN., June 8, 1871.

"One day after date I promise to pay to the order of Redfield & Co. nine hundred and eighty-seven dollars, with interest thereon at 12 per cent. per annum, value received in labor and material furnished in building the Landreth Hotel. J. L. LANDRETH."

Redfield & Co. was a firm composed of J. C. Redfield, W. A. Redfield, and E. F. Wright. On the tenth of June, 1871, said note was indorsed as follows: "Pay to the order of E. F. Wright. REDFIELD & Co." February 7, 1872, an action was commenced on said note, and to foreclose a mechanic's lien on the Landreth Hotel, by J. C. Redfield, W. A. Redfield, and E. F. Wright, Partners, etc., Plaintiffs, against J. L. Landreth, Sophia L. Fussman, and Henry Nagle, Defendants. Fussman and Nagle were joined as subsequent incumbrancers. While this action was pending another action was brought by Swartz, as plaintiff, against said Landreth and several others, as defendants, to foreclose a mortgage on said Landreth Hotel, given by Landreth to Swartz to secure certain notes held by him. In the last-mentioned action said Redfield & Co. were joined with Landreth as defendants, and they filed their separate answer, setting up the same facts as alleged by them in their action to foreclose said mechanic's lien, claiming a prior lien on said mortgaged premises to the amount of said note so given to and held by them. While these two actions were so pending, said Wright indorsed said note to Swartz, as follows: "Pay to order of D. G. Swartz. E. F. WRIGHT." And at the same time Wright executed and delivered to Swartz the following paper, to-wit:

"In consideration of the sum of \$987, in hand paid me by David G. Swartz, of Lancaster, Penn., I hereby guaranty to him, said David G. Swartz, that the claim of Redfield & Co. v. The Landreth Hotel, in Humboldt, Kan., is just, and in the amount of \$987, as per promissory note dated at Humboldt, Kansas, June 8, 1871, signed by J. L. Landreth, and that there is no legal set-off or defense against the same.

"Witness my hand this tenth day of July, 1872.

"E. F. WRIGHT."

Both of said actions were, at the July term, 1872, of the district court, referred to L. W. K. and N. F. A. for trial. The record (in this case) does not show what disposition was made of the action of Redfield & Co. v. Landreth and others, but one of the referees testifies that "it was dismissed by Redfield & Co." after said note had been transferred to Swartz. Another witness testifies that he was present when Wright indorsed the note and executed the guaranty to

Swartz, as above, and that it was then agreed by Swartz and Wright "that said note, being then in suit as the property and claim of Redfield & Co., should be prosecuted to final judgment under the title in which it was instituted." The record shows that the mortgage foreclosure case of Swartz v. Landreth, Redfield & Co. and others was tried before said referees in November, 1872; that before the trial Landreth deceased, and Watson Stewart, as administrator of his estate, had been substituted as a defendant; that the referees in that case, and with respect to the answer and said claim of Redfield & Co., find as facts "that, after the making and delivering of said note as aforesaid, the said note was, by writing on the back thereof, *552 made payable to the order of E. F. Wright, and also, by *writing on the back thereof, the said note was made payable to the order of D. G. Swartz;" and, as conclusion of law, said referees find "that they, the said Redfield & Co., are not the legal owners or holders of said note so given by Landreth as aforesaid, and that they are not entitled to a personal judgment for the amount of money specified in said note, nor for any sum whatever." The referees made their report to the district court, and said report was confirmed November 18, 1872. This action was commenced by Swartz on the sixteenth of January, 1873. He made Stewart, (as administrator of Landreth,) J. C. Redfield, W. A. Redfield, and Moses Neal (as administrator of E. F. Wright, deceased) defendants. Trial was had at the March term, 1873, of the district court. Findings and judgment in favor of Swartz against Stewart, as Landreth's administrator, for the amount of said note, (\$987 and interest,) and against Swartz, and in favor of the other defendants, for costs. From this last judgment Swartz appeals, and brings the case here on error.

L. W. Keplinger, for plaintiff in error.

The finding of facts is insufficient, one of the material facts proven not having been found upon. The testimony in the record shows that, at the date of the transfer of the note sued on, Landreth, the maker of the note, was already dead; for Redfield & Co. at the date of said transfer were prosecuting their claim on said note before referees in an action wherein said Landreth's *administrator* was defendant. The present action was brought January 16, 1873, within less than one year from Landreth's death, which occurred some time subsequent to February 8, 1872; at which date summons was served upon him in the action brought against him by Redfield & Co., on the note now sued on by plaintiff. Therefore the court should have made an additional finding that the assignment of the note by defendants, and the institution of this suit, took place within less than one year after Landreth's death. The mercantile law, like the common law, continues in force in this state only so far as it has *553 not been *abrogated by statute; and this omitted finding brings this case within our statutory provisions respecting executors and administrators, by which demand and notice are not

required. *Farnum v. Fowle*, 12 Mass. 91; *Oriental Bank v. Blake*, 22 Pick. 206; *Bell v. Norwood*, 10 La. 485; *Davis v. Francisco*, 11 Mo. 575; 1 Pars. Notes, 364. The evidence also shows that the defendants caused or procured the plaintiff to continue the prosecution of the claim in the name of the defendants; and the court should have found that this action of the defendants, in causing said claim to be prosecuted after transfer, was a waiver of right to demand and notice.

Should the court decline to examine the evidence to see whether or not the proper findings of fact were made, if the findings of facts be correct, why should a party be compelled to apply for a new trial upon the facts? Why should the remedy reach further than the error complained of? *Indiana & I. R. Co. v. Williams*, 22 Ind. 198.

The conclusions of law are not supported by the findings of facts. We recognize the general rule that, in case of transfer of negotiable promissory notes after maturity, the indorser is entitled to demand upon the maker, and notice within reasonable time; and that, so far as demand and notice are concerned, the parties stand upon the same footing as in case of parties to inland bills of exchange payable on demand. But we say the facts found show the defendants were not entitled to notice. 1 Pars. Notes, 535. At the date of the transfer of this note the defendants were, and for six months had been, attempting to collect this same note by suit against the maker. The continuance of this litigation was due to one or the other of two causes: either the maker of the note was unable to pay the note, or he was unwilling; and the defendants, at the time of indorsing the note, well knew that the maker was unable or unwilling to pay the note. How, then, can it be claimed they had reasonable grounds for believing the note would be paid? Where the fund drawn on is already in *554 litigation, (*at date of indorsement*,) demand and notice are *unnecessary to charge the indorser. 1 Pars. Notes, 534; *Benoist v. Creditors*, 18 La. 522. The remarks of the court in the latter case may well be applied to the case at bar: "This [a claim in litigation] was, indeed, a poor prospect for the collection of a bill of exchange, and almost equal to the drawees having no funds in their hands belonging to the drawers."

The pendency of a suit of defendants against the maker of the note, and the continuation of said suit in the name of the defendants, was a continuing demand and a continuing refusal; and all the defendants had full knowledge of such demand and refusal. Payment was demanded by the suit brought by defendants against the maker of the note prior to its transfer, (February 7, 1872,) and payment was again demanded when Redfield & Co. appeared before the referees, and prosecuted their claim upon the note. The defendants had full notice, for they themselves prosecuted the claims, and such demand and notice inured to the plaintiff. *Trowbridge v. Baker*, 1 Cow. 252; *Lee v. Clark*, 1 Hill, 57.

J. B. F. Cates, for defendants in error.

The only question presented by the record is as to whether demand and notice of non-payment was necessary to fix the liability of the defendants in error upon the note sued on. The contract of an indorser upon a note or bill is conditional, upon non-payment by the principal debtor after due presentment and notice. Story, Prom. Notes, §§ 133, 135; Byles, Bills, 258, 282; Gen. St. 115, §§ 6, 7. A bill or note indorsed after dishonor is in the nature of a new bill payable on demand, and to hold an indorser thereon, the same strictness as to demand and notice is required as in cases of indorsement before due. *Colt v. Barnard*, 18 Pick. 260; *Keith v. Jones*, 9 Johns. 121; *Dwight v. Emerson*, 2 N. H. 159; *Greely v. Hunt*, 21 Me. 455; 3 Hunt, 171; *Lockwood v. Crawford*, 18 Conn. 361; *Allwood v. Haselton*, 2 Bailey, 457; *Branch Bank v. Gaffney*, 9 Ala. 153; *Beebe v. Brooks*, 12 Cal. 308; *McKinney v. Crawford*, 8 Serg. & R. 357.

It is claimed that there was demand and notice in the case of *555 the note sued on; that a knowledge on the part of the defendants that suit was being prosecuted on said note by this plaintiff against the principal debtor was waiver of further demand and notice. Suppose this to be proper demand, the suit was a continuing demand, and not complete until the termination of such suit. The notice required by the law-merchant is not notice of demand alone, but notice of non-payment after demand, which in this case would have been after the action thereon was terminated. The defendants had no notice that judgment was not obtained thereon, and satisfied by execution, until the bringing of this action, so far as the record shows. Neither was there a motion for new trial in the court below.

BREWER, J. The material facts of this case are as follows: On the eighth of June, 1871, J. L. Landreth executed his note, due in one day after date, to Redfield & Co. Thereafter Redfield & Co. indorsed to E. F. Wright, one of the partners in the firm of Redfield & Co., and on July 10, 1872, Wright indorsed it to the plaintiff. At the time of the indorsement to plaintiff, and for months prior, Redfield & Co. were prosecuting their claim on said note against the maker. This action (or their said claim) was terminated adversely to them on the eighteenth of November, 1872, on the ground, as appears from the report of the referees, that they had no interest in the claim. On the sixteenth of January, 1873, this action was instituted by plaintiff, seeking to charge both the maker and the indorsers. No proof was made of demand by the plaintiff of payment from the maker or notice to the indorsers. Were the latter liable? It is conceded that a bill or note indorsed after maturity is in the nature of a new bill, payable on demand, and that, to hold an indorser thereon, the same strictness as to demand and notice is required as in the case of the drawer of an ordinary inland bill. But it is insisted that upon the

facts shown the indorsers were not entitled to notice; that the rule is that if the drawer had not at the time reasonable grounds to *556 expect that the bill would be honored, he is not *entitled to notice; and that as at the time of the indorsement the indorsers were vainly attempting to collect the note by suit, they had no reasonable grounds to expect that the maker would pay it to the indorser. We are inclined to think that the facts as stated do not make an exception to the ordinary rule, and that no demand and notice having been shown the indorsers were not liable.

The principle is thus stated in 2 Smith, Lead. Cas. 61: "The whole principle of exception, then, appears to be that where the non-acceptance or non-payment of the bill is caused by the fraudulent act of the drawer or indorser,—or, in other words, where the drawing or issuing of the bill, or the leaving it to be presented, is a fraud in any party liable on the bill,—such fraudulent party is not entitled to notice, and it is believed that there are no other exceptions to the general rule requiring demand and notice. In some of the cases the rule is stated to be that notice is excused wherever the drawer or indorser could not possibly be injured by the want of it, (*Commercial Bank of Albany v. Hughes*, 17 Wend. 94;) but, practically, that amounts to the same thing; for there is always in law a possibility of being injured by the want of notice, and the law will never refuse to take notice of that possibility, except in case of a fraudulent drawer or indorser. The well-settled principle that bankruptcy, or notorious insolvency of the drawer, will not excuse notice; that having actual knowledge will not excuse regular legal notice; and that the holder neglecting to give legal notice is not permitted to show that no injury has in fact been sustained,—all of which points are settled beyond the possibility of question,—clearly show that the application of the fixed rule as to notice is no longer affected by what may once have been the reason for it."

In the first volume of *Parsons on Notes and Bills*, on page 535, the rule is differently stated, and in these words: "The true test, in our opinion, in each case, is this: Had the drawer, under the circumstances of the case, a right to draw? This depends upon the fact whether he had a reasonable ground to expect that the bill would be honored or not. If he had such reason to expect it to be hon- *557 ored, he is *entitled to a regular presentment and notice, and refusal to accept or pay; and if not so entitled, he cannot complain either for negligence in presenting and in forwarding notice, or for entire neglect to do either. The reasonable grounds required by law are not such as would excite an idle hope, a wild expectation, or a remote probability that the bill might be honored, but such as create a full expectation and a strong probability of its payment,—such, indeed, as would induce a merchant of common prudence and ordinary regard for his commercial credit to draw a like bill."

Now, there was certainly no fraud in the indorsement of this note. It was a valid instrument,—a legal promise to pay. No suggestion is made of anything tending to impeach it. Being a contract in writing, it, under our statutes, imported a consideration, (Gen. St. 183, § 7,) and there is nothing to raise a suspicion that full value was not given for it. To transfer a valid obligation, given for value, involves nothing of fraud. If it be regarded as a new bill, it is a draft on funds, and an accepted draft at that. If it be said that there was no reasonable grounds to expect payment, no more is there when the maker or acceptor is notoriously insolvent; yet demand and notice in such a case are unquestionably necessary. Many of the most eminent English judges have expressed regrets that there was ever any exception made to the rule of demand and notice to charge a drawer or indorser, and the current of authority tends to limit rather than extend the cases of exception. The indorsement effectuates two things: it transfers the title, and creates a conditional liability. The first is often, in the contemplation of the parties at the time of the transfer, the only thing sought; and if afterwards recourse is sought on the indorser, he may well insist on an exact compliance with all the steps necessary to change the conditional to an absolute liability. See, further, on this subject, Byles, Bills, pp. 232, 234, and notes; Story, Prom. Notes, § 367; 3 Kent. Comm. marginal page 110, and note. In this last citation the author says:

"Nor does knowledge in the indorser, when he indorsed the *558 paper, of the insolvency of the maker of the note or drawer *of the bill, do away the necessity of notice in order to charge him."

The judgment will be affirmed.

(All the justices concurring.)

JAMES DE LONG and another v. JONATHAN STAHL.¹

July Term, 1874.

1. **Referees: Limit of Powers: Reports.** The powers of a referee are limited by the order appointing him, and when in such order he is directed to make his report within a certain time, and such time passes without any report, his powers are at an end, and a report thereafter is a mere volunteer report, and without validity.

¹ Review of report, *Murray v. Kelley*, 23 Kan. 666; mutual accounts, *Galbraith v. McCormick*, 23 Kan. 706; construction of report, *Griffiths v. Reimert*, 24 Kan. 226; conclusiveness of findings, *Campbell v. Phillips*, 23 Kan. 753; *Walker v. Eagle Works*, 8 Kan. 267, and cases cited; when motion to set aside is made too late, *Grayson v. Hinkle*, 29 Kan. 277; power of referee, *Arn v. Coleman*, 11 Kan. *461; what report must state, *Oaks v. Jones*, 11 Kan. *443; presumption, *Simpson v. Woodward*, 5 Kan. 347; oral submission—effect, *Bulsom v. Lampton*, 1 Kan. *324; waiver of errors, *Lannan v. Clavin*, 3 Kan. *18; not a final order, *Savage v. Challiss*, 4 Kan. *319; setting aside report, *Owen v. Owen*, 9 Kan. 64.

2. ———. It is error for the court to confirm any such volunteer report.
3. ———: **Completing Report: Notice: Bills of Exception.** Trial courts should, by general rule, or in each order of reference, require notice to be given by the referee of the completion of his report to each party, a reasonable time before its filing, in order to give opportunity for the preparation and presentation of a bill of exceptions.

Error from Montgomery district court.

Action by Stahl against De Long, as mayor of the city of Independence, and one William Mott, to set aside a certain deed executed by De Long, as mayor, to said Mott. The report of the referee, G. C., was in favor of Stahl, and the district court, at the August term, 1873, confirmed said report, and gave judgment thereon in favor of Stahl, and De Long and Mott bring the case here on error.

Nathan Cree, for plaintiffs in error.

The court below erred in overruling defendant's motion to set *559 aside the report and reinstate the case for trial. We *maintain that the report of the referee, being made after the time fixed by the order, was a nullity, the authority of the referee having expired. The argument of the case before the referee was closed on the twenty-fifth of March. The April term of our court commenced on Monday, the 7th, thus giving the referee ample time to make his report according to the directions of the order of reference. *Hanner v. Coffin*, 1 Or. 99; *Townsend v. Glen's Falls Ins. Co.*, 10 Abb. Pr. (N. S.) 277; *Ryan v. Dougherty*, 30 Cal. 218; *Francis v. Ames*, 14 Ind. 251; *Steel v. Steel*, 1 Nev. 27; *Smith v. Warner*, 14 Mich. 152; *Rhodes v. Bairn*, 16 Ohio St. 573; *Potter v. Sterrett*, 24 Pa. St. 411; *Small v. Thurlow*, 37 Me. 504; *Denman v. Bayless*, 22 Ill. 300. It has been expressly decided that "when a rule of reference requires a report within a limited time, power ends at expiration of that time." *Brower v. Kingsley*, 1 Johns. Cas. 334; *White v. Puryear*, 10 Yerg. 441.

There can be no valid decision unless notice be given. *Morse*, Arb. 118. By reference to the affidavits, it will be observed that defendants had no notice of the final decision of the referee, or of its character. This voids the report, for it utterly precluded a motion for new trial or review. Exceptions must be taken, or there can be no motion for a new trial. *Branger v. Chevalier*, 9 Cal. 353; *Cappe v. Brizzolara*, 19 Cal. 609. Defendants expected notice of the decision, and noted many exceptions to the rulings of the referee on the trial. The Code, §§ 293, 295, fixes the method of trial before the referee, and the manner in which his decision is to be made. The trial is to be conducted in the same manner as before the court, and exceptions to "any order or decision" made in the case must be signed and delivered with their report. *Phelps v. Peabody*, 7 Cal. 50; *Dinsmore v. Smith*, 17 Wis. 20. The referee can sign no exceptions after he files his report. He is then *functus officio*. This has

repeatedly been determined. *Voorhis v. Voorhis*, 50 Barb. 119; *Indiana Cent. Ry. Co. v. Bradley*, 7 Ind. 49; *Niles v. Price*, 23 How. Pr. 473; *Morse, Arb. & A.* 226. It follows that if a report is filed without exceptions, a motion for a new trial must prove nugatory. Exceptions must appear *of record* or it will be presumed that none were made. *Sutherland v. Rose*, 47 Barb. 144. No tribunal of review will consider a decision unless it be excepted to, or give a new trial except on objections distinctly made on the trial. As *560 plaintiff below claimed the right to *have judgment entered on the report of the referee, it only remained for defendants to obtain an order against it, and to ask for the reinstatement of the case for trial. As the failure to allow us to except entirely cut off our rights, it placed the decision of the referee on the same footing as any other judicial act performed without notice; that is, rendered it void. *People v. Bacon*, 18 Mich. 247; *Kitsmiller v. Kitchen*, 24 Iowa, 163; *Blackw. Tax Titles*, 213. Our mere right to except implied that we should have notice. *Norton v. McLeary*, 8 Ohio St. 210; *Redman v. Gulnac*, 5 Cal. 148. When a case is referred to arbitrators, notice of the time and place of meeting must be given, or the award is void.

Turner & Ralstin, for defendant in error.

"The findings of fact by a referee have equal force with the findings of fact by a court, or the special verdict of a jury," (*Walker v. Eagle Works Manuf'g Co.*, 8 Kan. *397;) and no exception is taken to the report of the referee that his findings of fact are "not sustained by sufficient evidence," (Code, § 306.) By what rule or law of judicial procedure is the plaintiff in error enabled to present the questions raised in this case for consideration on appeal? It appears from the record that the referee filed his report with the clerk of the district court, May 1, 1873, during the term of the court. It further appears that defendant in error filed his motion for judgment on the report of the referee on the same day. . It also appears that plaintiff in error did not move against the report of the referee until the fourteenth of August, 1873, when he files his motion for the first time, and objects to the rendition of and entry of any judgment on the report of the referee. The Code, §§ 306, 308, 309, provides *how* and *where* a party may move against "a verdict of the jury, report of a referee, or a decision by the court," and the grounds on which such motion must be based. "The application must be made *at the term* the verdict, report, or decision is rendered," (section 308,) and "shall be within *three days* after the verdict or decision was rendered." And "the application must be by motion, upon written grounds filed at the time of making the motion." Section 309. It is not pre- *561 tended that plaintiff *in error has complied with either or any of these provisions. The only act of plaintiff in error prior to the filing of his written motion at the *next term* was an objection against the *entry* of the judgment on the journal of the court proceedings.

The entry of judgment is a mere *clerical* act of the clerk. "The report of the referee, upon the whole issue, stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court," (Civil Code, § 293;) and "judgment is entered upon the report of a referee as a matter of course, and the only mode of taking advantage of it is by moving to set it aside as on motion for a new trial," (3 Estee, Pl. & Pr. 491, § 47.)

Motion for a new trial must be made at the term at which the verdict was rendered. *Odell v. Sargent*, 3 Kan. *80. Application at the next term after the verdict must be by petition. Code, § 688. Motion to set aside the report is analogous to a motion for a new trial, may be made in like cases, and is governed by the same rules. *Wait*, N. Y. Code, 501, note *d*. The decision of a referee to whom all the issues are referred is entitled to the same respect as a judge. *Wait*, 503, note *i*; *Hancock v. Hancock*, 22 N. Y. 568; 3 Estee, 490.

Plaintiffs in error complain of the action of the referee in not giving them notice of the filing of the report, and that they were thereby deprived of a right to except to the findings of fact and conclusions of law. Assuming that his exceptions must be taken and noted to the report prior to the filing of the same with the clerk of the court, still there is no foundation for this complaint against the referee, any more than there would be against a jury, for not notifying either party, *in advance* of the returning into court their verdict, what that verdict would be; or against the court, where a jury is waived, not advising a party or counsel what the finding *would be* before it was amended by the court. The proper time to move against the report of a referee is after it is made and filed in court, and not *before*, just as a verdict of a jury, or the finding by the court when the cause is tried *562 *by the judge. Plaintiff in error had ample opportunity to object, and save his exception on the record, to any order or decision of the referee during the progress of the trial. And it is not claimed that any exception was taken to any order or decision of the referee during the progress of the trial, from beginning to the end thereof, which the referee refused to note, give a bill of exceptions, or failed or neglected to return the same with his report to the court. The great error complained of in the court below was that the referee did not show plaintiff in error his findings of fact and conclusions of law before he filed his report with the clerk, and thereby prevented plaintiff in error from excepting, and making a bill of exceptions, to the report, assuming (as has already been said) that the exceptions to the report must be made and bill of exceptions signed to the report *before* it is filed with the clerk, instead of afterwards.

There being no part of the testimony in this case in the record, the findings of fact by the referee will not be considered by the court; and there is nothing presented in the record for the consideration of the court but objections which are more technical than substantial.

BREWER, J. The issues in this case were, at the December term, 1872, of the district court of Montgomery county, referred to a single referee, with instructions to report his determination ten days before the beginning of the next term. No report was filed within the time named, but one was filed on the last day of that next term. This report is dated of the day it was filed. There is nothing in it to show when the trial before the referee was completed or his decision rendered; and if you are to look at the affidavits filed on the motion to set it aside, it would appear that his decision was not made until the day before the filing. At any rate, it does not appear from the report or otherwise that the trial was completed and the decision made prior to the time fixed by the court for filing the report. A *563 motion to set it aside, *on the ground that at the time of filing the referee had no power to act, was overruled, and judgment entered on the report. In this we think the court erred. The referee is an officer whose power and duties are created by the order of the court. If he go outside the limits of that order, his acts are void. When the time within which, by the terms of the order, he must act has expired, his office has ceased, and his powers are ended. Neither party is obliged to take any further notice of the reference. Here he was ordered to make his report by a specified time. When that time had passed without the filing of a report, his powers as referee were at an end, and any further action was as though no order of reference had ever been made; nor did the confirmation of the report make valid that which was before void. The report, when filed, was no more than a volunteer report; and a court cannot by confirmation breathe life into such a document. *Hanner v. Coffin*, 1 Or. 99; *Brower v. Kingsley*, 1 Johns. Cas. 334; *White v. Pivyer*, 10 Yerg. 441; *Ryan v. Dougherty*, 30 Cal. 218; *Francis v. Ames*, 14 Ind. 251; *Smith v. Warner*, 14 Mich. 152.

Before disposing of the case we desire to notice one other matter. No exceptions were filed with this report, and several affidavits are filed to show that plaintiffs in error had no knowledge of the determination of the referee until after the filing of the report, and no opportunity to prepare and present a bill of exceptions to the referee. The statute requires the referee to sign exceptions, and return them with his report. In practice, a party does not generally like to write out exceptions and have them signed, unless the findings are against him. To do so pending the hearing works disagreeable delays. Hence a referee ought always, after the preparation of his report, to give notice thereof to the parties a sufficient time before the filing for them to prepare exceptions if desired. The writer of this opinion, when upon the bench of the First judicial district, made a general rule, requiring, in all cases of reference, five days' notice to each party before the filing of the report. It would be well for all trial *564 courts, if *they have no general rule applicable, to prescribe in each order of reference the length of notice to be given before the filing. In this way the defeated party can always save his

exceptions; and whenever, in the absence of any general rule or special order, it appears that a defeated party has, without any laches on his part, been deprived, through the action of the referee, of an opportunity to prepare and preserve his exceptions, the report should be set aside.

In taking advantage of this case to make some suggestions as to references, we do not wish to be understood as intimating that the facts in this case show any misconduct on the part of the referee. So far as those suggestions are concerned, we speak not in criticism of the present, but in advice for future cases. The judgment of the district court will be reversed, and the cause remanded for further proceedings.

KINGMAN, C. J., concurring.

VALENTINE, J. I concur in the decision of this case upon the first ground stated in the opinion and syllabus.

ST. LOUIS, K. C. & N. RY. CO. v. S. O. THACHER.

July Term, 1874.

Principal and Agent: Contract by Agent in His Own Name: Parties to Action. Where a person acting for himself, and also acting as the agent for a certain principal, entered into a contract in his own name with a railway company for the transportation of certain specific cattle, a portion of which belonged to himself and the other portion belonged to his principal, and the name of his principal was not disclosed in said contract; and the cattle were injured during their transportation through the negligence of the railway company; and the principal commenced an action against the railway company for the loss sustained by himself, not making the agent a party to the action; and no claim was made that there was any defect of parties, either plaintiff or defendant, but the action was tried upon its merits, and judgment rendered for the plaintiff: *held*, that in such a case the action may be maintained.¹

*565 *Error from Douglas district court.

Action by Thacher, as plaintiff, to recover for damages sustained to 17 of the 35 head of cattle mentioned in the contract set

¹Same principle applied, *Carter v. George*, 30 Kan. 48; S. C. 1 Pac. Rep. 58; *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kan. 649; S. C. 2 Pac. Rep. 821; *Tracy v. Gunn*, 29 Kan. 512; after a written contract is executed, it is competent to show by parol evidence that both of the contracting parties were agents for other persons, and acted as such in making the contract, *Nutt v. Humphrey*, 32 Kan. 100; S. C. 8 Pac. Rep. 787; see *Butler v. Kaulback*, 8 Kan. 451, and note; as to knowledge of agent affecting principal, see note to *Huff v. Farwell*, 25 N. W. Rep. 255.

out in the case of *St. Louis, K. C. & N. Ry. Co. v. Piper, ante*, *506, *510. Thacher had judgment at the September term, 1873, of the district court.

Pratt & Ferrey, for plaintiff in error.

Thacher was not one of the contracting parties, nor an assignee, and could maintain no action for damages for its breach. Whether *parol testimony* could have been admitted to show that Piper was but an agent in making this contract, and Thacher the *sole principal*, it is unnecessary to discuss, as no such claim was made. While the most respectable courts of England and of the United States have differed, and still do differ, upon this question, and although the weight of authority in numbers is with the affirmative, yet no case, we believe, can be found where *parol testimony* was admitted to show that a written contract was made *partly* for the benefit of one named therein as principal, and *partly* for the benefit of an undisclosed principal, so as to give to each a separate right of action. To admit such testimony would be to subject a party contracting, as he supposes, with but one person, to as many different claims and suits as the subject of the contract would admit of. *Fenly v. Stewart*, 5 Sandf. 101. The district court held that the defendant in error could show by *parol* that this contract was made *partly* for himself, and maintain an action upon it for each part, and this we think was error.

Thacher & Stephens, for defendant in error.

All actions must be prosecuted in the name of the real party *566 in interest. As to the cattle of Thacher, Piper could *not maintain an action, or, if he could, it would inure to the benefit of the real party owning them, and he would only be a nominal party. But no objection was raised in the court below that Thacher was not the proper party, nor that Piper was a necessary party.

VALENTINE, J. On November 27, 1872, G. W. Piper shipped thirty-five head of cattle from Kansas City to Chicago, under a written contract between himself and the plaintiff in error, a copy of which contract will be found in the case of this same plaintiff in error against Piper, recently decided in this court. *St. Louis, K. C. & N. Ry. Co. v. Piper, ante*, *510. Eighteen head of said cattle belonged to Piper, and the other seventeen head belonged to the defendant in error, S. O. Thacher. With reference to these seventeen head of cattle, Piper was merely the agent of Thacher for their transportation and sale. There were delays in their transportation claimed to have been caused by the negligence of the railway company, in consequence of which delays the cattle were injured, their value depreciated, and extra expenses incurred. Piper and Thacher then sued the railway company, each bringing a separate action for his own separate loss, and each obtained a judgment against the railway company. The railway company then brought both of the cases to this

court for review. We have already decided Piper's case, and in that decision have disposed of every legal question involved in this case except one. That question is whether Thacher can maintain a separate action for his own separate loss, notwithstanding the fact that the railway company contracted with Piper alone, and had no knowledge of Thacher's interest in the transaction. That Piper could alone maintain an action for the whole loss, including that sustained by Thacher as well as that sustained by himself, we suppose will not be questioned; for "a person with whom or in whose name a contract is made for the benefit of another * * * may bring an action without joining with him the person for whose *567 benefit it was *prosecuted." Civil Code, § 28. But whether what might be a single cause of action in favor of Piper may be so divided as to give to Piper and Thacher each a cause of action for that portion of the loss which each has severally sustained, is the question now to be considered by this court. If Thacher had owned all the cattle, instead of only a portion of them, he could unquestionably have maintained an action for the whole loss sustained; for it is generally conceded that under our Code, as well as in equity, where a contract is made by an agent for the benefit of his principal, the principal may sue on the contract, even though the agent may also have the right to sue, and even where the contract is made in the name of the agent, and the principal's name is not disclosed. *Erickson v. Compton*, 6 How. Pr. 471; *Union India Rubber Co. v. Tomlinson*, 1 E. D. Smith, 364; *Morgan v. Reid*, 7 Abb. Pr. 215; *Thompson v. Thompson*, 4 Ohio St. 333; *Brooks v. Minturn*, 1 Cal. 481; *Ruiz v. Norton*, 4 Cal. 358. The principal, in every such case, is "the real party in interest," and under our Code the rule is that "every action must be prosecuted in the name of the real party in interest." Code, § 26. Every action allowed to be prosecuted in any other manner constitutes an exception to a general rule.

But these exceptions are, generally, not exclusive. For instance, there are many actions that may be prosecuted in the name of the agent, or in the name of the principal, at the election of the parties; and if Thacher had owned all the cattle in this case, this unquestionably would be one of such actions. 1 Waite, Pr. 96. This should be so; for, on the one hand, there are many cases where the principal resides in another state, and could not well attend personally to the suit himself; and, on the other hand, there are other cases where the agent may have been discharged, and no longer has any interest in the principal's affairs. Indeed, the agent's interests may become hostile to those of the principal's, and, in such a case, it would not be well for the agent alone to have the power to prosecute the action for the principal. In the present case Piper's *568 agency ceased when he *shipped said cattle to Chicago and sold them, and it would seem absurd that he alone could sue for Thacher's loss. Suppose he should neglect or refuse to sue, would

Thacher be without a remedy? And having no interest in Thacher's loss, he might well neglect or refuse to sue. As the railway company were liable on only one contract, and as both Piper's and Thacher's actions were prosecuted in the same court, and at the same time, it is possible that the railway company could have compelled a consolidation of the two suits; or it is possible that they could have compelled Thacher to make Piper a party, either plaintiff or defendant, in Thacher's suit. But none of these questions having been raised in the court below, we do not choose to decide them now. There was no attempt made to consolidate the two suits; there was no attempt made to make Piper a party in Thacher's suit; and there was no claim made that there was any defect of parties, either plaintiff or defendant. The suit was tried upon its merits, and upon its merits Thacher recovered the judgment of which the plaintiff in error now complains; and, under the circumstances of this case, we think that the judgment was correct, and that the court below did not err in rendering the same. And, by allowing Thacher to recover, it can hardly be said that it is a division of a single cause of action into two separate causes of action. It is true that the contract under which both Piper's and Thacher's causes of action arose is a single contract, yet, as the cattle belonged to separate owners, the railway company, by causing the cattle to be injured, created two causes of action,—one in favor of Piper, and the other in favor of Thacher; and each was created at the same time, neither having precedence of the other with regard to time. And the rule is, as we have before seen, that Thacher should sue for his own loss, although by way of exception to the rule Piper might also sue for Thacher's loss, if Thacher himself had not done so. But if Piper should have sued for both his own loss and that of Thacher's, in the same suit, and as one cause of action, it would properly have been the consolidation of two

*569 causes of action. To recapitulate: The *railway company, by injuring the cattle, created two causes of action. These may be prosecuted separately by the respective owners of the cattle, or may be consolidated and prosecuted by Piper alone. But even if by allowing each owner of the cattle to prosecute for his own loss would be to divide a single cause of action into two separate causes of action, still it is possible that such a thing may be done. In New York it has been held that when an entire demand had been assigned in parts, to several persons, the assignee of one of the parts may maintain an action to recover his part. *Cook v. Genesee Mut. Ins. Co.*, 8 How. Pr. 514; *Field v. Mayor of New York*, 6 N. Y. 179; *Christie v. Herrick*, 1 Barb. Ch. 258, 259. But it would seem in such cases that all persons interested in the matter should be made parties to the action, if any party should demand it.

The judgment of the court below is affirmed.

(All the justices concurring.)

CITY OF EMPORIA and others v. H. E. NORTON and others.¹

July Term, 1874.

1. **Statutory Construction: Constitutional Law: Rule.** A law may be so completely at variance with some constitutional provision as to be absolutely and under all circumstances void; or it may be valid as to some classes of cases, and void as to others; or it may be fairly susceptible of two constructions, one of which conflicts, while the other harmonizes, with the constitution. In the first class of cases the decisions would be uniformly against the law, and all rights claimed thereunder; in the second, they would vary with the class of the case for which the support of the law was invoked; while in the third, that construction which supports would be preferred to that which destroys the law.
2. **Municipal Corporation: Power to Relevy Taxes: Constitutional Law.** Section 41 of chapter 100 of the Laws of 1872, which purports to grant to cities of the second class power in all cases of insufficient levy or assessment to relevy and reassess, may be placed in the second class *570 of cases above named. Pur*porting to cure all defects, it cures all within the power of the legislature to cure. Though containing no restriction on the power to levy taxes, it is not in conflict with section 5 of article 12 of the constitution.
3. **Taxation: Legislative Power: Curative Acts.** Where the original purpose for which the power of taxation is invoked is one of the ordinary purposes of municipal government, and within the powers granted; and where there is no fraud or oppression in the creation of the debt or burden, and no inequality or injustice in the apportionment of the tax: *held*, that the legislature can, by subsequent enactment, cure any defect in the proceedings to collect the tax which it could in the first instance, by prior enactment, have made immaterial.
4. **—: Relevy of Taxes: Municipal Corporations.** The city of Emporia, a city of the second class, was authorized to improve its streets. It caused one to be curbed, guttered, and macadamized. It attempted to assess and collect the cost thereof from the adjoining lots, but failed, owing entirely to the fact that no estimate of the cost had been made by the engineer and submitted to the council prior to the contracts therefor. Subsequently, by general law, the legislature authorized a reassessment and relevy by cities of the second class in all cases of prior insufficient assessment and levy. *Held*, that this cured the defect caused by the omission of the estimate, and that the city could proceed to reassess and collect the taxes therefor.

Error from Chase district court.

This action was first commenced in Lyon district court, in October, 1871, by Norton and twelve others, as plaintiffs, against the county clerk and county treasurer of Lyon county, to restrain the collection of assessments levied to pay contractors for macadamizing, curbing, and guttering Commercial street, in the city of Emporia. The city of Emporia was not then a party. In April, 1872, judgment was

¹This case again in court, 16 Kan. 286. See Sanders v. Greenstreet, 23 Kan. 426, for a discussion of legislative power to pass curative acts, etc.

rendered for plaintiffs below, and injunction made perpetual. The case was brought here on error at July term, 1872, and reversed. 10 Kan. *491. In the mean time the legislature had passed a special act attempting to make valid the assessments in question. Laws 1872, p. 13; 10 Kan. *503, *505. On June 14 and June 28, 1872, under section 35 of the new city-charter act passed February 28, 1872, (Laws 1872, c. 100,) the city council, by ordinances, provided for issuing "street bonds" to pay the contractors for balance due for the said improvements under their contracts, and immediately thereafter issued the bonds as provided in said ordinances; and *571 in August following said city council, to pay said contractors, and to meet and pay off the bonds when the same should mature, relieved said special assessments or taxes upon the said plaintiff's said several lots, under section 41 of said city-charter act. In February, 1873, plaintiffs filed amended petition, being *verbatim* the original petition, with the addition of the City of Emporia and its officers as defendants, to meet the decision of this court in *Gilmore v. Fox*, 10 Kan. *509. The defendants answered—*First*, a general denial; *second*, the regularity of proceedings on the part of the city council, including making and submission to council of estimates by city engineer, the special act of the legislature, and the levy of said assessments. The cause went to Chase county on change of venue, and was there tried at the October term, 1873. The district court found against defendants, finding that no estimate was made; that all the exhibits attached to defendants' answer were duly executed; that the special act was passed, and referred to the assessments in question; that the levy was made as alleged; but held the special act void, and that the levy could not cure the want of such estimate; and therefore rendered judgment against defendants below, making the injunction perpetual.

J. Jay Buck, for plaintiffs in error.

The special act of the legislature (Laws 1872, p. 13) made these assessments, as at first levied in 1871, valid and binding, and cured the omission of the engineer's estimate, which is the only omission, error, or irregularity found by the court. I wish to enter upon the discussion of this first point unembarrassed, and therefore refer the court to its former decision herein, (10 Kan. *503,) where I attempted to raise this question; but the court held that the supplemented answer then filed "was a separate and independent pleading," and as it "did not deny any allegations of the plaintiffs' petition," and as "the *572 allegations of the petition were substantially that certain persons voluntarily, and without any authority, macadamized, curbed, and guttered Commercial street, and that afterwards the city authorities levied an assessment on the adjacent or abutting lot-owners to pay for the same, at the time the work was done, (according to the allegations of the petition,) neither the city of Emporia nor the lot-owners were liable to pay for the same;" and also to the con-

cluding remarks upon that point: "All that we now decide is that the legislature cannot pass a special act which will cure all such irregularities." An examination of the present answer will show a denial of every allegation of the petition, (except the city's organization,) and the findings will show every legal step taken except the estimate. Hence this "voluntary" and charitable work, *pro bono publico*, evaporates. The allegations of the petition are not only denied in the answer, but are wholly and absolutely disproved by the findings, and the exhibits which are a part of the findings, so far as material. In this connection, see *City of New Haven v. Fair Haven & Westville R. Co.*, 38 Conn. 422.

As it must be conceded that both statutes under which the city claims are within the province and scope of legislation, let us consider the two points upon which the city relies. The special act made these assessments valid. *Cooley*, Const. Lim. 371, 379; *Dill. Mun. Corp.* 288; *Drexel v. Com.*, 46 Pa. St. 38; *State v. City of Cincinnati*, 20 Ohio St. 35; *Sevièr v. Holliday*, 2 Ark. 527; *Sticknoth's Estate*, 7 Nev. 223; *Thomson v. County of Lee*, 3 Wall. 327; *Waldo v. Portland*, 33 Conn. 371; *Bartholomew v. Harwinton*, Id. 410; *Stewart v. County of Polk*, 30 Iowa, 9; *Merryman v. David*, 31 Ill. 405; *Edmunds v. Goodins*, 24 Ind. 173; *King v. City of Portland*, 2 Or. 146; *People v. County of Ingham*, 20 Mich. 95; *May v. Holdridge*, 23 Wis. 93; *Dean v. Charlton*, Id. 590; *Brewster v. City of Syracuse*, 19 N. Y. 116, 118; *Bradley v. Lee*, 38 Cal. 366; *Kunkle v. Town of Franklin*, 13 Minn. 128, (Gil. 119;) *National Bank v. City of Iola*, 9 Kan. *696. The principle established by these authorities is that no man can have a vested right in escaping his proportion of equitable tax or assessment; that it is against the policy of the law for him to permanently enjoy such exemption from his share of the public burden; that what the legislature might have dispensed with, it may cure by retroactive legislation; that any ratification by a legislature is good if the original defect is merely lack of legislative consent, and even if it were void *ab initio*. *Dean v. Charlton*, 23 Wis.

590; S. C. 27 Wis. 522; *Lucas v. San Francisco*, 7 Cal. 463; *573 *People v. Swift*, 31 *Cal. 26; *White W. Val. C. Co. v. Vallette*, 21 How. 414. In the case at bar the "established principle"

of taxation was followed and adhered to; the tax was levied for an "authorized purpose;" the work was done "according to contract;" it was "well done, and done cheaply, and was a valuable and lasting improvement;" and the plaintiffs below do not even complain of an unjust tax. Hence the injunction should have been dissolved. The city council "are, in fact and in law, agents for the property owners," and fairly and fully protected the plaintiff's interests in the premises. *Warden v. County of Fond du Lac*, 14 Wis. 618; *Cameron v. Cameron*, 15 Wis. 9; *Hasbrouck v. City of Milwaukee*, 17 Wis. 284; and see, especially, *Hannewinkle v. Georgetown*, 15 Wall. 547.

This special act violates neither section 17, art. 2, nor section 1, art. 12, of our constitution. While many authorities can be cited, we think the following conclusive that it is not objectionable as a special act: *Walker v. City of Cincinnati*, 21 Ohio St. 14; *Bernal v. Hovious*, 17 Cal. 547; *Hall v. Bray*, 51 Mo. 288; *State v. Hitchcock*, 1 Kan. *178; *Jones v. State of Kansas*, Id. *273; *State v. Thompson*, 2 Kan. *432; *National Bank v. City of Iola*, 9 Kan. *690; *Beach v. Leahy*, 11 Kan. *23. It does not violate art. 12, § 1. *City of Wyandotte v. Wood*, 5 Kan. *603; *Land G. Ry. v. County of Coffey*, 6 Kan. *255; *National Bank v. City of Iola*, 9 Kan. *692; *Sticknoth's Estate*, 7 Nev. 223; *Schenley v. Com.*, 36 Pa. St. 29; *Shaw v. Norfolk Co. R. Co.*, 5 Gray, 180; *McCallie v. Chattanooga*, 3 Head, 317; *Lemon v. Johnson*, 6 Dana, 400; *Robinson v. Gardiner*, 18 Grat. 514. The only power the city of Emporia ever assumed to exercise in the premises was to improve and make passable the business street of the city, and assess the expenses thereof on the adjoining lots; and that power it has possessed ever since its organization, in 1870. This special act does not assume to confer a *new power*, nor an additional power, nor any power, but to legalize the manner of procedure, and waive omissions which had been made in the exercise of a power previously granted, and this it is competent for a legislature to do. If these assessments as first levied in 1871 were invalid, it was not because of any constitutional ground, nor want of power generally, but for "lack of legislative consent," and this consent was given by the special act.

The court finds that the city made the contract as alleged, and that the work was done accordingly,—well done, done cheaply,—and was a valuable and lasting improvement; hence the city was liable in the first instance. This is not a case of *ultra vires*. Now, *574 as the city, under the law of 1868, had full *power (if the estimate had been made) to do all that it did do, and as the making of an estimate was only necessary because the *legislature* had required it, and was in no sense constitutionally or naturally necessary, it follows that the legislature might waive and cure that defect, and that, too, without "conferring" any "power" whatever. It will be borne in mind that this is a case where the property was "subject to taxation," the tax a proper and equitable one, and the levy not excessive, and where plaintiffs attempt no equitable showing.

In the former decision in this case it was conceded "that the legislature may, in some cases, pass special curative laws for corporations." This language cannot mean that the legislature may by special act simply cure irregularities, because mere irregularities will not be noticed by the court in suits to enjoin the collection of taxes. *Missouri River, Ft. S. & G. R. Co. v. Morris*, 7 Kan. *231; *Kansas Pac. Ry. Co. v. Russell*, 8 Kan. *561; *Parker v. Challiss*, 9 Kan. *155; *Adams v. Beman*, 10 Kan. *37; *City of Lawrence v. Killam*, 11 Kan. *499; *City and County of San Francisco v. Certain Real Estate*, 42

Cal. 517; *Stoddert v. Ward*, 31 Md. 562. And to say that the legislature might only cure what the courts would disregard, is equivalent to denying the legislature any "curative" power by special act.

The relevy made these assessments legal, valid, and binding liens on plaintiffs' lots. It will be remembered that the district court finds "that a relevy of said taxes and assessments was made as alleged in said defendants' said answer;" hence it was made under section 41, Laws 1872, p. 204, and in accordance with the provisions of that section. See, in this connection, proviso to section 35, Laws 1872, p. 203, and *State v. City of Wyandotte*, 4 Kan. 434. This section 41 certainly covers the want of an estimate, which is the only thing shown at all irregular; and the cases above cited are conclusive that it is within legislative power to enact this section. That the relevy was proper, and cured all defects, see, in addition to the above-cited cases, the following: *Jackson v. Lodge*, 36 Cal. 41; *Hackett v. Richards*, 13 N. Y. 140; *McInerney v. Reed*, 23 Iowa, 410; *Howell v. City of Buffalo*, 37 N. Y. 268; *McCulloch v. State of Maryland*, 4 Wheat. 423; *State v. City of Newark*, 34 N. J. 236.

I concede from the "findings" in this case that the levy, when made in 1871, for these local improvements, was void as to the abutting lot-owners, because the estimate was not made. *But the contracts between the city and contractors were valid; and the contractors could have sued the city on those contracts for the work, according to their terms. It was fully in the power of the city to do just this work, and make just these contracts. It was the city, and not the lot-owners, that these contractors looked to for their pay, and the city has already paid them; and a relevy under said section 41 of the new city-charter act was not only valid, but was mere justice to reimburse the city. Of the many reasons which are given by the courts for upholding these reassessments, perhaps that in *Warden v. County of Fond du Lac*, 14 Wis. 618, is as satisfactory as any, in which case it is said that such tax "is a debt due the government, which the owner of the property has no more right in equity and conscience to withhold than the most sacred debt of a private nature."

R. M. Ruggles, for defendants in error.

The plaintiffs in error hang their case, as they themselves state in their brief, on two propositions, viz.: (1) The special act of the legislature (Laws 1872, p. 13) made these assessments, as at first levied in 1871, valid and binding, and cured the omission of the engineer's estimate, which is the only omission, error, or irregularity found by the court; and (2) the relevy in August, 1872, made these assessments valid and subsisting liens upon the property in question. Of these in their order.

In order to get a full understanding of the matter, it will be well to refer to the statute in force in 1871 in relation to the necessity for an estimate by the city engineer of the cost of any proposed work be-

fore a contract should be let therefor. The section of the statute is as follows, (Gen. St. p. 169:)

"Sec. 31. *Before* the city council shall make any contract for building bridges or sidewalks, or for any work on streets, or for any other work or improvement, an estimate of the cost thereof *shall* be made by the city engineer, and submitted to the council; and no contract shall be entered into for any work or improvement for a price exceeding such estimate; and in advertising for bids for any such *576 work, the council *shall cause the amount of such estimate to be published therewith."

The court below found, as matters of fact, that the city engineer never made any estimate of the cost of the work, and that the contract for the macadamizing was let to Brown, and the contract for the curbing and guttering was let to Chaplin. No estimate *ever* having been made by the city engineer, or any one for him, of course it follows that the above contracts for said work were entered into without an estimate being first made. We suppose it cannot be successfully questioned that the making of an estimate by the city engineer of the cost of the proposed work was a *condition precedent* to the letting of a valid contract,—a statutory requirement *absolutely necessary to be performed* in order to form a valid basis for proceedings to subject the property of abutting lot-owners to the cost of doing said work, and without which the contracts for said work, and all proceedings thereafter had in relation to said work, including the levy of the special assessments upon the property of defendants in error to pay for the same, were *absolutely void*, at least so far as the abutting lot-owners were concerned. Indeed, plaintiffs in error impliedly admit such to be the case, but seek to avoid its effect by claiming (1) that the special act of 1872 (Laws 1872, p. 13) made the first assessments, levied in 1871, valid and binding; and (2) that the second assessment or relevy, made in August, 1872, as they claim under section 41, Laws 1872, p. 204, was valid and binding. As to the effect of the failure to have an estimate made, we refer the court to the case of *City of Leavenworth v. Rankin*, 2 Kan. *357, as being precisely analogous to the case at bar. The court in that case uses this language, (2 Kan. *371:): "When the law prescribes a prerequisite to their [the city council's] ability to contract, the obligation to observe it cannot, with impunity, be disregarded; nor will a subsequently attempted ratification cure the defect. Such a construction would render nugatory the most salutary safeguards, and, in effect, make municipal corporations omnipotent. They must contract, if at all, within *577 the prescribed limits, and according to the prescribed forms."

We suppose that in the case above quoted, and in the case at bar, the contractors might, *perhaps*, recover on a *quantum meruit* against the city,—not upon the contract, nor under or by virtue of it, nor the price stipulated in it, nor any other particular price; but if

recovery could be had at all against the city, it should be the value of the benefit of the work to the city, and because the city had accepted it; and when such an action is brought, the question whether the work was "well and cheaply done," whether it was "necessary," or whether it was a "lasting and valuable improvement," will form proper subjects of investigation, but not till then. We utterly deny that abutting lot-owners can be made liable, or their property taken either by taxation or otherwise, unless the forms of law in force at the time the property is sought to be made subject to the charge are at least substantially complied with, when such forms, as in the present case, go to the very foundation of the right to incur the liability at all. *Dean v. Charlton*, 23 Wis. 610; *Welker v. Potter*, 18 Ohio St. 87, 88; *People v. Davis*, 61 Barb. 469.

But it is said by plaintiffs in error that the special act (Laws 1872, p. 13) heals and cures the original defect. To this we answer—*First*, the legislature had no constitutional power to pass such an act; and, *second*, the act by its terms does not purport to attempt to cure the omission of the city engineer to make an estimate as required by law. It seems to us clear that said special act is in violation of section 1, art. 12, of our state constitution. That the act in question is a special act seems to be beyond all controversy. It refers to the city of Emporia alone, and to no other city of the second class in the state. That the above constitutional provision refers to and embraces cities, is settled by the cases of *City of Atchison v. Bartholow*, 4 Kan. *124; *City of Wyandotte v. Wood*, 5 Kan. *607; *Gilmore v. Norton*, 10 Kan. *491; *National Bank v. City of Iola*, 9 Kan. *689. Then the question remains, did the above special act confer corporate powers? We answer, clearly so. The act, in effect, says that in every other city of the second class in the whole state of

Kansas the city engineer must make an estimate of the cost of *578 work of the kind in question before a contract for the *performance of it can be entered into, but the city of Emporia can enter into such contract notwithstanding no estimate was ever made; which, as we have before seen, is a condition precedent to the making of any valid contract at all. The proposition that such an act does not confer corporate power is so ridiculous that to state it is its own refutation, (*Gilmore v. Norton*, 10 Kan. *503;) and as to the power of the legislature to pass such an act, making abutting lot-owners liable, see *Baltimore v. Horn*, 26 Md. 194.

This special act is also in violation of section 17, art. 2, of our constitution. In effect it says that the general statutes of the state in relation to cities of the second class shall have a uniform operation in all and every of such cities throughout the state, *except* in the city of Emporia; and to hold such an act valid is to say that the legislature may, by special act, limit the uniform operation throughout the state of a general law. This proposition also is too ridiculous to be discussed. As to such an act, see *Darling v. Rodgers*, 7 Kan. *592;

Gilmore v. Norton, supra. All the cases cited in plaintiffs' brief, where such acts have been held valid, are in states where there are no such constitutional restrictions as in our state. The learned counsel for plaintiffs in error refers the court particularly to *Hannewinkle v. Georgetown*, 15 Wall. 547. That case decides that an injunction will not lie to restrain the collection of a tax on the sole ground of the illegality of such tax; and so this court has decided in *Barnes v. City of Atchison*, 2 Kan. *489; and such was and is the equity rule. But after the decision in *Barnes v. City of Atchison, supra*, and in consequence thereof, such an action is provided for and authorized by express statutory enactment. Civil Code, § 253; Laws 1867, c. 74, § 1. The counsel also cites several other authorities, noticeable among which is *Beach v. Leahy*, 11 Kan. *23. This case expressly holds that cities, towns, and villages are corporations proper, and within the constitutional prohibition in regard to special acts; and just as squarely decides that counties, townships, and school-districts are merely political subdivisions, and not within the purview of *579 section 1, *art. 12, of the constitution. We conclude that the plaintiffs in error "take nothing" by the special act of 1872.

Said special act of 1872 only purports to cure "irregularities and omissions" on the part of the mayor and councilmen. That this was not intended to obviate the consequences of a non-performance of a condition precedent, see *Welker v. Potter*, 18 Ohio St. 85. That the legislature only intended to hear irregularities is further evidenced by a comparison of the language used in said special act, and that in section 41 of the city charter act providing for a relevy.

Now, if we are right in our assumption that the contract under which the work was done was void by reason of no estimate having been made by the city engineer, and if said special act is void, then we suppose it will be conceded that the relevy made in August, 1872 was void also, unless the powers given by section 41 of the city charter act helped the matter out. To give this section the construction claimed by plaintiffs in error, (viz., that no matter how void or illegal, either "for want of sufficient authority, or other cause," a tax or assessment may have been, let the city council make a relevy and the whole thing is cured,) is, as we think, to bring said section 41 in conflict with section 5 of article 12 of the constitution, and thereby render said section void. That there must be some restriction in any act of the legislature which purports to confer on cities the power of taxation or assessment has been decided by this court. *Hines v. City of Leavenworth*, 3 Kan. *204. If the city council of any city can, by a single relevy, under said section 41, cure any and all defects arising, either from "want of sufficient authority or other cause," then we say there is no restriction. If this court shall hold that that construction or effect claimed by counsel for plaintiffs in error of said section 41 is the correct one, then a city council may disregard all restrictions, no matter how wise or salutary, or how well calculated for the pro-

section of the property owner, and may incur any and all manner of indebtedness; and when the tax-payer objects, and perhaps seeks his remedy in the courts, the council may let the matter rest until the next annual levy, *make a relevy of the void tax, and straightway the whole thing is cured. Such a doctrine is monstrous, and cannot be the law. Besides, the learned counsel for plaintiffs in error is hardly entitled to a patent for his invention in dragging forth said section 41 to save the relevy. The same provision was in force in 1871. City Charter Act 1871, c. 62; Laws 1871, § 20. This section 20, at a first glance, does not seem as broad as said section 41 of the Laws of 1872, by reason of the omission of the word "assessments" therefrom, yet we find that the word "taxes," as used in this section 20 of the Laws of 1871, included the word "assessments," (*Hines v. City of Leavenworth, supra;*) and that, therefore, said section 20 of the act of 1871 is just as broad in its scope as said section 41 of the act of 1872. Therefore we find that the legislature in enacting said section 41 did not intend to enact any new curative act, but only intended to re-enact an already existing law. Consequently we see that this same section 41 was in full force at the time of the first levy and assessment made by the city to pay for this grading, etc. Therefore we submit that as there was just the same power and authority delegated to the city at the very time this work was done for the city, and at the time the first assessments were made by the city to pay for it, as can possibly be claimed to have been delegated and given to the city by the subsequent enactment of 1872, it follows that the logic of the position of plaintiffs in error upon this point is just this: that though the section of the constitution above quoted requires the legislature to restrict the power of cities in reference to "taxation, assessment, borrowing money, contracting debts, and loaning their credit," and that although the legislature had fixed the restrictions and limitations provided for by this provision of the constitution by prohibiting cities from doing these things, or any of them, unless they first complied with these restrictions and limitations as conditions precedent, yet all that was necessary for a city to do in order to successfully evade this provision of the constitution, and the laws of the legislature enacted for the purpose of enforcing it, was to go on and exercise the power *of taxation, assessment, borrowing money, contracting debts, loaning its credit, with utter disregard to restrictions and limitations placed upon these powers by the constitution and the acts of the legislature, (as was done in the case at bar;) and when these powers had so been exercised in such utter violation of the laws of the land, all that such a city need do would be, in the first instance, to levy a tax or make an assessment to pay the void indebtedness resulting from the exercise of such powers in such an unlimited and unrestricted manner, and then, when the tax-payers against whom these taxes are levied refuse to pay, the city makes a relevy or a reassessment under section 20, p. 151, Laws

1871, or section 41, Laws 1872, p. 204, and the whole matter becomes at once cured, and the indebtedness made valid, and thus this constitutional provision is successfully evaded. If this be the proper construction of said section 20 of the act of 1871, or section 41 of said act of 1872, or if these sections can be made to operate to produce such a result, then we say that they are in direct conflict with said section 5 of article 12 of the constitution, whenever such a construction is sought to be given to them, or such a result sought to be produced by their operation, and are of course void, to the extent at least of producing such results. *Hines v. City of Leavenworth*, 3 Kan. *204; *Foster v. City of Kenosha*, 12 Wis. 616.

It of course follows as a corollary to the rule laid down by this court in *Hines v. City of Leavenworth*, 3 Kan. *204, that any law passed by the legislature to evade this constitutional provision is absolutely void in so far as it accomplishes such purpose; and that also, when any construction is sought to be given to any law of the legislature which will have the effect of giving to such law the intention of evading this provision, (as is sought to be done by the argument of plaintiffs in error in the case at bar,) such construction will not be given by the courts, or, if given, they will be compelled to hold the law unconstitutional. Therefore we submit that the provisions of section 20 of the city charter act of 1871, re-enacted by section 41,

p. 204, Laws 1872, are only valid so far as they apply to cases *582 of assessment or levy of taxes which *were authorized by law in the first instance, but were void by reason of some irregularity or neglect to comply with the law regulating proceedings in such cases, and that as to such cases only can this section 41 make valid a subsequent relevy or assessment. The supreme court of Wisconsin, in construing just such a statute as this section 41, in relation to just the same constitutional provision, says: "But it would be a strange abuse of such a statute to say that it would extend to the assessment of a tax which was defective, not on account of mere irregularity in the proceedings, but from an entire want of authority." *Dean v. Charlton*, 23 Wis. 610; *Hopkins v. Mason*, 61 Barb. 469. As we have seen, the city of Emporia not having had the power in the first instance to make these contracts, in utter disregard of the limitations and restrictions imposed upon their contracting power, the contracts when made were *ultra vires*; and this being the case, it follows, as a matter of course, that the first assessments made to pay these contracts were not void by reason of some mere irregularities, but were void because the city had not the power to make these contracts, and therefore not the power to enforce their payment. And we here assert to the court, without fear of contradiction, that the only safety of the inhabitants of cities in this state from oppressive and ruinous taxation lies in the courts adopting as a rule of construction of such statutes as section 41 the rule above quoted from *Dean v. Charlton*, rather than the construction sought to be given

by the learned counsel for plaintiffs in error. And this is specially so in such cases as the one at bar, as the right to make these assessments against the defendants is as an asserting of the right to compel a few to pay for that which, if of any benefit at all, is as much a benefit to the whole public as it is to the few; and we submit, as a rule in such cases, that the assertion of such a right is in derogation of individual rights, and must be strictly construed and rigorously observed; and if there is a failure to comply with any material requirement, such failure will make the whole proceedings so
 *583 absolutely void that *it will be even beyond the power of a legislature to cure such a failure.

BREWER, J. In May and June, 1871, the city of Emporia entered into two contracts, one for the curbing and guttering, and the other for the macadamizing, of Commercial street. The work was done under these contracts, was well and cheaply done, was accepted by the city, and was a valuable and lasting improvement. No estimate of the cost of the work was ever made by the city engineer or submitted to the city council. In July, 1871, the city attempted to provide for the payment of this work by special assessment on the adjoining lots. At the time of these proceedings the following provision of the statute applicable thereto was in force:

"Sec. 31. Before the city council shall make any contract for building bridges or sidewalks, or for any work on streets, or for any other work or improvement, an estimate of the cost thereof shall be made by the city engineer, and submitted to the council; and no contract shall be entered into for any work or improvement for a price exceeding such estimate; and in advertising for bids for any such work, the council shall cause the amount of such estimate to be published therewith." Gen. St. 169, § 31.

In consequence of the omission of this estimate, the proceedings of the city council were without authority, and the collection of the contract price by the assessments, so far at least as the lots of defendant in error are concerned, was a failure. In 1872 the legislature passed a special act validating these assessments. Laws 1872, p. 13, c. 13. It also passed a general law for cities of the second class, the forty-first section of which is as follows.

"Sec. 41. In case the corporate authorities of any city have attempted to levy any taxes or assessments for improvement or for the payment of any bonds or other evidence of debt, which taxes, assessments, or bonds are or may have been informal, illegal, or void, for the want of sufficient *authority* or other cause, the council of such city at the time fixed for levying general taxes *shall* relevy and reassess
 *584 any such *assessments or taxes in the manner provided in this act." Laws 1872, p. 204.

Under this section the city proceeded to make a relevy of these assessments, and this action was brought to restrain any further process.
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ceedings on the part of the city. The judgment in the district court was in favor of the lot-owners, and the city brings the question here for re-examination.

It is conceded that but for the legislation of 1872 the lot-owners would be entitled to their restraining order; but it is contended—*First*, that the special act made valid and legal the assessment of 1871; and, *second*, that the relevy made the assessments valid and binding liens on the lots. A consideration of the second question is all that will be necessary, for it seems to us that the proposition therein contained is correct. This section was passed after the levy of 1871, and by its terms is manifestly applicable to a case like the present. Indeed, we do not understand counsel as disputing that it is within the very letter of the statute, but the contention is that to give to this section the sweeping and comprehensive construction that its language will permit, is to bring it into conflict with section 5 of article 12 of the constitution. That section of the constitution is as follows:

"Sec. 5. Provision shall be made by general law for the organization of cities, towns, and villages, and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit *shall be so restricted* as to prevent the abuse of such power."

Upon this counsel for defendants in error argues: "That there must be some restriction in any act of the legislature which purports to confer on cities the power of taxation or assessment, has been decided by this court. *Hines v. City of Leavenworth*, 3 Kan. *204. If the city council of any city can, by a simple relevy, under said section 41, cure any and all defects arising either from 'want of sufficient authority, or other cause,' then we say there is no restriction. If this court shall hold that the construction or effect claimed by the counsel for plaintiffs in error of said section 41 is the correct one, then a city

council may disregard all *restrictions*, no matter how wise or
 *585 salutary, or how well culculated for the pro*tection of the property owner, and may incur any and all manner of indebtedness; and when the tax-payer objects, and perhaps seeks his remedy in the courts, the council may let the matter rest till the next annual levy, make a relevy of the void tax, and straightway the whole thing is cured. Such a doctrine is monstrous, and cannot be the law." Hence counsel concludes that it is only valid so far as it "applies to cases of assessment or levy of taxes which were authorized by law in the first instance, but were void by reason of some irregularity or neglect to comply with the law regulating proceedings in such cases, and that as to such cases only can this section 41 make valid a subsequent relevy or assessment." It would seem to be conceded by this statement of counsel that this section was not intrinsically and absolutely invalid, but only so in application to certain cases.

Now, it is well known that a statute may be attacked for unconstitutionality in more than one way. It may be so wholly and directly at variance with some constitutional provision that it is under

all circumstances, and in all applications, absolutely void. A law granting a divorce, one reducing the terms of county officers to one year, and one making the state a stockholder in a banking institution, are examples of such void enactments. Again, a legislative act may be entirely valid as to some classes of cases, and clearly void as to others. A law might be void as violating the obligation of existing contracts, but valid as to all contracts which should be entered into subsequent to its passage, and which would therefore have no legal force except such as the law itself would allow. *Cooley, Const. Lim.* 180. And, again, an act may be fairly susceptible of two constructions, one of which conflicts while the other is in harmony with the constitution. In the first case the decision would be uniformly against the law, and all rights claimed to be derived therefrom; in the second, the decisions would vary according to the circumstances of the particular case for which the support of the law was invoked; while in the third, that construction which sup-
*586 ports would be preferred to that which destroys the law. It seems to us that this section may be placed in the second class; that it is valid as applicable to certain cases, and invalid as to others. It purports to authorize a relevy in all cases of a prior insufficient levy. It is thus curative in its nature. But there are some things beyond the power of cure. As to these, it is invalid and inoperative. But purporting to cure all, it cures all within the power of cure. Nor should we look to this section for the restrictions contemplated by the section of the constitution heretofore quoted, but rather to the original act by which the power to levy was granted. If there were no sufficient restrictions in that, then that act was void, and there was *ab initio* a failure of power. But we should not expect to find in a merely curative act limitations and restrictions on an original grant of power.

But what defects may a legislature cure, and is the defect in this case within the power of cure? Two or three things may be remarked. The original purpose for which the power of taxation was invoked was not one of the extraordinary, but one of the common, purposes of municipal government. It was for the purpose of improving one of the thoroughfares of the city. As to the difference, if any, which exists between those two classes of cases, in the extent of the power to cure, see *Hasbrouck v. Milwaukee*, 13 Wis. 37, and the comments thereon, in the same court, by Chief Justice Dixon, in the subsequent case of *Mills v. Charleton*, 29 Wis. 413; and see, also, *Cooley, Const. Lim.* 380, and note. Again, there is nothing inequitable in subjecting these lots to the payment of this assessment. The work, as it appears from the findings, was well and cheaply done, and was a lasting and valuable improvement. There was no fraud in the making of the contracts by which excessive and unjust burdens were imposed. There is no inequity in casting the burden of a street improvement upon the adjoining lots. There was no partiality or op-

pression in the appraisal of those lots. In fact, nothing appears to invalidate the proceedings except the mere omission of *587 the *engineer's estimate. Again, this defect was one as to a matter which might have been omitted by the legislature in the first instance. There is nothing in the nature of things which requires that an estimate of the cost be made prior to the letting of the contract and the doing of the work. It may be a very proper precaution, but it is within the unquestioned power of the legislature to authorize such improvements without it. "If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute." Cooley, Const. Lim. 371.

In *May v. Holdridge*, 23 Wis. 93, Paine, J., says: "This rule must, of course, be understood with its proper restrictions. The work for which the tax is sought to be assessed must be of such a character that the legislature is authorized to provide for it by taxation. The method adopted must be liable to no constitutional objection. It must be such as the legislature might originally have authorized, had it seen fit. With these restrictions, where work of this character has been done, I think it competent for the legislature to supply a defect of authority in the original proceedings, to adopt and ratify the improvement, and to provide for a reassessment of the tax to pay for it."

In *Mills v. Charleton*, 29 Wis. 400, Dixon, C. J., referring to this case, says: "It will be seen by examining the facts in *May v. Holdridge*, as stated on pages 95 and 96 of the report, that the original proceedings were as void for want of authority in the aldermen as it is possible to conceive the original proceedings to have been here; and yet the power of the legislature to legalize and authorize the reassessments was upheld. * * * The principle upon which these and other similar decisions rest, is that the taxing power, when acting within its legitimate sphere, and unrestrained by positive constitutional provisions, is a far-reaching and unlimited power, which knows no stopping place nor moderation of force until it has accomplished the purpose for which it exists, namely, the actual enforcement *and collection of the tax. It moves constantly *588 forward to its object until that is accomplished, and, if turned aside by any obstacles or impediments, may again and again return to the same tax or assessment, until, the way being clear, the tax is paid or the assessment collected." See, also, *Thomas v. Leland*, 24 Wend. 65; *Town of Guilford v. Supervisors Chenango Co.*, 13 N. Y. 143; *Brewster v. Syracuse*, 19 N. Y. 116; *Grim v. Weissenberg School-dist.*, 57 Pa. St. 438; *Musselman v. City of Logansport*, 29 Ind. 533; *Howell v. City of Buffalo*, 37 N. Y. 267; *State v. Mayor*, 34 N. J. 236; *Dean v. Borchsenius*, 30 Wis. 236; *People v. Holladay*, 25

Cal. 300; *Brevoort v. Detroit*, 24 Mich. 322. In this last case, noticing the objections to the reassessment, the court says: "One is that, the original assessment being void, there was no constitutional power in the legislature to order a reassessment. This, however, may depend upon the nature of the original infirmity. If the difficulty there was that the sums assessed did not constitute any just or equitable charge for public purposes upon the property upon which it was sought to be imposed, it is quite clear that the legislature could not make it such a charge; but if the defect consisted in some irregularity of proceeding, or in some oversight in the law itself, in consequence of which a just and equitable claim had failed to be legally imposed, there could be no good reason why the legislature should not retrospectively supply the omission or cure the irregularity."

The case may then be summed up thus: The city had the power to make these improvements. They were among the ordinary objects of municipal government. It is equitable that the adjoining lots should bear the burden of such improvements. There was no fraud in the contracts, no excessive, oppressive expenditures made. There was no inequality or injustice in the apportionment. The defect was on a matter which the legislature might have dispensed with in the first instance. It was therefore a defect which by subsequent enactment a legislature could cure; and a general act authorizing, in all *589 cases of insufficient assessment *and levy, a reassessment and relevy, is applicable to and cures this defect.

The judgment of the district court will be reversed, and the case remanded for further proceedings in conformity to the views herein expressed.

(All the justices concurring.)

STATE OF KANSAS v. WALTER BEEBE.

July Term, 1874.

Escape: Failure of Sheriff to have Copy of Recognizance. Where a person charged with the commission of a criminal offense is at liberty on bail, and his sureties, with his consent, but without any copy of the recognizance, deliver him to the sheriff, taking his receipt therefor, *held*, that the sheriff, without having any copy of the recognizance, cannot lawfully hold the accused in custody against his will; and therefore that the accused in such a case may escape from the custody of the sheriff without committing a felony; and also that any other person may assist him to escape without committing a felony.¹

Appeal from Sedgwick district court.

In October, 1873, one Joseph Lowe was arrested upon a warrant charging him with the commission of a felony. He waived an ex-

¹Defective information in prosecution for an escape, see *State v. Hollon*, 22 Kan. 580.

amination, and entered into a recognizance in the sum of \$2,000, with two sureties, for his appearance to the next term of the Sedgwick district court. On the eighth of December afterwards his sureties, "at Lowe's request, [as they testify,] turned Lowe over to the sheriff verbally, and took the sheriff's receipt for him." The receipt is as follows:

"Received of S. H. K. and R. M. S., sureties on the recognizance of Joseph Lowe, the body of said Joseph Lowe.

"December 8, 1873.

"Wm. SMITH, Sheriff of Sedgwick Co."

On the thirteenth of said December, Lowe escaped, and the *590 defendant, Beebe, was charged by information with aiding and assisting in such escape. The action against Beebe was tried at the December term, 1873, of the district court. Verdict of guilty, and judgment on the verdict.

Tucker & Fischer, for appellant.

The principal question in the case is whether Lowe was in the lawful custody of the sheriff at the time of his escape. The facts, as disclosed by the evidence, are as follows: Lowe was charged with shooting one William Anderson, with intent to kill. Lowe was out on bail. On the eighth of December, before court commenced, at the request of Lowe, his sureties surrendered him to the sheriff, and took a receipt for him. This surrender was made by turning him over to the sheriff without delivering any copy of Lowe's recognizance with him. The sheriff then delivered Lowe to one John Nugent to guard. Nugent was not a deputy nor sworn bailiff. On the thirteenth of December Lowe made his escape from Nugent.

We claim, on the part of the appellant, that Lowe was not in the lawful custody of the sheriff at the time of his escape; and, if not, then Beebe could not be punished for the crime of assisting him to escape. Section 177 of the crimes act refers expressly to aiding persons to escape from the *lawful custody* of the officers or other persons. If the custody of the sheriff was not lawful, then Nugent's could not be. This question of lawful custody involves a construction of sections 148 and 150 of our Criminal Code. Section 148 provides for the surrender of a principal by his sureties, and requires that they procure a *certified copy* of the recognizance, by virtue of which they can take the principal and surrender him to the sheriff. Section 150 requires that the sureties must deliver *such copy*, with their principal, to the sheriff, and the sheriff must acknowledge the surrender in writing. We claim that Lowe was not in the lawful custody of the sheriff for the reason that these sections have not been complied with.

*591 The district court instructed the jury that this surrender was good, and sufficient to warrant the jury in finding that Lowe was in the lawful custody of the sheriff. We think this is not the law

of the case. The defendant asked the court to instruct the jury that if they found, "from the evidence, that Lowe was out on bail, and had been delivered up to the sheriff by his bail, in order to render his custody lawful Lowe's bail must deliver a certified copy of his recognizance to the sheriff with the body of Lowe," which the court refused. We think the instruction asked by defendant embodied the law in the case, and should have been given.

The court seemed to think that the fact that Lowe's surrender was made with his consent, or at his request, would obviate the necessity of a compliance with said sections 148 and 150. Lowe's consent or request in that behalf could certainly make no difference with the appellant in this case. The sheriff should have something to show by what authority he held the prisoner, and in this case it should have been a copy of Lowe's recognizance. Lowe was being guarded by Nugent, who, as the evidence shows, was not an officer of the law; and he had nothing but the verbal order of the sheriff for Lowe's detention. Unless the sheriff had the lawful custody of Lowe himself, he certainly could not transfer it to a private individual, and one in the pay of Lowe; and the evidence shows that Lowe was to pay Nugent for his time in guarding him. Upon the subject of escapes, we again refer to section 177 of the crimes act, and to 2 Bish. Crim. Law, § 1034. In some cases the principal might be liable, and the aider not, but in this case neither would be liable. If Lowe could not have been punished for an escape, certainly Beebe could not for assisting him.

H. C. Sluss, Co. Atty., for the State.

The point relied upon by the appellant is that the sureties in the recognizance for the appearance of Lowe did not procure a copy of Lowe's recognizance, and deliver it with Lowe to the sheriff. The *592 object of procuring the copy of the recognizance, under section 148 of the Criminal Code, is to enable the surety to take the principal. Having a copy the surety is armed with evidence of an existing fact which enables him to overcome the will of the principal, and take him without his assent. It is not the copy that gives the power; it is the existence of the fact of the recognizance that gives the power to take and surrender the principal. A certified copy is but evidence of the fact. Without the evidence of the fact, the surety cannot compel the principal contrary to his will; but where the principal comes voluntarily, and requests his surety to surrender him, and voluntarily places himself in the custody of the surety for that purpose, there is no will to overcome,—the assent of the principal is obtained. There is no taking to be done, and the necessity for the sureties having a copy of the recognizance is obviated by the act of the principal. There is no necessity of evidence of the fact of the recognizance, for that fact the principal admits by his action, and waives all right to demand the production of the copy of the recognizance. Now, in

such a case, if it is not necessary for the sureties to have a copy of the recognizance in order to accept the principal's voluntary surrender of himself, it is certainly not essential for him to deliver such copy to the sheriff in order to enable the sheriff to accept the surrender from the sureties. Perhaps Lowe might have refused to be taken and surrendered without a copy of the recognizance being produced; but when it is done at his own request, it ought to be considered that he waived the formality.

It is questionable, from the language of section 148, whether it is intended to apply where the principal is found in the county where the recognizance is of record, and the proceeding pending; for, independently of this statute, the bail has the right to surrender his principal. The recognizance is of record in the court of the county where the principal must appear; in the other counties of the state it is not. The object of the provision of section 148 was twofold: to arm the surety with the evidence of his authority in those counties where such authority was not a matter of public record, and also to *593 give immunity *to the principal from an otherwise unauthorized arrest. But it seems reasonable that this immunity is one of the rights which a man may waive. Lowe stood charged with crime. He voluntarily placed himself in custody, and the sheriff had the right to hold him, and that is the test of "lawful custody."

VALENTINE, J. The defendant was tried and convicted upon a charge for feloniously aiding a prisoner to escape. It seems that one Joseph Lowe was charged with the offense of assault with the intent to commit murder. He entered into a recognizance for his appearance at the next term of the district court. Afterwards, at his own request, he was delivered by his sureties to the sheriff of the county, and the sheriff gave the sureties a receipt therefor. The sheriff then delivered him into the custody of one John Nugent, to be guarded, and by agreement Lowe was to pay Nugent for his services. While in the custody of Nugent he escaped, and the defendant Beebe, assisted him to escape, by furnishing him with a horse with which to ride away. From the time Lowe entered into said recognizance up to the time he escaped, neither the sureties, nor the sheriff, nor Nugent ever had any warrant of any kind, or any copy of the recognizance, or any other instrument in writing, for the detention, imprisonment, or custody of said Lowe. Under these circumstances, was the escape a felony? This is a difficult question. It is one upon which good lawyers may differ. It is one upon which we know that good lawyers do differ. We have therefore given the question a very careful consideration. We have searched the text-books and the reports for something to throw light upon the subject, but have found nothing. The real question is whether Lowe escaped from *lawful custody*. Now, there is no ambiguity in the language of the statute upon this

subject. The statute plainly enough prescribes what shall be done in such cases in order to place the person charged with the offense in lawful custody. But the difficulty arises in cases where the *594 statute has not been fully complied with. May the *accused be in lawful custody, although the statute prescribing how he shall be placed in such custody has not been complied with? Lowe was at liberty on bail, and no one had any right to restrain him of his liberty except in a particular manner. The statute provides that "when the surety desires to surrender his principal he may produce [procure] a copy of the recognizance from the clerk, by virtue of which the bail or any person authorized by him may take the principal in any county within the state." Crim. Code, § 148. The sureties in the present case did not comply with this statute. They procured no copy of the recognizance from the clerk. The principal, however, voluntarily surrendered himself to them. But still it can hardly be questioned that if the principal, at any time before he was delivered to the sheriff, had refused longer to remain in the custody of his bail, and had chosen to depart therefrom, he could have done so legally, and without committing any offense. They could hold him as long as he voluntarily chose to remain with them, but when he chose to depart therefrom they could hold him no longer. After his voluntary surrender to his bail they transferred their custody of him to the sheriff, and, as we are inclined to think, they transferred nothing more. Then, had the sheriff any more right to hold said principal in custody than his surety had? While he chose to remain with the sheriff he was, of course, in the lawful custody of the sheriff; but when he chose to depart therefrom he was no longer in the lawful custody.

The statute provides that "the bail must deliver a certified copy of the recognizance to the sheriff with the principal, and the sheriff must accept the surrender of the principal, and acknowledge it in writing." Crim. Code, § 150. Now, the bail did not deliver to the sheriff any certified copy of the recognizance; and the sheriff had no such copy, nor any other written authority, by which to hold said Lowe when he escaped from Nugent. Even if we should be of the opinion that the bail impliedly (they did not do so expressly) authorized

the sheriff to procure a certified copy of said recognizance, *595 still the sheriff did not procure the same. *Then what was there to prevent Lowe from escaping, if he chose to do so? There is no authority anywhere given to the sureties on a criminal recognizance to arrest their principal, or to hold him in custody, or to deliver him to the sheriff, without a copy of the recognizance; and there is no authority anywhere given to the sheriff to receive such principal, or to retain him in custody, unless he is also furnished with a copy of the recognizance. If the sheriff can hold a person in custody under such circumstances, without such copy, it is by virtue of some authority not found in the statutes. Under our system of criminal jurisprudence we are of the opinion that no person can be

deprived of his liberty on account of some criminal charge against him except by virtue of some written authority therefor, except in cases where the accused may be arrested before any warrant has ever been issued. But even in cases where the accused may be arrested without warrant, he must be immediately taken before a magistrate, and a complaint be filed against him, and a warrant issued wherewith to hold him, or the custody of him would become unlawful. But where a person has been arrested on a criminal charge, and afterwards set at liberty on a recognizance, then he is as much entitled to his liberty as he ever was before, and cannot again be deprived of his liberty except by following the law. There can be no excuse for again arresting him, or holding him in custody, without written authority. The sureties may take a certified copy of the recognizance when they execute the same, or they may require ample security from their principal before they become his bail. They have ample time to take every precaution necessary; hence we think they ought to follow the law. Before a man can be deprived of his liberty, even the forms of law should be complied with. In such cases, even the forms of law become matters of substance. And it would hardly seem that a man should be charged with committing a felony for merely failing to recognize certain proceedings as valid and binding where the proceedings themselves are not in conformity to *596 law. And, of course, if Lowe did not commit a felony in *escaping, Beebe did not commit a felony in assisting him to escape. We have come to the conclusions we have in this case with some doubts; but our conclusions are that the sheriff could not legally hold Lowe in custody against his will, except by having a certified copy of the recognizance as the law requires; and therefore that Lowe did not commit a felony in escaping; and therefore that Beebe did not commit a felony in assisting him to escape.

The judgment of the court below is reversed, and cause remanded for further proceedings.

BREWER, J., concurs. KINGMAN, C. J., dissents.

STATE OF KANSAS v. PETER MARSH.

July Term, 1874.

Grand Jury: Irregularity in Calling. While a grand jury should only be called by order of the district court, yet when one has been called by order of the judge in vacation, and has been impaneled, charged, and sworn by the court, it is a *de facto* grand jury, and, under section 79 of the Code of Criminal Procedure, no objection is good to an indictment presented by it on account of the manner of its organization, which does not imply corruption in such organization.

Appeal from Mitchell district court.

January 13, 1874, the judge of the Mitchell district court, in vacation, made and transmitted to the county clerk, an order, as follows: "You are requested hereby to draw from the jury-box of said county, according to law, the names of fifteen persons to serve as grand jurors for the ensuing April term of the district court of said county." Pursuant to this order a grand jury were drawn and summoned.

By act approved March 3, 1874, (Laws 1874, p. 93,) the *597 spring term of the district court for Mitchell county *was changed from April to the fourth Monday of March, on which day said court convened, and said grand jury was impaneled and sworn. Said jury returned twenty-nine bills of indictment, one of which was against the defendant, Marsh, for selling intoxicating liquors without license. At the August term, 1874, of said district court the defendant was tried and convicted of the offense charged in said indictment.

H. & L. Cooper and A. J. Banta, for appellant.

The grand jury finding and presenting the indictment in this case was drawn and summoned by authority of a written request of the judge of the district court made at chambers, and addressed to the county clerk. The power to order grand juries to be drawn and summoned to attend the sittings of the district court is, by statute, vested in the court only; and a body of fifteen men, drawn and summoned by authority of a request of the judge at chambers, is not a legally constituted grand jury, and its proceedings are absolutely void. Gen. St. 833, § 73; Id. 535, § 9; Id. 538, § 24. The judge at chambers can only exercise the powers given by law. Const. § 16, art. 3. The power to order a grand jury to be drawn and summoned was at one time by law vested in the judge of the district court at chambers, (Laws 1864, § 7, p. 113;) but this section was amended by the law now in force, which gives the power to order a grand jury to be drawn and summoned to the court alone. Gen. St. 1868, § 73, p. 833. The change in the language of the statute shows clearly that the intention of the legislature was to take the power from the judge of the district court at chambers, and give the power to the court in term time.

The district court seems to have thought that the grand jury was not properly ordered, but held it to be a mere irregularity in their selection, not amounting to corruption, deciding on section 79 *598 of the Criminal Code. Here we think the court erred. *That section is not applicable to the question here raised. This is not a question of the irregular exercise of a power given by law; but the question here raised is, is the power which has been exercised given by law to the judge at chambers? The court could not acquire jurisdiction by an indictment presented by a grand jury, the proceedings of which were absolutely void. *Vattier v. State*, 4 Blackf. 73; *State v. Bolt*, 7 Blackf. 19; *State v. Hensley*, Id. 324; *Bellair v. State*, 6 Blackf. 104; *Montgomery v. State*, 3 Kan. *263; 1 Bish. Crim. Proc. § 749.

Clark A. Smith, Co. Atty., for the State.

Two questions are raised: *First*. Has the judge of the district court in vacation, or at chambers, power to order the drawing of a grand jury? *Second*. If the judge has not such power under the law, but nevertheless makes such an order, and a grand jury is regularly drawn, impaneled, sworn, and charged, and such grand jury proceeds regularly to find sundry indictments, is it such an irregularity as to avail a defendant so indicted, on a plea to the jurisdiction of the court, or in abatement?

By chapter 76, Laws 1873, the spring term of court was fixed for April. By chapter 60, Laws 1874, it was changed to March. Under section 2 of the act last mentioned, (Laws 1874, p. 94,) if this grand jury would have been a legally constituted grand jury for the April term, had no change been made in the law, it certainly was a legal grand jury for the March term, as changed. The objections of the appellant are founded entirely on section 73 of the Criminal Code, which provides that no grand jury shall be drawn unless ordered by the court. And it is claimed that the order for the drawing of the grand jury which found the indictment in this case, being made by the judge of the court in vacation, was absolutely void, and that all proceedings of the grand jury drawn in pursuance of such order are void. We submit that such proceedings are not void, but valid. *Com. v. Smith*, 9 Mass. 107; *People v. Jewett*, 3 Wend. 314. It was but an irregularity in the drawing or selecting the grand jury; *599 and as this irregularity did not amount to corruption, the *district court did not err in overruling the appellant's motions to quash the indictment, and for the arrest of judgment.

BREWER, J. The defendant was indicted by the grand jury at the March term of the district court of Mitchell county. He objected that the grand jury was not legally constituted, and raised this objection by a plea to the jurisdiction, a plea in abatement, a motion to quash the indictment, and a motion in arrest of judgment; so that if the objection was well taken, he placed himself in a proper

position to avail himself of it. The grand jury was drawn in pursuance of an order made by the judge of the district court in vacation. The record shows that on the first day of the term such jury was duly impaneled, sworn, and charged. The statute provides that "grand juries shall not hereafter be drawn, summoned, or required to attend the sittings of any court in any county in this state, unless ordered by the court." Crim. Code, § 75; Gen. St. 838; and see, also, Gen. St. 535, § 9; Id. 538, § 24; Id. 835, § 89. Was this grand jury properly constituted? and, if not, was the defect fatal to the indictment? Section 79 of the Criminal Code provides that "no plea in abatement, or other objection, shall be taken to any grand jury duly charged and sworn, for any alleged irregularity in their selection, unless such irregularity, in the opinion of the court, amounts to corruption, in which case such plea or objection shall be received." It is claimed by counsel for appellant that a grand jury is created only by the order of the court, and that without such order it has no legal existence; and that the section last quoted refers simply to the manner in which the order for its creation is executed, and not to the order itself. We think the section is broader in its scope, and that it includes everything antecedent to the impaneling of the jury. The section first quoted is a restriction on the calling, not the impaneling, of the jury. The jury is impaneled and charged by the court, so that thereby the court recognizes that body as a valid *600 and legal grand jury. And we think this section means that whatever body is duly charged and sworn as a grand jury, and recognized as such by the court, is to be taken, like any other officer or tribunal, as a *de facto* jury, whose acts are valid as to the public; and that no objection to the manner of its creation will be recognized unless it be one that implies corruption. A *de facto* prosecuting attorney legally prosecutes; a *de facto* judge legally tries and sentences; and a *de facto* grand jury may, with equal propriety, legally indict.

The legislature has elsewhere used this word "selection" as embracing the order for the grand jury as well as the manner of its execution. Chapter 54 of the General Statutes, is entitled "An act providing for the selection and summoning of grand and petit jurors;" and sections 21, 23, and 24 provide for the orders of the court or judge.

There being no other question presented, the judgment of the district court must be affirmed.

It is understood that another case against the same defendant, and the cases of *State v. Seright* and *State v. Lowry*, brought to this court by appeal, and now pending here, involve only the same question, and must be decided in the same way.

(All the justices concurring.)

COMMISSIONERS OF SEDGWICK CO. v. H. W. BAILEY.¹

July Term, 1874.

1. **Constitutional Law: Titles of Bills and Laws.** The constitutional provision that "no bill shall contain more than one subject, which shall be clearly expressed in its title," is mandatory; and if the legislature should clearly violate this provision by putting something in the body of an act clearly not embraced in the title thereof, or wholly foreign to the title, it would be the duty of the courts to declare such portion of the
 *601 act void. If any bill, while pending in the legislature, should, *in any of its stages, be in conflict with this provision, it would be the imperative duty of the legislature, on or before the final passage of the bill, to correct it, so as to make it harmonize with said provision, and if they should fail to do so, the bill itself, or some portion thereof, would be void.
2. ———: **Chapter 97, Laws 1872: Section 6 Held Void.** Where the legislature, on March 3, 1868, passed an act entitled "An act defining the boundaries of counties;" and afterwards on the twenty-ninth of February, 1872, passed another act entitled "An act amendatory and supplemental to an act entitled 'An act defining the boundaries of counties,' approved March 3, 1868;" and by section 5 of the last-mentioned act created the new county of Harvey, taking a portion of the county of Sedgwick and placing it within the boundaries of Harvey; and by section 6 of said last-mentioned act provided, by an arbitrary rule, for taxing the territory detached from Sedgwick county and attached to Harvey county, to assist in paying certain old debts of Sedgwick county: *held*, that the matters contained in section 6 were not expressed in the title to the bill, and therefore that said section 6 is unconstitutional and void.

Original proceedings in mandamus.

On the sixth of November, 1873, the plaintiff made application to the chief justice of this court for an alternative writ of *mandamus*. Said application was based on the affidavit of the county attorney of Sedgwick county, alleging, among other things, that the entire length of the Wichita & Southwestern Railroad, between the town of Newton and the town of Wichita, is 26½ miles; that when said railroad was constructed it was wholly within Sedgwick county; that by section 5 of chapter 97 of the Laws of 1872, approved February 29th, (Laws 1872, p. 184,) a portion of said Sedgwick county was detached, and the territory so detached was annexed to, and made a part of, the county of Harvey, a new county created by said chapter 97; that the town of Newton, by such change in the boundary of Sedgwick county, and by force of said section 5, became a town of said Harvey county; that of said 26½ miles length of said Wichita & Southwestern Railroad, 9½ miles thereof was now situated in said Harvey county, and 15½ miles thereof in said Sedgwick county; that said

¹See Sedgwick Co. v. Bunker, 16 Kan. 498; Prescott v. Beebe, 17 Kan. 323; subject matter of acts, title, see Evans v. Adams, 21 Kan. 124; Prescott v. Beebe, 17 Kan. 322; John v. Reaser, 31 Kan. 406; S. C. 2 Pac. Rep. 771; State v. Bankers' Ass'n, 23 Kan. 502; Shepherd v. Helmers, Id. 508; Philpin v. McCarty, 24 Kan. 402; Missouri, K. & T. Ry. Co. v. Long, 27 Kan. 692; State v. Barrett, Id. 218.

Sedgwick county had duly and legally issued its bonds in the sum of \$200,000 to the Wichita & Southwestern Railroad Company in payment of its subscription to the stock of said company in that amount; that the interest on said bonds, at the rate of seven per cent. per annum, was payable semi-annually on the first of January and first of July; that the interest on such bonds to become due in 1874 was \$14,000; that by section 6 of said chapter 97 of the Laws of 1872 said "territory detached from the county of Sedgwick, and made a part of the county of Harvey," should "pay the same proportion of said (\$200,000) indebtedness as the length of the W. & S. W. Railroad within the county of Harvey bears to the entire length of said railroad between Newton and Wichita;" that the proportion of said \$14,000 interest for the year 1874 to be paid by Harvey county was \$5,166.98; that the defendant, H. W. Bailey, was the county clerk of said Harvey county; that on the first of September, 1873, the county clerk of Sedgwick county had duly certified to the defendant, as county clerk of said Harvey county, said sum of \$5,166.98, "as the amount of taxes to be levied upon the said territory detached from said county of Sedgwick, and made a part of said county of Harvey, to pay the said interest on the said bonds accruing on said first of January and the first day of July, 1874, and delivered said certificate to said defendant; that said defendant had neglected and refused, and still neglects and refuses, to apportion said amount upon the taxable property situated in the territory detached from Sedgwick county as aforesaid, and insert the same so apportioned in the tax-roll of the county of Harvey," etc. An alternative writ was allowed, commanding Bailey to apportion said sum of \$5,166.98 upon the taxable property in said detached territory, and insert the same in the tax-roll of Harvey county, to be collected on the assessment of the year 1873, or to show cause, etc.¹ Bailey appeared, and moved to quash the alternative writ on the ground that said section 6 of said chapter 97 of the Laws of 1872, which undertakes to prescribe the duty which it is sought by the writ to compel him to perform, is unconstitutional and void.

¹ NOTE OF HON. W. C. WEBB, STATE REPORTER.

An action of this same title and character, and between these same parties, was determined in this court at the July term, 1873, and is reported in 11 Kan. 631. That action was commenced in December, 1872, to compel the defendant, Bailey, to apportion the amount of \$5,166.98 of the \$14,000 interest on said \$200,000 bonds, payable in the year 1873, on the taxable property in said detached territory, and insert the same in the tax-rolls of Harvey county, to be collected upon the assessment thereof for the year 1872. To the alternative writ issued in that case Bailey answered, setting up four several defenses, each of which was considered and determined by the court on the final hearing. But no one of the defenses in that action raised the question which is raised in *this* action, (to-wit, whether section 6 of said chapter 97 of the Laws of 1872 is constitutional,) nor was this question suggested even in the briefs of counsel in that case. 11 Kan. 632-635. The court did not consider any question in that case except those raised and presented on the answer of the defendant, and, not regarding those defenses as sufficient, awarded a *peremptory mandamus*.

C. S. Bowman and J. J. Barker, for defendant, in support of the motion to quash the alternative writ.

We contend that section 6 of the act mentioned and referred to in the alternative writ of *mandamus*—"An act entitled 'An act amendatory of, and supplemental to, an act entitled "An act defining the boundaries of counties," approved March 3, 1868,' " (Laws 1872, c. 97, p. 183)—is in direct conflict with section 16 of article 2 of the constitution, which provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title." *People v. Denahy*, 20 Mich. 349. The provisions of the fundamental law that the subject *shall* be expressed, and *clearly* expressed, are mandatory. Every word contained in the constitution must have a meaning, and intend what it says. *Harvey v. Coffin*, 5 Ind. 567; *Newell v. People*, 7 N. Y. 83; *Gibbons v. Ogden*, 9 Wheat. 188; *Indiana C. Ry. Co. v. Bradley*, 7 Ind. 49; *Van Horne v. Dorrance*, 2 Dall. 308; *People v. Allen*, 42 N. Y. 404; *Weaver v. Lapsley*, 43 Ala. 229; *Potter's Dwar*. 354.

The framers of the constitution classified the important subjects of legislation under appropriate heads. They assumed that different subjects of legislation existed; and in the constitution the subject of counties, their organization, etc., was wisely kept entirely separate and distinct from the subject of finance and taxation. Const. arts. 9, 11; *Bright v. McCullough*, 27 Ind. 226. In determining whether more than one subject is contained in an act, the true test is: "Might this identical matter reasonably be looked for under this particular head?" *Bright v. McCullough*, 27 Ind. 227; *Ryerson v. Utley*, 16 Mich. 277; *City of St. Louis v. Tiefel*, 42 Mo. 591; *McGill v. *604 McGill*, 4 La. Ann. 268; *Banker v. Brent*, *4 Minn. 524, (Gil. 408; *Town of Fishkill v. Fishkill B. P. R. Co.*, 22 Barb. 643; *People v. O'Brien*, 38 N. Y. 195; *City of New York v. Colgate*, 12 N. Y. 146. The title must cover the subject of the act. *Town of Fishkill v. Fishkill B. P. R. Co.*, 22 Barb. 642; *Ryerson v. Utley*, 16 Mich. 279; *Igoe v. State*, 14 Ind. 240; *State v. Bowers*, Id. 195; *City of St. Louis v. Tiefel*, 42 Mo. 578; *People v. Mellen*, 32 Ill. 181; *Gas-kin v. Anderson*, 55 Barb. 259; *Smith v. City of New York*, 84 How. Pr. 508; *City of New York v. Colgate*, 12 N. Y. 146; *State v. Brandon*, 6 Kan. *255.

And even if we should concede that the title of the act in question *might* have been made sufficiently comprehensive to cover the provisions of section 6, the fatal objection would still remain that this was not done. *Cooley*, Const. Lim. 149; *Ryerson v. Utley*, 16 Mich. 278; *Mewherter v. Price*, 11 Ind. 201; *Foley v. State*, 9 Ind. 363; *State v. Hixon*, 41 Mo. 39; *People v. Mellen*, 32 Ill. 181; *Town of Fishkill v. Fishkill B. P. R. Co.*, 22 Barb. 642; *Waters v. Langdon*, 40 Barb. 408; *State v. Bowers*, 14 Ind. 196; *Prothro v. Orr*, 12 Ga. 41.

The legislature may make the title of an act as restrictive as it pleases, and the courts cannot enlarge its scope. The constitution has

made the title the conclusive index to the legislative intent. *Cooley*, Const. Lim. 149; *Wolcott v. Wigton*, 7 Ind. 49; *Township of Greencastle v. Black*, 5 Ind. 567; *City of St. Louis v. Tiefel*, 42 Mo. 592. "When a statute which applies to the state at large contains provisions of a local or private nature, not disclosed by its title, the later provisions are void." *People v. County of Chautauqua*, 43 N. Y. 10. Nothing can be incorporated in an amendment which was not included in the title of the original act. *State v. Bowers*, 14 Ind. 198.

We insist that section 6 of the act mentioned in the alternative writ of *mandamus* is in direct contravention of section 17 of article 2 of the constitution, which provides: "All laws of a general nature shall have a uniform operation throughout the state; and in all cases where a general law can be made applicable, no special law shall be enacted." *Thomas v. County of Clay*, 5 Ind. 4.

Section 6 of the act in question specially prescribes the duties of certain officers in a special case. This special provision cannot find a place in a general statute. *People v. County of Chautauqua*, 43 N. Y. 10; *Pullman v. City of New York*, 54 Barb. 169; *People v. O'Brien*, 38 N. Y. 193; *Smith v. City of New York*, 34 How. Pr. 511. And it is the duty of the courts, and not the legislature, to say whether a general law can be made applicable. *County of Knox v. Jones*, 7 Ind.

4; *Smith v. City of New York*, 34 How. Pr. 511.

*605 **H. C. Sluss*, Co. Atty., for plaintiff.

"No bill shall contain more than one subject, which shall be clearly expressed in its title." So says the constitution; and we deem it unnecessary for the purposes of this case to discuss the question as to whether this provision is to be considered *mandatory* or *directory*. Respectable authorities, however, hold it to be merely *directory* of the mode of legislation. *Washington v. Page*, 4 Cal. 388; *Miller v. State*, 3 Ohio St. 475, 484; *Pierpont v. Crouch*, 10 Cal. 315; *Pim v. Nicholson*, 6 Ohio St. 176, 180. It seems to be pretty well settled that the subject of a legislative enactment may be broad and comprehensive "as the common law itself," and that the legislature, in its discretion, may determine how broad it may be, or how restricted it shall be, and with what degree of clearness and particularity that subject shall be expressed in the title of the enactment. *Cooley*, Const. Lim. 144; *Bowman v. Cockrill*, 6 Kan. *311, *335. The *subject* expressed in the title of the act in question (chapter 97, Laws 1872) is to amend and add to an act entitled "An act defining the boundaries of counties." It is consistent with this subject to enlarge, diminish, or change the boundaries of counties then existing, and, as a result of such change, to form and define the bounds of the new and additional counties. The original act (chapter 24, Gen. St.) declared into what counties the state was divided, gave names to them, and defined their boundaries. To change this, to some extent, was the subject and purpose of the act in question. This subject is comprehensive enough to include the provisions to create the county of Harvey, and the

purpose to create the county of Harvey is sufficiently clearly expressed in the title of the act. *Cooley*, Const. Lim. 146; *Morford v. Unger*, 8 Iowa, 82; *Duncombe v. Prindle*, 12 Iowa, 1. It was legitimate for the legislature to incorporate in the act all such exceptions, saving clauses, and provisions which it might deem essential to protect vested rights, to effectuate the object of the act, or to provide for any contingency that might arise in consequence of the new state of affairs produced by the passage of the act itself, so that such provisions were not entirely inconsistent with and repugnant to the general subject and purpose expressed in the title. *State v. Squires*, 26 Iowa, 340; *People v. Mahaney*, 13 Mich. 481; *Harriman v. State*, 2 Iowa, 280. There is nothing contained or enacted in section 6 of the act in question inconsistent with or repugnant to the subject of creating the new county of Harvey, or inconsistent with the subject of amending and adding to the original act defining the boundaries of counties. There is nothing contained in section 6 that would require distinct and independent legislation to effect. If it was legitimate or appropriate for the legislature to make the provision contained in section 6 at all, it was legitimate and proper that it should be done in and as a part of the very act creating the county of Harvey; and that it had the power, there is no question. *Dill. Mun. Corp.* §§ 30, 36, 37, 127-129; *Cooley*, Const. Lim. 191-193.

As to the second proposition advanced in defendant's brief, we refer to *State v. Hitchcock*, 1 Kan. *178, which, we think, sufficiently disposes of the point.

VALENTINE, J. On March 3, 1868, an act of the legislature was passed entitled "An act defining the boundaries of counties." Gen. St. 228. Under this act the boundaries of 79 counties were defined and established. In 1872 another act was passed entitled "An act amendatory and supplemental to an act entitled 'An act defining the boundaries of counties,' approved March 3, 1868." Laws 1872, p. 183. Under this act the boundaries of four counties were defined and established. Two of these counties were created by the act, and the other two simply had their boundaries changed. Section 5 of the act created the new county of Harvey, and in doing so took a portion of the county of Sedgwick and placed it within the boundaries of the county of Harvey. Section 6 reads as follows:

"Sec. 6. The territory detached from the county of Sedgwick, and made a part of the county of Harvey, by this act, shall not in anywise be relieved from its obligation to pay its proportion of all indebtedness of Sedgwick county which may be occasioned by the issue of bonds for or in aid of any railroad, which issue of bonds has heretofore been voted by the said county of Sedgwick; and the territory so detached shall pay the same proportion of said indebtedness as the length of the Wichita & Southwestern Railroad

within the county of Harvey bears to the entire length of said railroad between Newton and Wichita. The county clerk of Sedgwick county shall annually certify to the county clerk of Harvey county the amount of the taxes to be levied on territory so detached, to pay the interest and principal of said indebtedness as the same shall become due; and the county clerk of Harvey county shall apportion the same upon the taxable property situated in said detached territory, and insert the same in the assessment roll of his county; and the same shall be collected as other taxes; and, when collected, shall be paid over by the county treasurer of Harvey county to the county treasurer of Sedgwick county, to be applied in the same manner as if collected by him." Laws 1872, pp. 184, 185.

The first part of section 16 of article 2 of the constitution of Kansas reads as follows: "No bill shall contain more than one subject, which shall be clearly expressed in its title." Now it is claimed that said section 6 is in conflict with this provision of the constitution, and therefore void. This is the only question involved in this case. About twenty-seven states have constitutional provisions similar to that of ours. In two of these states—Ohio and California—the provision is considered merely as directory to the legislature; but in all the others in which decisions upon the subject have been made, the provision is considered as mandatory. And it ought to be so considered. It would be a dangerous doctrine to announce that any of the provisions of the constitution may be obeyed or disregarded at the mere will or pleasure of the legislature, unless it is clear, beyond all question, that such was the intention of the framers of the instrument. It would seem to be a lowering of the proper dignity of such an instrument to say that it descends to prescribing mere rules of order in unessential matters, which may be followed or disregarded at pleasure. Judge COOLEY uses the following language: "The fact is this: that whatever constitutional *608 *provision can be looked upon as directory merely, is very likely to be treated by the legislature as if it was devoid even of moral obligation, and to be therefore habitually disregarded. To say that a provision is directory, seems, with many persons, to be equivalent to saying that it is not law at all. That this ought not to be so, must be conceded. That it is so, we have abundant reason and good authority for saying. If, therefore, a constitutional provision is to be enforced at all, it must be treated as mandatory." Cooley, Const. Lim. 150. Now, whether what Judge COOLEY says is true or not, we have no doubt, both upon reason and authority, that the said constitutional provision should be considered as mandatory; and whenever the legislature clearly violates the provision by putting something in the body of an act which is clearly not embraced in the title thereof, or is wholly foreign to the title, the courts should declare such portion of the act void.

The language of this constitutional provision differs in some re-

spects in the different states. We shall notice some of these differences. In some of the states the word "bill" is used, where in others the word "act," or "law" is used. But, as the question is usually presented to the courts, it can probably make but little if any difference which one of the words is used. Each, as presented to the courts, means the final determination of the legislature upon the particular subject embraced in such "bill," "act," or "law." The word "act" is probably the best word to use, for it includes no action of the legislature, or of any person, prior to the final passage of the act by the legislature, and it includes the whole of the act,—nothing more and nothing less. The word "law" is probably the worst word to use, for a portion of any act may be law, as well as the whole of the act. "Law," however, as here used, is intended to be synonymous with "act." Our constitution, as well as those of Ohio, Nebraska, Pennsylvania, New York, Wisconsin, and perhaps some of the other states, uses the word "bill." The word "bill" means the bill as it is first introduced *609 into one of the houses of the legislature, and as it *may at any time be, in any of its stages, until it is finally passed by both houses of the legislature, signed by the officers of each house, signed by the governor, and filed away by the secretary of state, as the highest evidence of what the law is. When the bill is thus filed it is called the "*enrolled bill*." It is then the embodiment of the "act"—the "law"—that finally passed the legislature, and should contain but one subject, which subject should be clearly expressed in its title. In our opinion, said constitutional provision is an imperative mandate to the legislature, commanding them that "no bill shall contain more than one subject, which shall be clearly expressed in its title;" and if any bill, in any of its stages, should be in conflict with this provision, the legislature should, on or before its final passage, correct it, so as to make it harmonize with said provision; and if the legislature should fail to so correct it, the bill itself, or some portion thereof, would be void.

In Florida, Indiana, Iowa, Nevada, and Oregon their constitutional provision upon this subject is that every act or law "shall embrace but one subject, *and matters properly connected therewith*, which subject shall be expressed in the title." [In Florida and Nevada the language is, "which subject shall be *briefly* expressed in the title."] In the Kansas constitution the above words in italics are omitted. Hence in Florida, Indiana, Iowa, Nevada, and Oregon the legislature may, without violating their constitution, place in the body of the act *matters properly connected with the subject expressed* in the title thereof, (although these matters themselves may not be expressed in the title,) while in this state, under our constitution, such a thing could not be done. This difference will account for certain decisions made in some of the above-mentioned states. These are the only differences of which we shall take notice.

The next question is whether said section 6, or any part thereof,

is not expressed in the title of the act. We suppose there can be but one answer to this question. Neither the act of 1868, nor the *610 act of 1872, mentions any subject except that of "defining the boundaries of counties." This title is probably broad enough to authorize the changing of county lines, the establishing of county lines, the creation of the boundary lines of new counties,—substantially the creation of new counties; but still it can do nothing more than to authorize the defining and establishing of the territorial boundaries of either old or new counties. It cannot authorize the establishment of an arbitrary rule, or, indeed, of any rule, for taxing the inhabitants of that portion of Sedgwick county attached to Harvey county. The title of the act is not broad enough to include assessment or taxation of any kind. Of course, the legislature could have passed a bill under a title broad enough to include all that is contained in said sections 5 and 6, and such bill would have been valid; but they did not do it. Who would think of looking for any kind of assessment or taxation under such a title as that prefixed to said chapter 97 of the Laws of 1872? And who would think of finding under such a title an arbitrary rule of assessment and taxation, differing in almost every particular from the general rule established for the other counties in the state? As the legislature will frequently be called upon to change the boundary lines of counties, it would probably be better for them to pass a general law for the assessment and collection of taxes from territory detached from one county and attached to another, where one county is more in debt than the other; otherwise they will have to make the title to the act in each case broad enough to include assessment and taxation to pay previous indebtedness, as well as to include the changing of boundary lines.

Whether the rule attempted to be established for taxing the territory detached from Sedgwick county, and attached to Harvey, is just or not, we cannot tell. It would seem that if said territory should continue to assist in paying the old debts of Sedgwick county it ought to be relieved from assisting to pay the old debts of Harvey county. And it would further seem that if said territory is still to continue to assist in paying the old debts of Sedgwick county, it ought in doing so to pay as a property tax the same percentage on the value *611 of the property within said territory which the territory still remaining in Sedgwick county does on its property. The rule that "the territory so detached shall pay the same proportion of said indebtedness as the length of the Wichita & Southwestern Railroad within the county of Harvey bears to the entire length of said railroad between Newton and Wichita" may be unjust, and it is certainly very arbitrary. We cannot, however, take judicial notice that it is unjust, and therefore could not, in the absence of evidence showing the same to be unjust, declare that the rule is unconstitutional for that reason. County of Sedgwick v. Bailey, 11 Kan. *631, *635.

Section 5 of said act defining the boundaries of Harvey county, and

detaching a portion of the territory of Sedgwick county, and attaching it to the county of Harvey, does not depend for its validity upon section 6 of the act which provides for levying and collecting taxes from said detached territory to pay certain old debts of Sedgwick county, and therefore the whole of said section 6 may be void and the whole of section 5 be valid. Hence no argument can be made that it was necessary to pass section 6 in order to pass section 5.

This provision of the constitution, found in the constitutions of the most of the states, is elaborately discussed in Sedgwick's Statutory and Constitutional Law, (second edition.) See, also, Cooley, Const. Lim. 141-151.

The motion to quash the alternative writ of *mandamus* will be sustained, and judgment rendered for the defendant for costs.

(All the justices concurring.)

*612 *J. F. BABBITT v. AMANDA CORBY, Adm'x, etc.

July Term, 1874.

1. **Error: Waiver.** A party who voluntarily takes all the benefits of a judgment will not be permitted to say there was error in such judgment.¹
2. ———: **Assent to Judgment.** Where a party claimed title by virtue of tax deeds, but such title was adjudged void, and judgment given him for the money paid therefor, *held*, that a voluntary acceptance of the money thus adjudged to him was a waiver of any error in the judgment as to title.

Error from Brown district court.

Mrs. Corby, as administratrix of the estate of John Corby, deceased, in June, 1872, recovered a judgment in the district court against Royal Baldwin, which became a lien on his lands. W. W. Guthrie, J. F. Babbitt, C. H. Jones, and F. F. Miles, respectively, had or claimed liens on a certain quarter section of land belonging to Baldwin, by reason of which no sale of said lands could be made under said judgment in favor of Mrs. Corby against Baldwin. To determine their liens, and subject said land to sale under her judgment, Mrs. Corby

¹ A party holding the fee in mortgaged premises, and against whom a decree of foreclosure is entered, cannot, after voluntarily taking the surplus arising from the sale of said premises upon such decree, maintain a proceeding in the supreme court, to set aside the decree of sale, *Hoffmire v. Holcomb*, 17 Kan. 378; same principle applied, *Rasure v. McGrath*, 23 Kan. 601; where a party in an action of ejectment elects, after the verdict is rendered, to institute proceedings under the occupying claimant law, and demands a jury for that purpose, he is estopped from instituting proceedings in error to reverse the judgment rendered in such action; and this, although the judgment had not yet been rendered when the election and demand were made. *Bradley v. Rogers*, 5 Pac. Rep. 374.

brought suit against Guthrie, Babbitt, Jones, and Miles, and said Baldwin and his wife. Babbitt answered, claiming title to said quarter section of land under and in virtue of two tax deeds duly issued to him, one dated June 15 and duly recorded June 25, 1864; said deed being issued upon a tax sale made in September, 1860, for unpaid taxes levied on said land for the year 1859; and the other of said deeds being issued May 7, 1872, and duly recorded August 12, 1872, being issued upon a tax sale made in May, 1869, for unpaid taxes levied on said land for the year 1868. He also alleged that he had paid taxes on said lands since 1862, in addition to those for which the deeds were issued, to the sum of \$133.15, exclusive of interest. On the trial the district court, at the April term, 1873, found that "the said tax deeds set up by said defendant J. F. Babbitt in his said answer are each invalid as any conveyance, or to vest any *613 title, but the said second-described tax deed is valid *as a lien in favor of said Babbitt for the amount of taxes by him paid on said land, with interest thereon as provided by law, as is set up in his answer, which the court finds is the sum of \$147.57." Upon the trial of the whole case the court decreed that said land be sold, and decreed that said sum of \$147.57 should be paid to Babbitt out of the proceeds of such sale. From such decree Babbitt appealed to this court. After the petition in error and transcript were filed in this court, the lands were sold under said decree, and the amount of Babbitt's lien was paid to and accepted by him. Whereupon Mrs. Corby; defendant in error, filed a motion to dismiss, and brought the fact of such payment to the record by affidavit.

Guthrie & Metcalf, for defendant in error.

W. D. Webb and Ira J. Lacock, for plaintiff in error.

Since this case came into this court, it is alleged that Babbitt has taken the money that was deposited for the taxes that he had paid, and it is contended that he can no longer contest his right to the land. We admit that when one person tenders to another the amount that he admits is due to that other, on a claim made by him, and the tender is made as a full satisfaction of the claim, then, if it is accepted, that would be deemed the condition of the acceptance, and no action could be sustained to recover the amount. But here is an attempt made to set aside two deeds. It is not an offer to buy our land, to pay us an amount that we claim against Corby, nor does a receipt of the amount by us give Corby a right to our land, or set aside our deeds. Our title cannot be divested in that way.

BREWER, J. Plaintiff in error was with others a defendant in an action brought in the district court by defendant in error. In *614 that action he claimed title to the premises involved in the suit by virtue of two tax deeds. The court found against the validity of the deeds, but found that by reason thereof he was entitled to a repayment of the money paid by him therefor, and interest, and

ordered such sum paid out of the proceeds of the sale of the property. To this plaintiff in error excepted, and commenced this proceeding in error to reverse such judgment. After commencing this proceeding he voluntarily accepted the amount found due and ordered paid to him. In other words, he has voluntarily accepted the benefits of a judgment which he was seeking to reverse. Defendant in error has filed a motion to dismiss this proceeding on account of such acceptance, and we think her motion should be sustained. By voluntarily accepting the proceeds of the judgment, the plaintiff in error waived any errors, if errors there were, in it. A party who complains of a judgment must be consistent in his conduct with reference to it. If he recognizes its validity, he will not be heard to say that it is invalid. And surely there can be no clearer recognition of a judgment than is shown here. He claimed title. The court found against his title, but decreed him money. He says there was error in decreeing him money instead of title, and then voluntarily receives the money. The two are inconsistent, and, having received the money, he will not now be permitted to say there was error in giving it to him.

The motion to dismiss will be sustained.

(All the justices concurring.)

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EXTRA ANNOTATION
TO
PRECEDING VOLUME



NOTES

ON THE

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CASES IN 13 KANSAS

13 KAN. 17, BOARD OF EDUCATION OF CITY OF ATCHISON v. SCOVILLE

Garnishment—Nature and enforcement of order.—Cited in *C. H. Fitch & Co. v. Manhattan Fire Ins. Co.*, 23 Kan. 386; *Morgan v. Saline Valley Bank*, 4 Kan. App. 668, 46 Pac. 61; *Kansas City, Ft. S. & M. R. Co. v. Cunningham*, 7 Kan. App. 47, 51 Pac. 972—holding justice's order not a final adjudication of the garnishee's liability; *Phelps v. Atchison, T. & S. F. R. Co.*, 28 Kan. 165, holding that garnishee proceedings in justice court did not reach a liability incurred by the garnishee subsequent to the service of the garnishee summons; *Muse, Spivey & Co. v. Lehman*, 30 Kan. 514, 1 Pac. 804, holding that an order, on appeal from justice court, that the garnishee pay over money, was not *res judicata* as to a mortgagee who claimed the money; *C. L. Mull & Sons v. Jones*, 33 Kan. 112, 5 Pac. 388, holding that a justice's order on a garnishee to pay over money was not conclusive on the defendant; *Miller v. Noyes*, 34 Kan. 13, 7 Pac. 602; *Kansas City, St. J. & C. B. R. Co. v. Gough*, 35 Kan. 1, 10 Pac. 80—holding a justice's order against a garnishee was neither a judgment nor a final order, and was not reviewable; *Missouri Pac. R. Co. v. Reid*, 34 Kan. 410, 8 Pac. 846, holding that injunction would lie to restrain the enforcement of an execution issued on a judgment rendered by a justice against a garnishee in the garnishment proceeding; *Linder v. Murdy*, 37 Kan. 152, 14 Pac. 447, holding that the plaintiff by his garnishment proceeding obtained only such right to enforce payment against the garnishee as the defendant had; *Bank of Le Roy v. Harding*, 1 Kan. App. 369, 41 Pac. 680, holding that a justice's order on a garnishee to pay money into court is not a judgment.

Followed in *Atlantic & P. R. Co. v. Hopkins*, 94 U. S. 11, 24 L. Ed. 48, holding that execution could not issue against a garnishee upon his failing to make payment as ordered.

Distinguished in *New Mexico Nat. Bank v. Brooks*, 9 N. M. 113, 49 Pac. 947, holding that a judgment against a garnishee, being made final by statute, was *res judicata* as to a defendant with notice of the garnishment proceeding.

Supplementary proceedings.—Cited in note in 100 Am. Dec. 511, on proceedings supplemental to execution.

Interpleader.—Cited in *Schloredt v. Boyden*, 9 Wyo. 392, 64 Pac. 225, holding a third party could not interplead and be made a party to a garnishment proceeding.

Cited in note in 35 Am. Dec. 700, 710, 711, on interpleader in equity; in 91 Am. St. Rep. 597, on right of interpleader.

Imprisonment for debt.—Cited in notes in 34 L. R. A. 638; 37 Am. St. Rep. 759—on statute violating prohibition against imprisonment for debt.

Mechanics' liens.—Cited in note in 35 L. R. A. 145, on mechanics' liens on public property.

13 KAN. 35, **AMERICAN BRIDGE CO. v. MURPHY**

Cited in *Freeman v. Duncan*, 27 Kan. 784.

Appeal and error—Review of evidence.—Cited in *Kansas Pac. R. Co. v. Kunkel*, 17 Kan. 145, holding that a verdict sustained by evidence on every essential fact will not be disturbed on review, though the evidence preponderates against it; *Chicago, R. I. & Pac. R. Co. v. Doyle*, 18 Kan. 58; *Missouri Pac. R. Co. v. Perego*, 36 Kan. 424, 14 Pac. 7—holding that a judgment will not be reversed on the ground alone that the verdict is not sustained by sufficient evidence; *Fanson v. Harris*, 21 Kan. 734; *Radway v. Ellis*, 37 Kan. 256, 15 Pac. 220—holding that, where there was some testimony of every fact necessary to the verdict, the judgment would not be disturbed; *Kansas City, Ft. S. & G. R. Co. v. Foster*, 39 Kan. 329, 18 Pac. 285, holding that the court properly overruled a demurrer to the evidence and sustained a verdict for plaintiff, who had made out a prima facie case.

Receipt as evidence of payment.—Cited in *Ellicott v. Barnes*, 31 Kan. 170, 1 Pac. 767, holding that a receipt could be explained by evidence aliunde; *Clark v. Marbourg*, 33 Kan. 471, 6 Pac. 548, holding that a party may show that a receipt in full was given by mistake; *Solomon R. Co. v. Jones*, 34 Kan. 443, 8 Pac. 730, holding that receipts are not conclusive on a party who neither reads them nor has opportunity to read them; *St. Louis, Ft. S. & W. R. Co. v. Davis*, 35 Kan. 464, 11 Pac. 421, holding that a receipt in full given upon payment of only a part, did not discharge the full debt, and that a receipt was merely prima facie evidence of payment; *Brooks v. Hall*, 36 Kan. 697, 14 Pac. 236, holding that the rule that a receipt is open to explanation was inapplicable, where the settlement in which the receipt was given was not impugned; *Neely v. Thompson*, 68 Kan. 193, 75 Pac. 117, holding check to have been accepted as full settlement; *Fire Ins. Ass'n v. Wickham*, 141 U. S. 564, 12 Sup. Ct. 84, 35 L. Ed. 860, holding that a receipt in full, which did not partake of the nature of a contract, was not conclusive.

Distinguished in *Jersey Island Dredging Co. v. Whitney*, 149 Cal. 269, 86 Pac. 509, 691, holding that an indorsement on a disputed bill that a certain amount was paid "in full satisfaction of all claims" discharged all claims.

13 KAN. 41, **BRADY v. SWEETLAND**

Officers—Restraining interference with office.—Distinguished in *Neeland v. State*, 39 Kan. 154, 18 Pac. 165, holding that injunction would not lie to protect county officers, where no intrusion of their offices was threatened, or to determine title to the office; *Butler v. White*, 83 Fed. 578, holding that the appointing power may be enjoined from removing officers in violation of the civil service act; *Howe v. Dunlap*, 12 Okl. 467, 72 Pac. 365, 895, holding, in a dissenting opinion, that a city attorney, who had not been removed, could enjoin other city officers from interfering with him in discharging his duties, by recognizing another as city attorney; *State ex rel. Fairbanks v. Superior Court of Snohomish County*, 17 Wash. 12, 48 Pac. 741, 61 Am. St. Rep. 893, holding that

the court had jurisdiction to protect a *de facto* councilman against intrusion by one claiming the office *de jure*.

Same—Mode of action by board.—Distinguished in *Aikman v. School District No. 16, Butler County*, 27 Kan. 129, holding that a teacher's contract, signed by two of the three members of the school board in the absence of each other, without any meeting, was not binding.

13 KAN. 45, TUTT v. FERGUSON

Referred to in *Scroggs v. Tutt*, 23 Kan. 181 (subsequent appeal in related case).

Restraining enforcement of judgment.—Cited in *Noble v. Butler*, 25 Kan. 645, holding that one who negligently permitted a judgment to be rendered against him, could not enjoin its enforcement.

Cited in note in 31 L. R. A. 39, on negligence as a cause for, and as a bar to, injunctions against judgments; in 31 L. R. A. 771, on injunctions against judgments for defenses existing prior to rendition; in 32 L. R. A. 323, on equitable jurisdiction in regard to injunctions against judgments.

13 KAN. 62, CAMPBELL v. BLANKE

Continuance.—Cited in *Tucker v. Garner*, 25 Kan. 454, holding that a continuance was properly denied, where no sufficient diligence to procure the absent testimony was shown; *Clouston v. Gray*, 48 Kan. 31, 28 Pac. 983, holding that the refusal of a continuance was not reversible error, where the affidavit set forth the ultimate fact in issue, instead of the absent testimony by which affiant expected to prove such fact; *Keffer v. State*, 12 Wyo. 49, 73 Pac. 556, holding that refusal of a continuance was not error, where it appeared that the absent witnesses resided outside the state and defendant relied solely on their promise to attend.

Cited in note in 74 Am. Dec. 146, on continuance of civil causes.

Pleading—Attached copies part of petition.—Cited in *State v. School District No. 3, Chautauqua County*, 34 Kan. 237, 8 Pac. 208, holding that the contents of attached copies of instruments should be considered as part of the petition.

13 KAN. 64, ALEXANDER v. TOUHY

Fixtures—Replevin of dwelling.—Cited in *Central Branch R. Co. v. Fritz*, 20 Kan. 430, 27 Am. Rep. 175, holding that a dwelling house which had been wrongfully removed could be recovered by replevin as a chattel.

Same—Effect of agreement.—Cited in note in 19 L. R. A. 443, on effect of agreement to prevent fixtures from becoming part of realty.

Forfeiture of lease.—Cited in *Kansas Natural Gas Co. v. Harris*, 79 Kan. 167, 100 Pac. 72, holding that the lessee's violation of an oil lease did not work a forfeiture, where the lessor agreed that he would accept a valuable consideration as full performance.

13 KAN. 70, CITY OF TROY v. ATCHISON & N. R. CO.

Records—Defects and parol evidence to supply.—Cited in *State v. Board of Com'rs of Pratt County*, 42 Kan. 641, 22 Pac. 722, holding that the failure of the county clerk to enter of record the order calling the election did not invalidate the election; *City of Denver v. Spencer*, 34 Colo. 270, 82 Pac. 590, 2 L. R. A. (N. S.) 147, 114 Am. St. Rep. 158, holding that the proceedings of a park commission could be shown by parol where no record was kept.

Cited in 74 Am. Dec. 309, 310, on effect of failure to record corporate resolutions and acts; in 13 Am. St. Rep. 551, on conclusiveness of records of town meetings, etc., and power to amend same.

Estoppel against city.—Cited in *Boise City v. Wilkinson*, 16 Idaho, 150, 102 Pac. 148, holding that the doctrine of estoppel may be invoked against a city, seeking to eject one from a portion of a street which it has deeded away and long recognized as being privately owned, while valuable and permanent improvements were being placed upon it.

Cited in note in 137 Am. St. Rep. 371, on estoppel of county or municipal corporation to contest illegal claims or expenditures.

13 KAN. 74, POWERS v. KINDT

Appeal and error—Errors insufficiently presented.—Cited in *State v. Skinner*, 34 Kan. 256, 8 Pac. 420, holding that, no reference to costs being made in defendant's briefs, exceptions thereto would not be reviewed; *State v. Coulter*, 40 Kan. 673, 20 Pac. 525, holding that the Supreme Court on rehearing would consider only such errors as were specifically pointed out on the original hearing.

Trespassing animals.—Cited in *Hefley v. Baker*, 19 Kan. 9, holding that one in peaceable possession could recover at least nominal damages against a trespasser who drove his cattle upon the premises; *Swanson v. Groat*, 12 Idaho, 148, 85 Pac. 384, holding that a party is liable who drives his stock upon another's lands, though uninclosed; *Monroe v. Cannon*, 24 Mont. 316, 61 Pac. 863, 81 Am. St. Rep. 439; *Jones v. Blythe*, 33 Utah, 362, 93 Pac. 994; *Cosgriff Bros. v. Miller*, 10 Wyo. 190, 68 Pac. 206, 98 Am. St. Rep. 977—holding that one was liable who intentionally herded his sheep upon another's land, though it was unfenced; *Walker v. Bloomingcamp*, 34 Or. 391, 43 Pac. 175, 56 Pac. 809, holding that one is liable who grazes his stock upon another's uninclosed land; *Hecht v. Harrison*, 5 Wyo. 279, 40 Pac. 306, on liability for stock trespassing on insufficiently fenced land, without any holding on the point.

Cited in notes in 22 L. R. A. 60, 64; 49 Am. Dec. 255, 258; 73 Am. Dec. 149 (par. 3)—on liability for injuries by trespassing animals; in 81 Am. St. Rep. 449, 451, on liability of owners of stock herded or ranging on lands of another without lawful fence.

13 KAN. 78, LARIMER v. KELLY

New trial—Juror drinking intoxicants.—Cited in *State v. Tatlow*, 34 Kan. 80, 8 Pac. 267; *State v. Sorter*, 52 Kan. 531, 34 Pac. 1036—holding that the mere drinking of intoxicating liquor by some of the jurors during the trial did not require the granting of a new trial.

Cited in note in 35 Am. Dec. 258, on misconduct of jurors as ground for new trial.

13 KAN. 80, JENNINGS v. STATE

Distinguished in *State v. Jarrett*, 46 Kan. 754, 27 Pac. 146.

Warrant—Sufficiency.—Cited in *State v. Tennison*, 30 Kan. 726, 18 Pac. 948, holding preliminary warrant sufficient where, together with the testimony on the preliminary examination, it disclosed to the defendant the nature and character of the offense charged; *State v. Reedy*, 44 Kan. 190, 24 Pac. 66, holding that the warrant prior to a preliminary examination need not give a detailed description of the offense; *State v. Arnstein*, 9 Kan. App. 697, 59 Pac. 602, holding that a warrant which referred to the filing of the indictment and described the offense as "a certain crime of violating the prohibitory liquor law" was sufficient.

Cited in note in 20 L. R. A. 424, on effect of writ or process issued without seal of court.

Recognizance—Sufficiency.—Cited in *Kansas City v. Hescher*, 4 Kan. App. 782, 46 Pac. 1005, holding that a recognizance on appeal from police court was not void in failing to state the particular offense charged; *United States v. Eld-*

ridge, 5 Utah, 161, 13 Pac. 673, holding that, to hold the sureties on a forfeited recognizance, it was not necessary for the recognizance to have been filed.

Same—Action.—Cited in *Swerdsfeger v. State*, 21 Kan. 475, holding that the petition in an action on a forfeited recognizance was sufficient, where it conformed to the statute.

13 KAN. 92, GOLDEN v. ELLIOTT

Discretion as to mandamus.—Cited in *State v. Board of Com'rs of Anderson County*, 28 Kan. 67; *Evans v. Thomas*, 32 Kan. 469, 4 Pac. 833—holding that the courts may exercise considerable discretion in allowing and refusing writs of mandamus.

13 KAN. 96, LIGHT v. POWERS

Parol promise to accept bill.—Cited in note in 26 L. R. A. 621, on validity of parol promise to accept an order or bill of exchange.

13 KAN. 99, BARTLETT v. STATE

Public interest—Who entitled to sue.—Cited in *Crowell v. Ward*, 16 Kan. 60, holding that, after the ward became of age, she could maintain an action in her own name on her guardian's bond, which was executed in the name of the state as obligee; *State ex rel. Reed v. Commissioners of Marion County*, 21 Kan. 419, holding that action to enjoin county commissioners from letting a contract could be brought by the state on relation of county attorney; *State ex rel. Taggart v. Addison*, 76 Kan. 699, 92 Pac. 581, holding that an action to oust city officers illegally appointed was properly brought by the state on the relation of the county attorney; *State ex rel. Roberts v. Lawrence*, 76 Kan. 940, 92 Pac. 1131, holding that the state, on the relation of the county attorney, could maintain an action to compel the delivery of the county treasurer's records to the person declared in contest proceedings to be entitled to the office, though an appeal was pending; *State v. Shufford*, 77 Kan. 263, 94 Pac. 137, holding that a private person could not maintain quo warranto in the name of the state to disorganise an incorporated city, so as to withdraw his property from taxation; *State ex rel. Young v. City of Neodesha*, 3 Kan. App. 319, 45 Pac. 122, holding that the county attorney could maintain an action in the name of the state to enjoin city officers from doing an unlawful act; *Board of Education of Territory v. Territory*, 12 Okl. 286, 70 Pac. 792, holding that a county attorney could bring an action triable in his county to enjoin the board of education of Oklahoma territory from misappropriating public funds; *State ex rel. Atty. Gen. v. Huston*, 27 Okl. 606, 113 Pac. 190, 34 L. R. A. (N. S.) 380, holding that a county could maintain an action in the name of the state to enjoin state officers other than the Governor from misapplying public funds.

Distinguished in *Baughman v. Nation*, 76 Kan. 668, 92 Pac. 548, holding that a party in possession of the office of police judge could not maintain an action to oust defendant from the distinct office of judge of the city court.

13 KAN. 104, HOUSER v. PEARCE

Measure of damages.—Cited in *Skagit Railway & Lumber Co. v. Cole*, 2 Wash. 57, 25 Pac. 1077, on measure of damages for breach of a contract to furnish supplies for logging operations.

13 KAN. 107, FURROW v. CHAPIN

Cited in *Missouri Pac. R. Co. v. Houseman*, 41 Kan. 300, 21 Pac. 284.

Judgment—Parties.—Cited in *Palmer v. Meiners*, 17 Kan. 478, holding that it was error to render judgment against persons not parties to the action; *Kinney v. Hynds*, 7 Wyo. 22, 49 Pac. 403, 52 Pac. 1081, holding that plaintiff was not

prosecution for contempt for violating a writ of mandamus; In re Barnhouse, 60 Kan. 849, 58 Pac. 480, holding that the statute has deprived judges of the power at chambers to punish for contempt.

Cited in note in 13 L. R. A. (N. S.) 595, on character of contempt for violation of injunction to protect private right.

Same—Parties punishable.—Cited in State v. City of Pittsburg, 80 Kan. 710, 104 Pac. 847, 25 L. R. A. (N. S.) 226, 133 Am. St. Rep. 227, holding that all parties who attempted to defeat the purpose of an injunction were guilty of contempt of court, though they may not have violated any injunction directed expressly against them.

Distinguished in Re Reese, 98 Fed. 984, holding that a nonresident could not be punished for contempt for violating a federal restraining order, where he was not made a party to the injunction proceeding even by description.

Same—Jury trial.—Cited in State ex rel. Curtis v. Durein, 46 Kan. 695, 27 Pac. 148, holding party charged with contempt for violating an injunction not entitled to a jury trial.

13 KAN. 136, STATE v. GRAHAM

Quo warranto proceedings.—Cited in State v. Wilson, 30 Kan. 661, 2 Pac. 828, holding that the Legislature cannot increase, diminish, or abolish the general jurisdiction in quo warranto proceedings which is conferred upon the Supreme Court by the Constitution.

Same—Determination of right to office.—Cited in State v. Wilson, 30 Kan. 661, 2 Pac. 828, holding that the Supreme Court may oust one from an office, though his right to or forfeiture of the office has not been determined by any other court.

13 KAN. 145, SHEARER v. DOUGLAS COUNTY COM'RS

Eminent domain.—Cited in note in 31 Am. Dec. 375, on compensation for property taken under power of eminent domain.

13 KAN. 149, COMMISSIONERS OF JEFFERSON COUNTY v. McOLEARY

13 KAN. 153, REED v. WILSON

13 KAN. 155, FOOTE v. SPRAGUE

Denial of indorsement.—Cited in Underwood v. Quantic, 85 Kan. 111, 116 Pac. 361, holding that a limited denial of an indorsement, standing alone, was insufficient.

Attorney's fees on foreclosure.—Cited in Dorman v. Crozier, 14 Kan. 224, holding that it was error to tax attorney's fees, which the mortgagor had not agreed to pay.

Contract for a penalty.—Cited in Condon v. Kemper, 47 Kan. 126, 27 Pac. 829, 13 L. R. A. 671, holding that a stipulation for "liquidated damages" was for a penalty and void.

Parol evidence.—Cited in note in 20 L. R. A. 712, on extrinsic evidence to show who is liable as maker of note.

13 KAN. 161, ALBINSON v. ROBERTS

13 KAN. 164, HOOK v. BIXBY

Computation of time.—Cited in English v. Williamson, 34 Kan. 212, 8 Pac. 214, holding to exclude Sunday and include the next day, when the last day of the time to be computed falls on Sunday; Schultz v. American Clock Co., 39



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Settler's receipt and certificate as evidence.—Cited in *Barnhart v. Ford*, 41 Kan. 341, 21 Pac. 239, holding that a settler's receipt for the fees for filing his declaratory statement and his certificate were admissible on the issue of rightful possession.

13 KAN. 245, SMITH v. ROWLAND

Creation of vendor's lien.—Cited in *Andrews v. Alcorn*, 18 Kan. 351, holding a vendor's lien may be created by express contract of the parties; *Greeno v. Barnard*, 18 Kan. 518, holding a vendor's lien cannot be created by mere operation of law or of the rules of equity.

Equitable mortgage.—Cited in note in 4 Am. St. Rep. 706, on what constitutes an equitable mortgage.

13 KAN. 251, RUCKER v. DONOVAN, 19 AM. REP. 84

Stoppage in transitu.—Cited in *A. B. Symms & Co. v. Wm. Schotten & Co.*, 35 Kan. 310, 10 Pac. 828, holding that goods stored by the carrier awaiting payment of freight are presumed to be still in transit, with the right of stoppage in the vendor.

Cited in notes in 29 Am. Dec. 387, 398, 394; 1 Am. St. Rep. 312, 313—on right of stoppage in transitu.

Issues in replevin.—Cited in *Bartlett v. Ridgley Nat. Bank of Springfield, Ill.*, 70 Kan. 126, 78 Pac. 414, holding that the defendants could not by their pleading in replevin raise an issue distinct from the plaintiff's right to possession at the commencement of the action.

Carriers—Freight charges.—Cited in *Coit v. Schwartz*, 29 Kan. 344, holding that the seller was liable for freight and cartage, where the goods shipped were not as ordered; *Spangler v. Butterfield*, 6 Colo. 356, holding that a lien for freight and storage was paramount to the claim of an attaching creditor.

Same—Assignment of bill of lading.—Cited in note in 105 Am. St. Rep. 365, on rights and liabilities of assignees of bills of lading.

13 KAN. 257, WILLIS v. SPROULE

Objections to evidence.—Cited in *Humphrey v. Collins*, 23 Kan. 549; *Long v. Kasebeer*, 28 Kan. 226—holding that an objection to evidence must run to the specific evidence objectionable.

County commissioners and other inferior tribunals—Records—Extrinsic evidence.—Cited in *Com'rs of Wabannsee County v. Muhlenbacker*, 18 Kan. 129, holding that, before viewers are appointed in highway location proceedings, the record should show that all the petitioners are householders; *Oliphant v. Commissioners of Atchison County*, 18 Kan. 386, holding that, while the fact that petitioners for a highway are qualified house-holders may be shown by evidence aliunde the record, such fact must in some way be made to appear; *Crawford v. Board of Com'rs of Elk County*, 32 Kan. 555, 4 Pac. 1011, holding order laying out public road to be prima facie valid, where the records of the board complied with the statutory requirements; *Asbell v. Edwards*, 63 Kan. 610, 66 Pac. 641, holding that a live stock commission's order was invalid, where the record did not show jurisdictional facts, but not deciding whether evidence aliunde of such facts would have been admissible; *Hentzler v. Bradbury*, 5 Kan. App. 1, 47 Pac. 330, holding that facts necessary to the jurisdiction of a township board of supervisors must be shown, and will not be presumed, but may be shown by evidence aliunde.

Same—Jurisdiction of county commissioners.—Cited in *State v. Horn*, 34 Kan. 556, 9 Pac. 208, holding that a county board will be kept strictly within the limits of its jurisdiction.

Same—Petitions and reports.—Cited in *St. Louis & S. F. R. Co. v. Mossman*, 30 Kan. 336, 2 Pac. 146, holding that names on herd law petition would be presumed to be the genuine signatures of legal voters of the county.

Report of railroad right of way commissioners.—Cited in *Leavenworth, N. & S. R. Co. v. Meyer*, 50 Kan. 25, 31 Pac. 700, holding that the report of commissioners to condemn a railroad right of way will be reasonably construed.

Same—Notice of proceedings.—Distinguished in *Troy v. Board of Com'rs of Doniphan County*, 32 Kan. 507, 4 Pac. 1009, holding that a road cannot be vacated without notice.

Highways—Width.—Cited in *Graham v. Bailard*, 157 Cal. 96, 106 Pac. 215, holding that proceedings establishing a highway were not impeachable because the highway was of less width than the minimum prescribed; *Board of Com'rs of Wyandotte County v. Abbott*, 52 Kan. 148, 34 Pac. 416 (dissenting opinion), holding that failure of viewers to determine width of a road does not invalidate the road.

13 KAN. 269, *AYRES v. CRUM*

Justice of the peace—Error to district court—Motion for new trial.—Cited in *Rice v. Harvey*, 19 Kan. 144; *Central Branch R. Co. v. Phillipi*, 20 Kan. 9 (dissenting opinion)—holding that the evidence in justice court could not be reviewed, in the absence of a motion for a new trial; *Tyler v. Sooy*, 19 Kan. 593, holding that it could not be found that the district court erred in overruling motion for a new trial, where the motion was not in the record.

Same—Petition in error.—Cited in *Greenwell v. Greenwell*, 28 Kan. 413, holding defendant could not take the case from justice court to the district court on petition in error.

13 KAN. 274, *STATE v. SMITH*

Cited in *State v. Graham*, 13 Kan. 299 (appeal in related case).

Embezzlement.—Cited in *State v. Lillie*, 21 Kan. 728, holding that a conviction could be had for embezzling certain United States treasury notes and certain national bank notes; *State v. Bancroft*, 22 Kan. 170, holding that an agent of the state could be convicted of embezzlement from the state; *State v. Hubbard*, 58 Kan. 797, 51 Pac. 290, 39 L. R. A. 860 (dissenting opinion), holding that a receiver may be prosecuted for embezzlement; *Adams v. People*, 25 Colo. 532, 55 Pac. 806, holding that, under evidence showing a number of distinct items, a clerk of the district court could be convicted of failure to pay over money collected.

Cited in notes in 98 Am. Dec. 168, 172, 173; 87 Am. St. Rep. 46, 47—on embezzlement.

Same—Indictment and information.—Cited in *United States v. Bornemann*, 36 Fed. 257, holding that an indictment need not state the particular kind of money embezzled by a treasury cashier; *State v. Carrick*, 16 Nev. 120, holding that an indictment against a county treasurer for embezzlement need not state the particular kind of funds embezzled or when received; *Territory v. Hale*, 13 N. M. 181, 81 Pac. 583, 13 Ann. Cas. 551, holding an indictment charging embezzlement of a certain sum of money, then and there in defendant's possession, a better description being "to the grand jurors unknown," was sufficient; *State v. Neilon*, 43 Or. 168, 73 Pac. 321, holding that it is unnecessary to prove the particular kind and character of the money embezzled by a public officer.

Distinguished in *Moore v. United States*, 160 U. S. 268, 16 Sup. Ct. 294, 40 L. Ed. 422, holding that, where an indictment against an assistant postmaster for embezzlement did not allege that the money came into his possession in such capacity or describe the money, it was insufficient.

Preliminary examination.—Cited in *State v. Spaulding*, 24 Kan. 1, holding that a preliminary complaint charging embezzlement as city clerk was sufficient to sustain an information charging embezzlement as clerk, as agent, as officer, etc.; *State v. Bailey*, 32 Kan. 83, 3 Pac. 769, holding that it is sufficient that the preliminary examination papers and evidence notify the defendant of the nature and character of the offense charged; *State v. Tonnison*, 39 Kan. 726, 18 Pac. 948, holding that the preliminary warrant was sufficient where, considered with the evidence at the preliminary examination, it showed the nature and character of the offense charged; *State v. Reedy*, 44 Kan. 190, 24 Pac. 66, holding that the preliminary warrant in an incest case was sufficient, though the exact relationship between the parties was not stated; *State v. Myers*, 54 Kan. 206, 38 Pac. 296, holding that the accused could not, after information filed, revoke his waiver of a preliminary hearing; *In re Stewart*, 60 Kan. 781, 57 Pac. 976, holding that technical averments are not required in the warrant of the committing magistrate.

Same—Plea in abatement.—Cited in *State v. Bailey*, 32 Kan. 83, 3 Pac. 769, holding that the question whether a preliminary examination has been held may be raised by a plea in abatement.

Burden of proof.—Cited in *State v. Kuhuke*, 26 Kan. 405, holding that, in a prosecution for the unlawful sale of intoxicating liquors, the burden was on the state to prove the invalidity of a license introduced by the defendant.

Questions for jury.—Cited in *State v. Wilson*, 62 Kan. 621, 64 Pac. 23, 52 L. R. A. 679, holding an instruction, which in effect directed a verdict of guilty, to be erroneous; *State v. Truskett*, 85 Kan. 804, 118 Pac. 1047, holding that, where there were no eyewitnesses to the homicide, what actually took place was for the jury and not for the court.

13 KAN. 299, STATE v. GRAHAM

Direction of verdict.—Cited in *State v. Wilson*, 62 Kan. 621, 64 Pac. 23, 52 L. R. A. 679, holding it was error to in effect direct a verdict of guilty.

13 KAN. 302, MISSOURI RIVER, FT. S. & G. R. CO. v. MORRIS

Public lands—Exemption and taxation.—Cited in *Commissioners of Saline County v. Young*, 18 Kan. 440, holding that land granted by the United States became taxable when the grantee was entitled to patent; *Leonard v. Ross*, 23 Kan. 292, holding that lands commuted on were not exempt from the payment of debts contracted between the date of final payment and the date of issuance of the patent; *Flanagan v. Forsythe*, 6 Okl. 225, 50 Pac. 152, holding land not exempt from debts after final proof made and final certificate issued.

Cited in note in 132 Am. St. Rep. 342, on exemption from taxation or assessment of lands owned by governmental bodies, or in which they have an interest; in 35 L. R. A. (N. S.) 670, on property granted with reservation of title of lien in favor of public, as subject of taxation.

Indians—Law of descent.—Cited in *Brown v. Steele*, 23 Kan. 672, holding that the Shawnee law of descent, rather than the Kansas law, governed in respect to Shawnee Indians.

Same—Taxation of lands.—Distinguished in *Logan v. Board of Com'rs of Clark County*, 51 Kan. 747, 33 Pac. 603, holding that the state may tax Osage trust lands.

13 KAN. 320, WHETSTONE v. OTTAWA UNIVERSITY

Corporations—Powers.—Cited in *Sherman Center Town Co. v. Russell*, 46 Kan. 382, 26 Pac. 715, holding that a contract by a town company to pay a bonus for the removal of certain buildings to the town site was not ultra vires; *Fulton v. Sterling Land & Investment Co.*, 47 Kan. 621, 28 Pac. 720, holding

that the building of a college by a land and investment company was not ultra vires; *Union Pacific Town Site Co. v. Page*, 54 Kan. 363, 36 Pac. 992, as to the power of a town-site company to purchase supplies; *Tod v. Kentucky Union Land Co.*, 57 Fed. 47, holding that a corporation may guarantee bonds received, where the object is to increase their value, and it has power to execute negotiable paper; *Marbury v. Kentucky Union Land Co.*, 62 Fed. 335, 10 C. C. A. 393, holding a land corporation to have power to secure the construction of a railroad by taking its stock and guaranteeing its bonds; *Central Trust Co. of New York v. Columbus, H. V. & T. R. Co.*, 87 Fed. 815, holding that a business corporation may adopt any reasonable methods not prohibited by its charter to carry out the purposes of its organization; *Derr v. Fisher*, 22 Okl. 126, 98 Pac. 978, holding that a contract by a light and power company to pay for paving along and between the rails of a street railway was not ultra vires.

13 KAN. 341, BASSETT v. WOODWARD

Cited in *J. M. W. Jones Stationery & Paper Co. v. Hentig*, 31 Kan. 317, 1 Pac. 529.

Parties on appeal or error.—Cited in *Re Browne*, 30 Kan. 331, 1 Pac. 78, holding that all who were parties to the original survey and in the district court, should have been made parties on an appeal from the survey; *McKinstry v. Carter*, 48 Kan. 428, 29 Pac. 597, holding that partition proceedings affecting parties below who were not properly made parties to the appeal could not be inquired into; *McPherson v. Storch*, 49 Kan. 313, 30 Pac. 480; *Barber Asphalt Paving Co. v. Botsford*, 50 Kan. 331, 31 Pac. 1106, holding that the absence of a party who will be affected by a modification or reversal of the judgment will defeat appellate jurisdiction; *Pierce v. Downey*, 56 Kan. 250, 43 Pac. 223, holding that persons to whom defendants in ejectment conveyed their interest, having been made parties below, were necessary parties on proceedings in error; *Board of Com'rs of Logan County v. Harvey*, 5 Okl. 468, 49 Pac. 1006, holding that the case-made must be served on all parties who will be affected by a reversal, but need not be served on persons not parties below.

Distinguished in *Richardson v. Great Western Mfg. Co.*, 3 Kan. App. 445, 43 Pac. 809, holding that a case will be dismissed on appeal for want of necessary parties only when the decision might prejudicially affect some person before it.

13 KAN. 344, YANDLE v. CRANE

Cited in *Wilcox & White Organ Co. v. Lasley*, 40 Kan. 521, 20 Pac. 228; *Tipton v. Warner*, 47 Kan. 606, 28 Pac. 712.

Replevin—Right of action.—Cited in *Moses v. Morris*, 20 Kan. 208, holding that replevin would not lie against a sheriff after sale of the property seized.

Same—Pleading.—Cited in *Bailey v. Bayne*, 20 Kan. 657, holding that an answer in replevin, which denied wrongful detention, was sufficient; *Baker v. Cordwell*, 6 Colo. 199, holding that a complaint for the recovery of personal property must allege general or special ownership.

Same—General denial.—Cited in *Holmberg v. Dean*, 21 Kan. 73, holding that, under a general denial in replevin, the defendant could show that he rightfully detained the property; *Kennett v. Fickel*, 41 Kan. 211, 21 Pac. 93, holding evidence to be admissible under a general denial in replevin, to show title in a third party; *White v. Gemeny*, 47 Kan. 741, 28 Pac. 1011, 27 Am. St. Rep. 320, holding that any defense may be proven under a general denial in replevin; *Street v. Morgan*, 64 Kan. 85, 67 Pac. 448, holding that a general denial in replevin puts the plaintiff on proof of every fact material to his recovery; *Coleman Mfg. Co. v. Johnson*, 82 Kan. 655, 109 Pac. 403, 20 Ann. Cas. 296, holding that under a general denial in replevin the defendant could show that the plaintiff corporation had no capacity to sue; *Summerville v. Stockton Milling Co.*, 142 Cal.

529, 76 Pac. 243, holding that evidence of a mortgage lien giving a right of possession was admissible under a general denial; *Payne v. McCormick Harvesting Mach. Co.*, 11 Okl. 318, 66 Pac. 287, holding that, under a general denial in replevin, the defendant could prove that the chattel mortgage upon which the plaintiff relied was fraudulently obtained.

Inconsistent defenses.—Cited in note in 48 L. R. A. 198, 206, on right to plead inconsistent defenses.

13 KAN. 348, EDWARDS v. CRUME

Parent's liability for child's wrongful act.—Cited in *Baker v. Morris*, 33 Kan. 580, 7 Pac. 267, holding a father not liable for the careless shooting of a mare by his son; *Smith v. Davenport*, 45 Kan. 423, 25 Pac. 851, 11 L. R. A. 429, 23 Am. St. Rep. 737, holding a father not liable for his son's wrongful acts, which were not committed in connection with the father's business.

Distinguished in *Sharpe v. Williams*, 41 Kan. 56, 20 Pac. 497, holding a father liable who aided and abetted his son in a wrongful act.

Cited in notes in 10 L. R. A. (N. S.) 933, 934, 939; 74 Am. Dec. 778 (par. 2); 50 Am. Rep. 384; 74 Am. St. Rep. 801 (par. 2)—on parent's liability for torts of child; in 57 L. R. A. 674, on liability of infant for torts.

13 KAN. 351, ANDREWS v. ALCORN

Cited in *Stahl v. Wade*, 11 Okl. 483, 69 Pac. 301.

Petition—Several causes of action.—Followed in *Curtis v. Buckley*, 14 Kan. 449, holding that overruling of demurrer to count which attempted to state a second cause of action was not reversible error; *Ambrose v. Parrott*, 28 Kan. 603, holding that it was not error to overrule defendant's motion to require plaintiff to separately state and number her alleged causes of action; *Hopkins v. Kuhn*, 66 Kan. 619, 72 Pac. 270, holding a petition on a note and involving the question of the validity of the sale of collateral stock stated but one cause of action.

Same—Attached copies.—Cited in *State v. School District No. 3*, 34 Kan. 237, 8 Pac. 208, holding that attached copies should be considered as part of the petition.

Same—Cure.—Cited in *Schnitzler v. Fourth Nat. Bank of Wichita*, 1 Kan. App. 674, 42 Pac. 496, holding that failure of petition to set out the judgment sought to be vacated was cured by the answer and evidence.

Same—Objection.—Cited in *Winton v. Myers*, 8 Okl. 421, 58 Pac. 634, holding that an objection that a copy of the undertaking sued on was not attached to the petition should have been made by motion to require it to be attached.

Homestead—Priority of liens.—Cited in *Foster Lumber Co. v. Harlan County Bank*, 71 Kan. 158, 80 Pac. 49, 114 Am. St. Rep. 470, 6 Ann. Cas. 44, holding purchase-money equitable mortgage to be superior to the borrower's homestead rights.

Cited in notes in 45 Am. St. Rep. 385, on lien on homesteads for improvements; in 86 Am. St. Rep. 174, 176, on lien for purchase money of homesteads.

Widow's interest barred.—Cited in *Mosteller v. Gorrell*, 41 Kan. 392, 21 Pac. 232, holding that where the husband's property, not the homestead, was sold under foreclosure during his lifetime his widow's interest was barred.

Cited in note in 18 L. R. A. 76, on power of husband, or his creditors, to defeat wife's right of dower.

13 KAN. 362, SMITH v. PAYTON

Attachment—Order.—Followed in *Raymond v. Nix Halsell & Co.*, 5 Okl. 656, 49 Pac. 1110, holding that an attachment order was not void because it directed return to be made when executed, instead of in 10 days.

Same—Amendment.—Cited in *Emerson v. Thatcher*, 6 Kan. App. 325, 51 Pac. 50, holding that the act of the clerk in amending the order of attachment was a mere irregularity.

Summons—Time of filing.—Cited in *Miller v. Forbes*, 6 Kan. App. 617, 49 Pac. 705, holding summons not void or voidable because not filed until after the return day.

13 KAN. 367, HAGERTY v. ARNOLD

Officers—Term and vacancy.—Cited in *State ex rel. McDonald v. Conn*, 14 Kan. 217, holding that an appointee to the office of county treasurer held only until the next general election; *State v. Board of Com'rs of Hodgeman County*, 23 Kan. 264, holding that county officers elected at a special election, held at the same time as a general election, held office until the next general election and qualification of their successors; *Morgan v. Board of Com'rs of Pratt County*, 24 Kan. 71, holding that a probate judge elected at a special election held only until the next general election and the qualification of his successor; *State v. Mechem*, 31 Kan. 435, 2 Pac. 816, holding that an appointee to the office of county attorney holds only until the next general election; *State v. Foster*, 36 Kan. 504, 13 Pac. 841, holding that temporary county officers held until election and qualification of successors; *Davis v. Patten*, 41 Kan. 480, 21 Pac. 677, holding that one could not hold the office of county treasurer for more than two successive terms, though one term was not full two years; *Killion v. Herman*, 43 Kan. 37, 22 Pac. 1026, holding that officers of newly organized county held only until qualification of those chosen at the next general election; *State ex rel. Little v. Wentworth*, 55 Kan. 296, 40 Pac. 648, holding that superintendent, assistant superintendent, steward, and matron of insane asylum hold for three years from the date their appointments take effect; dissenting opinion, maintaining that appointees to positions in insane asylum prior to the expiration of a regular three-year term should hold only until the expiration of such term and the qualification of their successors; *State ex rel. Dawes v. Breidenthal*, 55 Kan. 308, 40 Pac. 651, holding that an appointment of a bank commissioner to fill an exceptional vacancy lasted only until the commencement of the next regular term; *Wilson v. Clark*, 63 Kan. 505, 65 Pac. 705, holding that, where the Legislature by the biennial election law postponed an election to secure uniformity, it could provide for filling the offices during the interval; *State v. Andrews*, 64 Kan. 474, 67 Pac. 870, holding that a district judge appointed by the Governor pursuant to the biennial election law was entitled to the office during the interval before the next regular election, as against a judge attempting to hold over; *Pruitt v. Squires*, 64 Kan. 855, 68 Pac. 643, holding that the Governor had no authority under the biennial election law to appoint any one to the office of sheriff.

Same—Election.—Cited in *Odell v. Dodge*, 16 Kan. 446, holding election of justice of the peace for Great Bend township in November, 1875, to be valid; *Morgan v. Board of Com'rs of Pratt County*, 24 Kan. 71, on the right to elect a probate judge at a general election; *State v. Mechem*, 31 Kan. 435, 2 Pac. 816, holding that the amendment to the Constitution in 1875 did not change the definition of general election as the annual fall election; *State v. Board of Com'rs of Kearny County*, 42 Kan. 789, 22 Pac. 735, holding that it was legal for a new board to canvass election returns without compulsion.

Abolition or change of counties or townships.—Cited in *Commissioners of Ottawa County v. Nelson*, 19 Kan. 234, 27 Am. Rep. 101, holding "An act to regulate taxation on the change of boundary lines" to be constitutional, the Constitution not applying with the same rigidity to new townships as to older ones.

Same—Effect on offices.—Cited in *Re Hinkle*, 31 Kan. 712, 3 Pac. 531, holding that the abolishing of a township abolished its officers.

Change in counties or townships.—Cited in *People ex rel. Lincoln County v. George*, 3 Idaho, 72, 26 Pac. 983 (dissenting opinion), holding that a statute dividing a county was constitutional.

Mandamus.—Cited in *Light v. State ex rel. Donelson*, 14 Kan. 489, holding that any proceedings to compel a canvass of the returns of an election must be commenced before a second election; *Lewis v. Com'rs of Marshall County*, 16 Kan. 102, 22 Am. Rep. 275, holding that the board may be compelled by mandamus to canvass election returns where it has refused to do so, though it has adjourned sine die; *Brown v. Board of Com'rs of Rush County*, 38 Kan. 436, 17 Pac. 304; *Stearns v. State ex rel. Biggers*, 23 Okl. 462, 100 Pac. 909—holding that a board could be compelled to reconvene and canvass election returns; *State ex rel. Bennett v. Barber*, 4 Wyo. 56, 32 Pac. 14, holding that an erroneous decision of the board of canvassers may be corrected by mandamus.

Cited in note in 36 L. R. A. (N. S.) 1091, on mandamus to compel officer after expiration of term to perform official duty.

13 KAN. 385, BUTLER v. McMILLEN

Referred to in *Stoddart v. Vanlaningham*, 14 Kan. 18, as appeal in related case. Followed in *Stoddart v. Vanlaningham*, 14 Kan. 18.

Referred to in *McMillen v. Butler*, 15 Kan. 62.

Trial—Completion at term.—Distinguished in *Tarpenning v. Cannon*, 28 Kan. 665, holding that, the trial having been completed, the court could take the case under advisement to the next term.

Cited in *Powers v. McCue*, 48 Kan. 477, 29 Pac. 686, holding exceptions must be reduced to writing at the term.

13 KAN. 393, CARR v. CATLIN

Cited in *Farmers' & Merchants' Bank of Cawker City v. Bank of Glen Elder*, 46 Kan. 376, 26 Pac. 680.

Administration of partnership estate—Necessity of presentation of claim.—Cited in *Franklin v. Trickey*, 9 Ariz. 282, 80 Pac. 352, 11 Ann. Cas. 1105, holding that it was not necessary to present a claim against partnership property which the administrator held in trust as the decedent had held it, and not as a part of the decedent's estate.

Same—Rights of surviving partner—Possession of property.—Cited in *Blaker v. Sands*, 29 Kan. 551, holding that a surviving partner had a right to the possession of the partnership property until he should have failed to give bond after being cited; *Trickett v. Moore*, 34 Kan. 755, 10 Pac. 147, holding that a debtor of a partnership cannot be made a garnishee in an action against one partner; *Shattuck v. Chandler*, 40 Kan. 516, 20 Pac. 225, 10 Am. St. Rep. 227, holding that a partnership estate, after the death of one partner, can be settled only as provided by statute; *Teney v. Laing*, 47 Kan. 297, 27 Pac. 976, holding administratrix of deceased partner could not take possession of the partnership property until the surviving partner, being cited, failed to give bond, and the administratrix had given a bond covering such property; *Towler v. Bull*, 3 Kan. App. 626, 44 Pac. 30, holding that, where a surviving partner appears and demands that the general administrator give bond to cover the partnership estate, he waives his right to demand that he be permitted to settle such estate; *Hackett v. Pratt*, 5 Kan. App. 586, 49 Pac. 100, holding that surviving partner could not reimburse himself out of partnership estate.

General appearance.—Cited in *Neosho Valley Investment Co. v. Cornell*, 60 Kan. 282, 56 Pac. 475, holding that, by contesting judgment on nonjurisdictional grounds, defendant entered a general appearance.

Limitations in favor of administrator.—Cited in *Allen v. Bartlett*, 52 Kan. 387, 34 Pac. 1042, holding that the statute of limitations did not begin to

run in favor of an administrator until he unequivocally indicated an intention to repudiate his trust.

13 KAN. 411, GATES v. SANDERS

Appeal from justice's judgment—Effect.—Cited in *St. Joseph & D. C. R. Co. v. Casey*, 14 Kan. 504, holding that defendant's appeal discharged the attachment; *N. B. Brown & Co. v. Tuppeny*, 24 Kan. 29, holding that an ordinary appeal bond did not bring up for review proceedings against a discharged garnishee; *Roll v. Murray*, 35 Kan. 171, 10 Pac. 472, holding that an order of a justice of the peace discharging an attachment was not appealable; *Becker v. Steele*, 41 Kan. 173, 21 Pac. 169, holding that an appeal from the judgment of a justice of the peace did not carry up the attachment proceedings, so as to authorize the constable to retain the attached property; dissenting opinion maintaining that, while an attachment which had been discharged before a justice's judgment on the merits cannot be taken up on appeal, yet an undischarged attachment was taken up.

Amendment of appeal bond.—Cited in *Lovitt v. Wellington & W. R. Co.*, 28 Kan. 297, holding that, where the appeal bond from a justice court ran to a stranger, it was not error for the district court to refuse a new bond; *Chicago, K. & W. R. Co. v. Abilene Town-Site Co.*, 42 Kan. 97, 21 Pac. 1112, holding that, since an insufficient appeal bond in condemnation proceedings may be amended, the district court acquired jurisdiction, though the bond was not in double the amount of the award.

13 KAN. 414, STATE v. POTTER, Same case on subsequent appeal, 15 Kan. 302

Referred to in *State v. Potter*, 16 Kan. 80, as a subsequent appeal of the same case.

Homicide—Sufficiency of information.—Cited in *State v. Pierce*, 23 Kan. 153, holding information sufficient to sustain conviction of murder in the second degree.

Same—Evidence of reputation of deceased.—Cited in *State v. Eddon*, 8 Wash. 292, 36 Pac. 139, holding evidence of deceased's good reputation inadmissible, when not assailed by the defense; *State v. Truskett*, 85 Kan. 804, 118 Pac. 1047, holding evidence of the deceased's character was inadmissible, except so far as consistent with the theory of self-defense.

Cited in notes in 3 L. R. A. (N. S.) 368; 85 Am. Dec. 600 (par. 2); 124 Am. St. Rep. 1035—on admissibility of evidence of character or reputation of deceased in homicide cases.

Assault—Hearsay evidence.—Cited in *State v. Newland*, 27 Kan. 764, holding declarations made by the party assaulted before or after the affray were inadmissible, being hearsay.

Same—Self-defense.—Cited in *State v. Archer*, 8 Kan. App. 737, 54 Pac. 927, holding that, in order for the pointing of a revolver at another in a threatening manner to constitute an assault, it was not necessary for it to be loaded.

Credibility of unimpeached witness.—Cited in *State v. Tawney*, 78 Kan. 855, 99 Pac. 268, holding that an objection to a question by which counsel sought to bolster up the credibility of his own witness before it had been attacked was properly sustained.

13 KAN. 426, WATKINS v. PARSONS

Recovery for nonpayment of draft.—Cited in *McLennan v. Anspaugh*, 2 Kan. App. 269, 41 Pac. 1063, holding that recovery could not be had for nonpayment of a draft without proof of its dishonor.

13 KAN. 438, TALLMAN v. JONES

Harmless instruction.—Cited in *Kansas City, Ft. S. & G. R. Co. v. Hay*, 31 Kan. 177, 1 Pac. 766, holding that a judgment would not be reversed because of an inapplicable instruction which was not misleading.

Married women—Rights and liabilities.—Cited in *Miner v. Pearson*, 16 Kan. 27, holding a personal judgment against a married woman will reach her nonexempt property; *Parker v. Bates*, 29 Kan. 597, holding that, the mere fact that the wife's property increased in value under the husband's management did not vest title in him; *State v. Walker*, 36 Kan. 297, 13 Pac. 279, 59 Am. Rep. 556, holding that a married woman may have her separate business and property; *Baker v. Stewart*, 40 Kan. 442, 19 Pac. 904, 2 L. R. A. 434, 10 Am. St. Rep. 213 (dissenting opinion), holding that a deed to a husband and wife made them tenants in common and not tenants in entirety; *Harrington v. Lowe*, 73 Kan. 1, 84 Pac. 570, 4 L. R. A. (N. S.) 547, holding married woman's contract not invalid because entered into during coverture, though she had no separate estate or business.

Trespass to mortgaged property.—Cited in note in 137 Am. St. Rep. 903, on actions maintainable by chattel mortgagor against third persons after condition broken.

13 KAN. 447, GANNON v. STEVENS

Cited in *Gilmore v. Butts*, 61 Kan. 315, 59 Pac. 645.

Evidence—Testimony of deceased or absent witness.—Cited in *Solomon R. Co. v. Jones*, 34 Kan. 443, 8 Pac. 730, holding that evidence of the substance of the testimony of a witness, since deceased, given at a former trial was admissible; *Atchison, T. & S. F. R. Co. v. Osborn*, 64 Kan. 187, 67 Pac. 547, 91 Am. St. Rep. 189, holding that the testimony given by a witness at a former trial was admissible, where the witness was outside the court's jurisdiction.

Distinguished in *State v. Conway*, 56 Kan. 682, 44 Pac. 627, holding that former testimony was not rendered admissible by the witness' being in the penitentiary.

Cited in note in 91 Am. St. Rep. 205, on admissibility of evidence given on former trial in civil action.

Instruction on witness testifying falsely.—Overruled in *Shellabarger v. Nafus*, 15 Kan. 547, on sufficiency of instruction, and holding erroneous an instruction that, if any witness willfully and corruptly testified falsely to any material fact, his entire testimony should be disregarded.

13 KAN. 462, HUNTER'S ADM'R v. FERGUSON'S ADM'R

Presumption of regularity.—Cited in *Garden City v. Heller*, 61 Kan. 767, 60 Pac. 1060, holding that the regularity of proceedings on application for change of venue will be presumed; *Commissioners of Leavenworth County v. Higginbotham*, 17 Kan. 62, holding statute not invalid because the yeas and nays were not entered on the Senate journal.

Appeal—Presumptions.—Cited in *Higby v. Ayres*, 14 Kan. 331, holding that the right of a judge pro tem. to act could not be raised for the first time on appeal; *Garvin v. Jennerson*, 20 Kan. 371, holding that the record need not state the mode or reasons of selection, or the qualifications of a pro tem. judge.

De facto officers—Collateral attack.—Cited in *Commissioners of Saline County v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171, holding that county clerk de jure had no right of action against the county board, which had paid the salary to a clerk de facto pending litigation over the office; *State v. Williams*, 61 Kan. 739, 60 Pac. 1050, holding that the title of a de facto police judge to office could not be collaterally attacked; *Missouri Pac. R. Co. v. Preston*, 63 Kan. 819, 66 Pac. 1050, holding that the acts of a de facto judge could not be questioned col-

laterally; *State v. Miller*, 71 Kan. 491, 80 Pac. 947, holding that the judicial acts of one duly elected and acting as justice of the peace were not subject to collateral attack; *McDowell v. United States*, 159 U. S. 596, 16 Snp. Ct. 111, 40 L. Ed. 271, holding acts of a judge de facto were not open to question, so far as they affected third persons; *McDowell v. United States*, 74 Fed. 403, 20 C. C. A. 476, holding orders of judge de facto continuing the term were not open to question.

Judicial notice—Laws of another state.—Cited in *Dodge v. Coffin*, 15 Kan. 277 (dissenting opinion), as to judicial notice of laws of another state; *Alexandria, A. & Ft. S. R. Co. v. Johnson*, 61 Kan. 417, 59 Pac. 1063, holding that judicial notice would not be taken of the statutes and decisions of another state; *In re Terrill*, 68 Kan. 315, 71 Pac. 589 (dissenting opinion), holding that judicial notice would not be taken of the penal laws of another state; *Ferd. Heim Brewing Co. v. Gimber*, 67 Kan. 834, 72 Pac. 859; *Loyal Mystic Legion of America v. Brewer*, 75 Kan. 729, 90 Pac. 247—holding that the laws of another state must be pleaded before proof of their contents is admissible; *Ayres v. Wm. Deering & Co.*, 76 Kan. 149, 90 Pac. 794, holding that defendant could not avail himself of a court rule of Nebraska, where he did not plead and prove its existence; *Missouri, K. & T. R. Co. v. Hutchings, Sealy & Co.*, 78 Kan. 758, 99 Pac. 230, holding that judicial notice would not be taken of the laws of another state, except to construe laws of this state.

Distinguished in *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176, holding that, in the absence of proof to the contrary, the common law of another state will be presumed to be the same as of this state.

Cited in note in 67 L. R. A. 84, on how case determined when proper foreign law not proved.

13 KAN. 476, GILTENAN v. LEMERT, Same case on subsequent appeal, 18 Kan. 9

Quieting title—Rights of action and defenses.—Cited in *Morrill v. Douglass*, 14 Kan. 293, holding that one who has neither title nor possession cannot maintain an action to quiet title; *Neve v. Allen*, 55 Kan. 638, 41 Pac. 966, holding that defendants' naked legal title to a one-third interest did not deprive plaintiff in possession under equitable title to whole premises, of his right to have his title quieted; *Waller v. Julius*, 68 Kan. 314, 74 Pac. 157, holding that an invalid deed could be set aside at the suit of one in possession under claim of ownership; *Cramer v. McCann*, 83 Kan. 719, 112 Pac. 832, 37 L. R. A. (N. S.) 108, holding that the defendant in proceedings to quiet title must prove title before he can question the title of a plaintiff in possession; *Prizer v. Taylor*, 3 Kan. App. 690, 44 Pac. 902, holding that a plaintiff in possession under color of title may maintain an action to quiet title against an adverse claimant who cannot show a superior title; *Muckle v. Good*, 45 Or. 230, 77 Pac. 743, holding that a naked adverse claim without color of title was insufficient to entitle one not in possession to sue to quiet title.

13 KAN. 482, BROWN v. HOLMES, Same case on subsequent appeal, 21 Kan. 687

Cited in *State v. Sowders*, 42 Kan. 312, 22 Pac. 425.

Replevin—Against whom maintainable.—Cited in *Moses v. Morris*, 20 Kan. 208, holding replevin not maintainable against a sheriff after sale of the property attached; *Davis v. Van De Mark*, 45 Kan. 130, 25 Pac. 589, holding that replevin would not lie against one not in actual or constructive possession.

Same—Demand and refusal.—Cited in *Smith v. Woodleaf*, 21 Kan. 717, holding that a tender after petition in replevin was filed and process issued was not made before the commencement of the action.

Same—Affidavits and pleading.—Cited in *Balley v. Bayne*, 20 Kan. 657, holding that the defendant in replevin was not required to allege the nature of the process under which he held the property, or the jurisdiction of the justice to issue the process; *Bartlett v. Ridgley Nat. Bank*, 70 Kan. 126, 78 Pac. 414, holding that an affidavit in replevin by a mortgagee was sufficient, though it alleged ownership in the mortgagee.

Chattel mortgages—Description of property.—Cited in *Shaffer v. Pickrell*, 22 Kan. 619, holding that a description of the mortgaged chattels as 250 stock hogs owned by the mortgagor in a certain county of this state was sufficient; *Tootle, Hanna & Co. v. Lyster*, 26 Kan. 589, holding chattel mortgage to be void as to third parties where, aided by inquiries which the mortgage suggested, they could not identify the property; *Sims v. Mead*, 29 Kan. 124, holding that the description of growing wheat was sufficient, though it did not designate how the wheat was to be divided; *Muse, Spivey & Co. v. Lehman*, 30 Kan. 514, 1 Pac. 804, holding sufficient a description of chattels as 35 acres of winter wheat, standing and growing on a certain quarter section; *Griffiths v. Wheeler & Barber*, 31 Kan. 17, 2 Pac. 842, holding description of cattle and other property in chattel mortgage to be sufficient; *Corbin v. Kincaid*, 33 Kan. 649, 7 Pac. 145, holding that a description of the mortgaged chattels as a flock of 600 sheep and increase for 1882, owned and in possession of mortgagor in a certain county, was sufficient; *Souders v. Voorhees*, 36 Kan. 138, 12 Pac. 526, holding insufficient a description from which the mortgaged growing corn could not be identified; *Crisfield v. Neal*, 36 Kan. 278, 13 Pac. 272, holding that a description of mortgaged chattels as a certain number of sheep of a certain kind in a certain county and belonging to the mortgagor was sufficient; *Schmidt v. Bender*, 39 Kan. 437, 18 Pac. 491, holding that the description of mortgaged chattels as "two brown mules, aged 8 and 12 years," was sufficient; *Inter-State Galloway Cattle Co. v. McLain*, 42 Kan. 680, 22 Pac. 728, holding that a chattel mortgage was not void because the cattle mortgaged were not separated from the herd; *Scraf-ford v. Gibbons*, 44 Kan. 533, 24 Pac. 968, holding description of mortgaged chattels to be sufficient, though not as full as it should be; *Scott v. Wagner*, 2 Kan. App. 386, 42 Pac. 741, holding that the judgment on foreclosure of a chattel mortgage should definitely describe the property, an indefinite description, which may be sufficient for the mortgage, not being sufficient for the judgment; *Shattuck v. Hall*, 3 Kan. App. 374, 42 Pac. 1101, holding that a chattel mortgage was not void for misdescription of the land upon which the mortgaged wheat was growing; *Alferitz v. Ingalls*, 83 Fed. 964, holding that a chattel mortgage was not void for uncertainty of the description of the property as 8,000 sheep and increase, now in a certain county and state.

Order of proof.—Cited in *Taylor v. Mason*, 28 Kan. 381, holding the order of admitting testimony is discretionary with the trial court.

Agister's lien.—Cited in *Case v. Allen*, 21 Kan. 217, 30 Am. Rep. 425, holding an agister's lien on cattle to be paramount to a chattel mortgage; *Kelsey v. Layne*, 28 Kan. 218, 42 Am. Rep. 158, holding that a farmer was entitled to a lien for his feed and care of another's stock.

Distinguished in *National City Bank of Lafayette, Ind., v. Henderson*, 59 Wash. 354, 109 Pac. 1038, holding agister's lien inferior to chattel mortgage executed prior to the statute giving the lien.

13 KAN. 494, PATTERSON v. CARRUTH

Taxation—Time of tax sale.—Cited in *Morrill v. Douglass*, 17 Kan. 291, on the right to hold tax sales on other than regular sale days.

Same—Recital in deed.—Cited in *Jordan v. Kyle*, 27 Kan. 190, holding a tax deed reciting a sale for the 1859 taxes on September 3, 1860, was not void

on its face; *Harris v. Curran*, 32 Kan. 580, 4 Pac. 1044, holding that a tax deed was not void which described lots "on Tenth Avenue West, city of Topeka," in failing to describe them as "in" city of Topeka; *Clarke v. Tilden*, 72 Kan. 574, 54 Pac. 139, holding a tax deed otherwise regular is not void on its face if the tax sale could, under any statutory provision, have been legally made on the day named.

13 KAN. 496, ST. JOSEPH & D. C. R. CO. v. CALLENDER

Cited in *Leavenworth, N. & S. R. Co. v. Herley*, 45 Kan. 535, 26 Pac. 23; *Portneuf Irrigating Co. v. Budge*, 16 Idaho, 116, 100 Pac. 1046, 18 Ann. Cas. 674.

Eminent domain—Payment of compensation before taking possession.—Cited in *Blackshire v. Atchison, T. & S. F. R. Co.*, 13 Kan. 514, holding that a railroad company was not entitled to have the deposit made by it with the county treasurer credited on the judgment obtained against it in condemnation proceedings; *St. Louis, L. & D. R. Co. v. Wilder*, 17 Kan. 239; *Florence, E. D. & W. V. R. Co. v. Lilley*, 3 Kan. App. 588, 43 Pac. 857—holding that a judgment for damages in condemnation proceedings should have been in the nature of an award, and not an ordinary personal judgment; *Leavenworth, N. & S. R. Co. v. Whitaker*, 42 Kan. 634, 22 Pac. 733, holding that a railroad must make compensation before using a right of way.

Cited in note in 16 L. R. A. (N. S.) 538, as to when title passes in condemnation proceedings.

Same—Effect of appeal.—Cited in *City of Kansas v. Kansas Pac. R. Co.*, 18 Kan. 331, holding that a landowner was entitled to an injunction to protect his possession during the pendency of his appeal in condemnation proceedings; *Central Branch Union Pac. R. Co. v. Atchison, T. & S. F. R. Co.*, 28 Kan. 453, holding that the right of a railroad company to take possession of land condemned pending appeal from the award is but provisional, and unless the award as finally fixed is paid the landowner is entitled to resume possession.

13 KAN. 505, ST. LOUIS, K. C. & N. RY. CO. v. PIPER

Referred to in *St. Louis, K. C. & N. R. Co. v. Thacher*, 13 Kan. 564, as related case.

Limitation of carrier's liability.—Cited in *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kan. 645, 2 Pac. 821, 46 Am. Rep. 104, holding that a contract by which a carrier sought to relieve itself from liability for its own negligence was void; *St. Louis & S. F. R. Co. v. Clark*, 48 Kan. 321, 29 Pac. 312, on limitation of carrier's liability and burden of proof.

Cited in note in 32 Am. Dec. 497, 500, on limitation of carrier's liability; in 67 Am. Dec. 215, on liability of carriers of live stock; in 72 Am. Dec. 231, 232, on connecting lines of carriers or railways; in 13 Am. St. Rep. 783, on extortion of unauthorized stipulations from shippers and their effect; in 106 Am. St. Rep. 606, on liability of initial carrier for torts or negligence of connecting lines; in 17 L. R. A. 339, on burden of proof of cause of injury to live stock during transportation; in 18 L. R. A. (N. S.) 87, on carrier as insurer of live stock; in 31 L. R. A. (N. S.) 69, on liability of connecting carrier for loss beyond own line.

Findings—Fact and law.—Cited in *Briggs v. Eggan*, 17 Kan. 589, on the right of a party to separate conclusions of fact and of law.

Same—Conclusiveness on review.—Cited in *Winstead v. Standeford*, 21 Kan. 270, holding that a general finding by the court in a case tried without a jury was conclusive on review on disputed questions of fact; *Tootle v. Brown*, 4 Okl. 612, 46 Pac. 550, holding that the Supreme Court would not weigh con-

flicting evidence to determine the correctness of the ruling on a motion to dissolve an attachment.

13 KAN. 514, BLACKSHIRE v. ATCHISON, T. & S. F. R. CO.

Referred to in *Doolittle v. Atchison, T. & S. F. R. Co.*, 20 Kan. 329, as related case.

Eminent domain—Appeal from award.—Cited in *St. Louis, L. & D. R. Co. v. Wilder*, 17 Kan. 239, holding that the judgment on appeal in condemnation proceedings should be in the nature of an award; *City of Kansas v. Kansas Pac. R. Co.*, 18 Kan. 331, holding that a landowner was entitled to possession pending his appeal in condemnation proceedings, and to protection by injunction.

Effect of appeal.—Distinguished in *Kansas City, Ft. S. & G. R. Co. v. Hammond*, 25 Kan. 208, holding that dismissal of an appeal restored judgment of justice of the peace; *State v. Curtis*, 29 Kan. 384, holding that a dismissal by the state on an appeal from a justice dismisses the entire prosecution; *State v. Forner*, 32 Kan. 281, 4 Pac. 357, holding appeal from a justice vacates the judgment in a criminal case; *Missouri Pac. Ry. Co. v. Gruendel*, 3 Kan. App. 53, 44 Pac. 439, holding that the effect of an appeal in condemnation proceedings was to vacate the assessment; *Kindred v. Union Pac. R. Co.*, 168 Fed. 648, 94 C. C. A. 112, in opinion by Justice Brewer, published in the margin, on effect of appeal in highway proceedings to vacate the order of the commissioners.

Same—Constitutionality of statute.—Cited in *Central Branch Union Pac. R. Co. v. Atchison, T. & S. F. R. Co.*, 28 Kan. 453, holding that the statute granting to commissioners the right to determine the compensation in condemnation proceedings is not unconstitutional.

Same—Deposits and payment of compensation—Abandonment of proceedings.—Cited in *Leavenworth, N. & S. R. Co. v. Whitaker*, 42 Kan. 634, 22 Pac. 733, on right of railroad to refuse to pay the award in condemnation proceedings and leave the landowner undisturbed; *Spratley v. Board of Com'rs of Leavenworth County*, 56 Kan. 272, 43 Pac. 232, holding that the interest on money deposited with the county treasurer in condemnation proceedings belonged to the county; *Atchison, T. & S. F. R. Co. v. Wilson*, 66 Kan. 233, 69 Pac. 342, holding that a railroad could reclaim its deposit where it abandoned its intention to use the land condemned; *Florence, E. D. & W. V. R. Co. v. Lilley*, 3 Kan. App. 588, 43 Pac. 857, in a quoted opinion, on right to eject railroad company from condemned land, upon its failure to pay the assessment; *Clelland v. McCumber*, 15 Colo. 355, 25 Pac. 700, holding that the petitioner in condemnation proceedings could maintain an action on the bond of the county judge, with whom it had made the required deposit, upon his failure to turn the deposit over to his successor.

Cited in notes in 86 Am. Dec. 203, 205, on time within which eminent domain proceedings may be discontinued; in 16 L. R. A. (N. S.) 538, as to when title passes in condemnation proceedings.

13 KAN. 518, TAYLOR v. HOSICK

Necessary parties.—Cited in *Barnett v. Schad*, 73 Kan. 414, 85 Pac. 411, 91 Pac. 539, holding that the judgment creditor was not a necessary party to a suit to enjoin a sheriff from selling property under execution.

Amendment of pleadings and filing out of time.—Cited in *Grant v. Pendery*, 15 Kan. 236, holding that a plaintiff may be permitted to file a reply, even after the jury has been sworn; *Wright v. Bacheller*, 16 Kan. 259, holding that refusal to permit plaintiff to amend his reply during trial was error; *City of Burlingame v. Kansas Valley Nat. Bank*, 17 Kan. 407, holding that, where a reply filed one day late had stood unchallenged for nearly three years, there was

no abuse in permitting it to remain; *Rice v. Hodge*, 26 Kan. 164—holding that the filing of new or amended pleadings does not necessarily delay the trial.

Appointment of administrator—Collateral attack.—Cited in *Denver, S. P. & P. Ry. Co. v. Woodward*, 4 Colo. 1; *Ewing v. Mallison*, 85 Kan. 494, 70 Pac. 369, 93 Am. St. Rep. 299; *Ekblad v. Hanson*, 85 Kan. 541, 117 Pac. 1028—holding that the appointment of an administrator, made by a court of competent jurisdiction, could not be collaterally attacked; *Brubaker v. Jones*, 28 Kan. 411, holding that letters of administration were *prima facie* evidence of all facts necessary to their validity.

Cited in note in 81 Am. St. Rep. 558, on collateral attack on right of acting administrators.

13 KAN. 529, JOHNSON v. BROWN

Sunday contracts and transactions.—Distinguished in *Birks v. French*, 21 Kan. 238, holding that a contract for the sale of cattle was valid, though made on Sunday; *Morris v. Shew*, 29 Kan. 661, holding that the service of an attachment on Sunday was illegal; *State v. Nesbit*, 8 Kan. App. 104, 54 Pac. 326, holding a law to be valid which prohibited labor on Sunday.

13 KAN. 532, NORTON v. FRIEND

Tax deeds—Validity.—Cited in *Magill v. Martin*, 14 Kan. 67; *McCauslin v. McGuire*, 14 Kan. 234—holding that the statutory form of a tax deed must be modified when necessary to state the facts; *Morrill v. Douglass*, 14 Kan. 293, holding that a tax deed was not void on its face in failing to state the amount for which the certificate was assigned to the county; *Bryson v. Spaulding*, 20 Kan. 427, holding that the issuance of a valid tax deed could be compelled by mandamus, where the deed issued erroneously showed the county to have been a competitive bidder; *Spicer v. Howe*, 38 Kan. 465, 16 Pac. 825, holding that a tax deed describing several tracts, and by its granting clause conveying the "last hereinbefore described," was invalid, except as to the tract last described; *McDonough v. Merten*, 58 Kan. 120, 35 Pac. 1117, holding a tax deed to be void on its face which failed to describe the property bid for at the tax sale; *Weeks v. Merkle*, 6 Okl. 714, 52 Pac. 929, holding a tax deed void on its face which attempted to convey several noncontiguous tracts and was based on a certificate issued to a county.

Same—County as competitive bidder.—Cited in *Babbitt v. Johnson*, 15 Kan. 252; *Larkin v. Wilson*, 28 Kan. 513; *Rush v. Lewis and Clark County*, 36 Mont. 566, 93 Pac. 943; *Hanenkratt v. Hamil*, 10 Okl. 219, 61 Pac. 1050—holding a tax deed void on its face which showed the county to have been a competitive bidder.

Cited in note in 75 Am. St. Rep. 235, on who may purchase and enforce a tax title.

13 KAN. 539, CITY OF LEAVENWORTH v. STILLE

Municipal improvements—Liabilities of city.—Cited in *Denny v. City of Spokane*, 79 Fed. 719, 25 C. C. A. 164, holding a city liable for damages from neglect of its duty to provide a fund out of which to pay a contractor's warrants; *Heller v. City of Garden City*, 58 Kan. 263, 48 Pac. 841, holding a city liable generally upon its refusal to make assessments to pay for the planting of trees pursuant to a contract with the city; *Portland Lumbering & Mfg. Co. v. City of East Portland*, 18 Or. 21, 22 Pac. 536, 6 L. R. A. 290, holding a city liable for material furnished for street improvements.

Cited in note in 32 L. R. A. (N. S.) 169, on liability of municipality failing to enforce assessments for improvements.

Homestead—Interests of husband and wife.—Cited in *Vining v. Willis*, 40 Kan. 609, 20 Pac. 232, holding that a wife, having the homestead in her name, could devise one-half of it to a third party; *Matney v. Linn*, 59 Kan. 613, 54 Pac. 668, holding that the whole of a homestead, which was in the name of the wife, passed to her heirs, the husband having a mere right of occupancy, with a restriction on the wife's power to alienate; *Mathewson v. Skinner*, 66 Kan. 309, 71 Pac. 580, holding that a wife, occupying land with her husband, in whom the title rested, was not the owner.

13 KAN. 550, SWARTZ v. REDFIELD

Indorsement of note.—Followed in *Selover v. Snively*, 24 Kan. 672, on liability of indorser; *Lank v. Morrison*, 44 Kan. 594, 24 Pac. 1106, holding that where, after maturity of a note, the payee signed his name below that of the maker, he was an indorser; *Wichita Nat. Bank v. Weeks*, 5 Kan. App. 694, 49 Pac. 105, holding that a bank's liability as an indorser or guarantor of the notes of a third party was conditional.

Cited in note in 46 L. R. A. 803, 804, 806, on rights of transferee after maturity of negotiable paper.

Same—Demand and notice.—Cited in *Beer v. Clifton*, 98 Cal. 323, 33 Pac. 204, 20 L. R. A. 580, 35 Am. St. Rep. 172, on the necessity of demand and notice to bind an indorser; *Shelby v. Judd*, 24 Kan. 161, holding demand and notice of nonpayment essential to hold indorser; *Malott v. Jewett*, 1 Kan. App. 14, 41 Pac. 674, on the necessity to allege demand and notice to hold an indorser of a note.

13 KAN. 558, DE LONG v. STAHL

Referees—Powers.—Cited in *Re Abrams*, 2 Cal. App. 237, 84 Pac. 363, holding that an award not filed within the time stipulated by the parties was void.

Distinguished in *Reever v. White*, 8 Utah, 188, 30 Pac. 685, holding that a referee had power to grant a nonsuit and report a judgment to that effect.

Cited in note in 34 L. R. A. (N. S.) 582, on effect of failure to file referee's report within proper time.

Same—Review of findings.—Cited in *Kelley & Lysle Milling Co. v. Schreiber*, 82 Kan. 403, 108 Pac. 816, 20 Ann. Cas. 192, holding that the findings of the referee could be reviewed without a bill of exceptions; *Iralson v. Stang*, 18 Okl. 423, 90 Pac. 446, holding that the court could not set aside the findings of a referee, where the evidence was not before the court.

13 KAN. 564, ST. LOUIS, K. C. & N. RY. CO. v. THACHER

Contract for benefit of another—Right to enforce.—Cited in *Tracy v. Gunn*, 29 Kan. 508, holding that an action on a contract could be maintained by the party who paid the consideration, though the contract was taken in another's name; *Carter v. J. S. George & Co.*, 30 Kan. 45, 1 Pac. 58, holding that a principal could recover on lease by agent in agent's name; *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kan. 645, 2 Pac. 821, 46 Am. Rep. 104, holding that the owner of the horse shipped could recover for its injury, though the shipment was made by his agent in his own name; *Nutt v. Humphrey*, 32 Kan. 100, 3 Pac. 787, holding parol evidence admissible to show that the parties contracted as agents; *Edwards v. Gildemeister*, 61 Kan. 141, 59 Pac. 259, holding a contract executed by an authorized agent may be enforced against the principal.

Cited in notes in 55 Am. St. Rep. 917, on suits by undisclosed principals on contracts made by agents; in 64 L. R. A. 613, as to who is real party in interest within statutes defining parties by whom action must be brought; in 60 Am. Dec. 619 (par. 3), as to when principal may sue on contract by agent.

13 KAN. 569, CITY OF EMPORIA v. NORTON

Changing rules of evidence.—Cited in *Sanders v. Greenstreet*, 23 Kan. 425, holding that the Legislature could change the rules of evidence.

Special assessments—Curative acts.—Cited in *City of Emporia v. Bates*, 16 Kan. 495; *Mason v. Spencer*, 35 Kan. 512, 11 Pac. 402; *Newman v. City of Emporia*, 41 Kan. 583, 21 Pac. 593; *Manley v. Emlen*, 46 Kan. 655, 27 Pac. 844; *Kansas City v. Silver*, 74 Kan. 851, 85 Pac. 805; *Thomas v. City of Portland*, 40 Or. 50, 66 Pac. 439; *Duniway v. City of Portland*, 47 Or. 103, 81 Pac. 945—holding a reassessment under a curative statute to be valid.

Cited in note in 76 Am. Dec. 528, 535, 536, on power of Legislature to supply defects in assessments for taxes; in 80 Am. Dec. 735, on power of Legislature to validate invalid municipal contracts.

Same—Validity.—Cited in *Newman v. City of Emporia*, 41 Kan. 583, 21 Pac. 593, holding that the legislative scheme of assessments is valid; *Thomas v. City of Portland*, 40 Or. 50, 66 Pac. 439, holding that a decree declaring an assessment void will not bar an action by the city for the cost of the improvement.

13 KAN. 589, STATE v. BEEBE, 19 AM. REP. 93

Escape.—Cited in *People v. Ah Teung*, 92 Cal. 421, 28 Pac. 577, 15 L. R. A. 190, holding that it could not be an offense to assist in the escape of one not lawfully held in custody; *State v. Hollon*, 22 Kan. 580, holding that an information charging an escape, which did not allege that the officer had a copy of the sentence or other paper under which to hold the defendant at the time of the escape, was insufficient.

Cited in note in 15 L. R. A. 191, on justification of prison breach.

Right to take bail.—Distinguished in *McKie v. State*, 74 Kan. 21, 85 Pac. 927, holding that, the defendant being lawfully in custody, the sheriff was authorized to take bail.

13 KAN. 596, STATE v. MARSH

Grand jury—Collateral attack.—Cited in *Territory v. Chartz*, 4 Ariz. 4, 32 Pac. 186, as to attack on proceedings of grand jury summoned upon an open venire from the body of the county; *State v. Skinner*, 34 Kan. 256, 8 Pac. 420, holding that the court properly excluded evidence to support pleas in abatement charging that the grand jurors were not properly drawn and summoned; *State v. Donaldson*, 43 Kan. 431, 23 Pac. 650, holding that defendant's plea in abatement, based on the disqualification of two grand jurors, was properly overruled; *State v. Williams*, 61 Kan. 739, 60 Pac. 1050, holding that the title of a de facto police judge to his office could not be collaterally attacked; *In re Davies*, 68 Kan. 791, 75 Pac. 1048, holding that the legality of a de facto grand jury could not be collaterally attacked in a habeas corpus proceeding.

Cited in note in 140 Am. St. Rep. 205, on de facto officers; in 27 L. R. A. 787, on organization of grand jury.

13 KAN. 600, COMMISSIONERS OF SEDGWICK COUNTY v. BAILEY

Constitutionality of statutes.—Cited in *Board of Com'rs of Wyandotte County v. Abbott*, 52 Kan. 148, 34 Pac. 416, on the necessity of statutes conforming to the Constitution.

Titles of statutes and ordinances.—Cited in *Commissioners of Sedgwick County v. Bunker*, 16 Kan. 498, on unconstitutionality of the act creating Harvey county, on account of its title; *Prescott v. Beebe*, 17 Kan. 320, holding title of a statute as "An act to provide for the sale of the school lands" to be sufficient; *Swayze v. Britton*, 17 Kan. 625, holding a statute unconstitutional which did

not express its subject-matter in its title; *Burgess v. Memphis, C. & N. W. R. Co.*, 18 Kan. 53, on the sufficiency of the title of a statute, without deciding the point; *Evans v. Adams*, 21 Kan. 119, holding that two amendatory acts were to be considered as portions of the original act, where any other construction would leave their titles insufficient; *State v. Bankers' & Merchants' Mut. Ben. Ass'n*, 23 Kan. 499, holding that an act, entitled "An act to amend sections 2, 4, 17, 41 and 59" of a prior act, was invalid in so far as it sought to amend section 72; *Shepherd v. Helmers*, 23 Kan. 504, holding a statute unconstitutional where its subject-matter was not expressed in its title; *Philpin v. McCarty*, 24 Kan. 393, holding that the title of an act for "the preservation of peace in unorganized counties" was sufficient to embrace the creation of an unorganized county into a municipal township; *State v. Barrett*, 27 Kan. 213, which states rules in respect to the title of a statute; *Missouri, K. & T. R. Co. v. Long*, 27 Kan. 684, holding title of a statute to be insufficient to comply with the constitutional requirement; *John v. Reaser*, 31 Kan. 406, 2 Pac. 771, holding title of an act (Laws 1879, c. 177) as "An act amendatory of and supplemental to chapter 25 of the General Laws of 1868," to be sufficient; *Stebbins v. Mayer*, 38 Kan. 573, 16 Pac. 745, holding that a city ordinance, not clearly expressing its subject in its title, was void; *Missouri Pac. R. Co. v. City of Wyandotte*, 44 Kan. 32, 23 Pac. 950, holding that a city ordinance containing two distinct subjects was void; *State v. Lewin*, 53 Kan. 679, 37 Pac. 168, holding that the title of "An act in relation to the state penitentiary" was insufficient; *Clark v. Board of Com'rs of Wallace County*, 54 Kan. 634, 39 Pac. 225, holding that the title of "An act to protect fruit trees," etc., was insufficient, where the statute provided bounties for gopher scalps; *State v. Guiney*, 55 Kan. 532, 40 Pac. 926, holding that the title of "An act to prescribe the punishment for certain offenses against railroad property," etc., is insufficient; *Atchison, T. & S. F. R. Co. v. Board of Com'rs of Kearny County*, 58 Kan. 19, 48 Pac. 583, holding that an act attaching H. county to another and purporting by its title to attach K. county was unconstitutional; *State v. Sholl*, 58 Kan. 507, 49 Pac. 668, holding the title of "An act to repeal or strike out certain redundant, obsolete, and inoperative provisions," etc., to be insufficient; *State v. Haun*, 61 Kan. 146, 59 Pac. 340, 47 L. R. A. 369, holding that, in view of its title, it was not the purpose of the "scrip law" to alter and amend corporate charters; *Howard v. Schneider*, 10 Kan. App. 137, 62 Pac. 435, holding act entitled "An act to abolish survivorship in joint tenancy" unconstitutional, in so far as it attempted to abolish estates in entirety; *In re Fourth Judicial District*, 4 Wyo. 133, 32 Pac. 850, holding a statute creating new judicial district and providing for a judge contains but one subject, which is clearly expressed in its title.

Taxation.—Referred to in *Commissioners of Sedgwick County v. Bunker*, 16 Kan. 498, on certain tax questions not reconsidered.

13 KAN. 612, **BABBITT v. CORBY**

Waiver of error by assent to or acceptance of benefit under judgment.—Cited in *Hoffmire v. Holcomb*, 17 Kan. 378, holding that a grantee of the mortgagor, by accepting the surplus, was estopped to attack the validity of the foreclosure sale; *Rasure v. McGrath*, 23 Kan. 597, holding that a party was bound by a compromise settlement of a judgment made by attorneys, yet retained by her; *Bradley v. Rogers*, 33 Kan. 120, 5 Pac. 374, holding that a party in ejectment, having elected his remedy after verdict, waived error in the judgment; *Fenlon v. Goodwin*, 35 Kan. 123, 10 Pac. 553, holding that one who voluntarily released the attached property pending his appeal waived any error in discharging the attachment; *Hodson v. Welden*, 35 Kan. 409, 11 Pac. 164, holding that a settlement of the matters in litigation after the judgment waived any errors; *Price v. Allen*, 39 Kan. 476, 18 Pac. 609, holding that plaintiff, having elected to take under his judgment in ejectment, waived all errors prior to the

election; *State Journal Co. v. Commonwealth Co.*, 43 Kan. 93, 22 Pac. 982, holding that a company, which voluntarily executed a bond which discharged a receiver, could not contest the costs of the receiver; *Guaranty Savings Bank v. Butler*, 56 Kan. 267, 43 Pac. 229, holding that plaintiffs, having accepted the benefits of a judgment of foreclosure, could not secure its reversal in so far as it released the defendants from personal liability; *Fidelity & Deposit Co. of Maryland v. Kepley*, 66 Kan. 343, 71 Pac. 818, holding that one who made a judgment the basis of a suit against other parties, could not have it reviewed; *Seaverns v. State*, 70 Kan. 920, 93 Pac. 163, holding that one who purchased school land from the state at public auction was estopped from prosecuting his appeal from a prior judgment denying his right to purchase as a settler; *Missouri Pac. Ry. Co. v. Gruendel*, 3 Kan. App. 53, 44 Pac. 439, holding that a railroad company, by paying the amount of the appraisal and occupying the land condemned, waived its right to appeal; *Smith v. Powell*, 5 Kan. App. 652, 47 Pac. 992, holding that one who accepted the proceeds of an order of distribution could not maintain proceedings in error; *Barnes v. Lynch*, 9 Okl. 11, 59 Pac. 995, holding that where plaintiffs in a suit to quiet title, after an adverse judgment, instituted proceedings to establish a lien upon the property, they were estopped to prosecute an appeal from such judgment.

Cited in note in 29 L. R. A. (N. S.) 2, 9, on right to appeal from unfavorable, while accepting favorable, part of decree, judgment, or order.

















EXTRA ANNOTATED EDITION
REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF KANSAS.

By C. F. W. DASSLER.

VOL. 14.

**CONTAINING A REVISED REPORT OF ALL CASES REPORTED
IN VOLUME 14 OF THE KANSAS REPORTS, WITH
NOTES AND REFERENCES, ETC.**

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(14 KAN.)

PREFACE.

THE annotations in this volume, in addition to references to the KANSAS REPORTS, Minnesota Reports, Pacific Reporter, and Northwestern Reporter, embrace citations and references to the Atlantic Reporter and Northeastern Reporter, thus embodying the current case law in the notes.

The volume contains all of the cases reported in volume 14 of the KANSAS REPORTS. As heretofore, all references to the old editions of volumes 1 to 14 of the KANSAS REPORTS are indicated by an * prefixed to the page number.

Volume 15 is in preparation.

Leavenworth, Kan., August, 1886.

C. F. W. D.

JUDGES

OF THE

SUPREME AND DISTRICT COURTS

OF THE

STATE OF KANSAS

DURING THE PERIOD COVERED BY THIS VOLUME.

State Supreme Court.

HON. SAMUEL A. KINGMAN, Chief Justice.
 HON. D. M. VALENTINE, } Associate Justices.
 HON. D. J. BREWER, }

Judges of District Courts.

FIRST	DISTRICT—	HON. H. W. IDE.
SECOND	"	" P. L. HUBBARD.
THIRD	"	" JOHN T. MORTON.
FOURTH	"	" OWEN A. BASSETT.
FIFTH	"	" E. B. PEYTON.
SIXTH	"	" M. V. VOSS. ¹
SEVENTH	"	" JOHN R. GOODIN. ²
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HON. BYRON SHERRY.

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¹Died October 21, 1874. Succeeded by Hon. W. C. STEWART.

²Resigned February 1, 1875. Succeeded by Hon. H. W. TALCOTT.

³Resigned March 1, 1875. Succeeded by Hon. SAMUEL R. PETERS.

JUDGES AND OFFICERS OF THE FEDERAL COURTS FOR THE DISTRICT OF KANSAS

During the Period Covered by this Volume.

United States Circuit Court.

(Held at Leavenworth on the 1st Monday in June, and at Topeka on the 4th Monday in November.)

HON. SAMUEL F. MILLER,

Associate Justice Supreme Court of the United States, assigned to the Circuit.

HON. JOHN F. DILLON,

Circuit Judge.

CLERK—HON. A. S. THOMAS.

United States District Court.

(Held at Leavenworth on the 2d Monday in October, and at Topeka on the 2d Monday in April.)

JUDGE—HON. C. G. FOSTER.

DISTRICT ATTORNEY—HON. GEORGE R. PECK.

U. S. MARSHAL—HON. WM. S. TOUGH.¹

REGISTERS IN BANKRUPTCY { HON. HIRAM GRISWOLD.
HON. CYRUS O. FRENCH.

CLERK—JOSEPH C. WILSON.

Attorneys General of Kansas

FROM ORGANIZATION OF THE STATE.

B. F. SIMPSON	-	-	-	-	From Jan. 29, 1861, to July 30, 1861.
CHAS. CHADWICK	-	-	-	-	July 30, 1861, to Dec. 20, 1861.
SAMUEL A. STINSON	-	-	-	-	Dec. 20, 1861, to Jan. 12, 1863.
W. W. GUTHRIE	-	-	-	-	Jan. 12, 1863, to Jan. 9, 1865.
J. D. BRUMBAUGH	-	-	-	-	Jan. 9, 1865, to Jan. 14, 1867.
GEORGE H. HOYT	-	-	-	-	Jan. 14, 1867, to Jan. 11, 1869.
A. DANFORD	-	-	-	-	Jan. 11, 1869, to Jan. 9, 1871.
A. L. WILLIAMS	-	-	-	-	Jan. 9, 1871, to Jan. 11, 1875.
A. M. F. RANDOLPH	-	-	-	-	Jan. 11, 1875, to Jan. 13, 1877.

¹ Resigned. Succeeded in¹ April, 1876, by Hon. CHARLES H. MILLER.

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SUPREME COURT.

STATE OF KANSAS.

JULY TERM, 1874.

PRESENT:

HON. SAMUEL A. KINGMAN, Chief Justice.

HON. D. M. VALENTINE, } Associate Justices.
HON. D. J. BREWER, }

*9

*SAMUEL LAPPIN v. JAMES E. MUMFORD.¹

July Term, 1874.

- Administration: Claim: Personal Property.** A claim existing in favor of an estate, for services rendered by the decedent in his life-time, is personal property, which may be sold by the administrator.
- 2. ———: Sale of Personalty.** The legal title to the personal property of a decedent is vested in his executor or administrator, and, except as restricted by provisions of statute, such executor or administrator can legally alien and dispose of any or all of such property.
- 3. ———.** Section 63 of the executors act does not restrict the power of sale. Its purpose is to enable the administrator or executor to obtain proper credit for doubtful claims without subjecting the estate to expense.
- 4. ———: Order of Sale.** Where personal property is ordered by the probate court to be sold at private sale, and the court intends to impose no other than the statutory restrictions as to price, it is unnecessary to specify such restrictions in the order.
- 5. ———.** The court may not order a private sale at less than three-fourths of the appraised value, and it may increase the limit to any extent deemed best for the interests of the estate.
- 6. Administrator's Sale: Presumption.** Where a party sues on a claim purchased from an estate, and alleges in his petition that the court ordered such claim sold at private sale; that it was sold, and an assignment to him made, with the approval of the court; and gives a copy of such
- *10 order and assignment;** and it appears that such order *and assignment are both silent as to the price,—it will be presumed that both court and administrator complied with the requirements of the statute, and such a showing of a sale will be held sufficient on demurrer.

¹An administrator has no power to compromise any claim, debt, or demand belonging to the estate in his hands to be administered, and accruing in the life-time of the deceased, so as to bind the estate, without the consent of the probate court, *Aetna L. Ins. Co. v. Swayze*, 30 Kan. 118; S. C. 1 Pac. Rep. 86; administration of partnership estate, see *Carr v. Catlin*, 18 Kan. *898, and note.

Error from Nemaha district court.

In November, 1858, Mumford made a contract with James R. Herd, then a land agent at Kickapoo, to locate a certain land certificate held by Mumford on government lands situate in the Kickapoo land-district, for which services Herd was to receive five cents an acre, to be paid in lands selected at the price of one dollar an acre. Herd located 16,760 acres, for which (under said contract) he was entitled to receive 838 acres of land. Herd died in 1860. Said claim for 838 acres of land, or its value, remained unpaid. In October, 1870, the probate court of Leavenworth county, "In the Matter of the Estate of James R. Herd, deceased," made the following order: "Upon the petition of George H. Rushmore, adm'r *de bonis non* of said estate, for authority to sell personal property of said estate, the following order is made by said probate court: The court having duly considered, examined, and filed the foregoing petitions, and being fully advised in the premises, it is ordered that said administrator *de bonis non* sell the claim in his said petition mentioned, at private sale, for cash in hand, and for the highest and best sum, in his opinion, obtainable for the same." Under this authority said administrator, on the twenty-fourth of October, 1870, sold said claim to plaintiff, Lappin, the assignment thereof being as follows: "For value received, and by authority in me vested by the order of the probate court of the county of Leavenworth and state of Kansas, I, George H. Rushmore, administrator *de bonis non* of the estate of James R. Herd, deceased, do hereby transfer, assign, and set over to Samuel Lappin, all right, title, and interest of the said estate in and to the within contract made between James R. Herd and J. E. Mumford, by which the said Herd agrees to locate a certain quantity of land for said Mumford, *11 and for the heirs of Louis Lourimer. Witness," etc. *Mumford resided in Missouri at the time of making his contract with Herd, and ever since. In 1872, Lappin, assignee, as plaintiff, brought suit to recover the amount due on said contract, and caused certain lands of Mumford, in Nemaha county, to be attached. Mumford appeared, and demurred to the petition. The district court, at the April term, 1873, sustained the demurrer.

W. W. Guthrie, for plaintiff.

It is said that Lappin got nothing by his assignment—*First*, for want of *power* in the administrator to assign; and, *second*, for want of *form* in assignment; and *Hardmann v. Bowen*, 39 N. Y. 196; *People v. County of Otsego*, 51 N. Y. 401; *Grantman v. Thrall*, 31 How. Pr. 464; and *City of New York v. Furze*, 3 Hill, 612,—are relied on. These were cases where authority to perform certain duties having been neglected by public authorities, upon proceedings *against* such officers to compel performance of these duties, it was held that such authority was *mandatory*, not *permissive*. That proposition has no application to any question involved in this case. *Ventress v. Smith*, 10 Pet. 167, also cited by defendant, not only fails to sup-

port his proposition, but decidedly maintains the contrary. See page 168. "The grant of the power carries with it all the usual, ordinary, and necessary means to effectuate the beneficial exercise of the power."

But the power of an administrator exists at common law to settle and compromise. *Short v. Johnson*, 25 Ill. 496. It is insisted by Mumford that the administrator had no *power* to do anything with "claims, debts, or demands," except to receive the money from the debtor by ordinary collection, or compromise with the debtor, or turn them over to the heirs or creditors, to make what they could out of them. In other words, that, in all cases where it is not absolutely certain that the debt can be collected in full, the *debtor must* have the monopoly of shaving his own paper, or *certain* of the creditors

the sole right to gamble on it; and if these resorts fail, that
 *12 then the claim must be allowed to go to waste; that "sections 62 and 63 of the executors' act are grants of power, in their nature excluding the exercise of any other in the disposition of "claims;" and that the sale to Lappin was *ultra vires*. We think that they are *additional* provisions, to be exercised under supervision of the court in unusual cases, where the expense of disposition might otherwise exceed the returns. This "claim" was a part of "the personal property belonging to the estate," and, like a bond, note, or scrip, was the subject of sale. Section 69, p. 445. It was the subject of "specific bequests,"—then, why not of sale? But the authority to compromise with the debtor would authorize a sale to another when more could thus be realized. *Ventress v. Smith*, *supra*.

Questions of regularity in appraising, inventorying, etc., are not the subject of inquiry in this action in this court. But we insist that the probate court is a court of record, and that its adjudications cannot be collaterally attacked in this court. This rule applies in all cases where the court rendering the decision had jurisdiction. *Fox v. Hoyt*, 12 Conn. 491; *Coit v. Haven*, 30 Conn. 199; *Freem. Judgm.* 94, § 123. In this state probate courts and district courts are authorized by the same constitution, each "having such jurisdiction as may be provided by law." Article 3, Const. §§ 1, 6, 8. And to the extent of the jurisdiction thus conferred, the jurisdiction is equally general in each case. *Haynes v. Meeks*, 10 Cal. 118; *Hahn v. Kelly*, 34 Cal. 412.

A. G. Otis and C. G. Foster, for defendant.

We maintain that the demurrer was properly sustained by the court below. The petition and exhibits show that the plaintiff's claim is based wholly upon a pretended assignment to him from the administrator *de bonis non* of the estate of Herd, deceased. The so-called assignment is of a claim existing in favor of the estate of the decedent, against the defendant, Mumford. It seems to have been made under an order of the probate court of Leavenworth county, October 24, 1870, about twelve years after the death of Herd, who died in March,

1860. Now, if the assignment to plaintiff is invalid, either for want of authority in the administrator to make it, or of the court
*13 *to order and affirm it, or if the requirements and forms of the statute as to the powers and duties of executors and administrators were not complied with, then Lappin took no title to the claim, and has no cause of action against defendant.

Under the constitution and laws of Kansas the administrator has no authority or power to assign and transfer a chose in action, or claim existing in favor of the estate he represents; nor can the probate court confer any such power, or make valid any such assignment. The constitution, art. 3, § 8, provides that the probate court shall have such *probate* jurisdiction as may be provided by law; limiting its jurisdiction to probate matters, and to such probate matters as shall be provided by law. See further, as to the probate court being a court of limited jurisdiction, *Kirkpatrick v. State*, 5 Kan. *678; *Stemple v. Hewling*, 2 Ohio St. 228; *Davis v. Davis*, 11 Ohio St. 390; *Cooper v. Sunderland*, 3 Iowa, 114; *Corwin v. Merritt*, 3 Barb. 343; *Smith v. Rice*, 11 Mass. 511; and cases cited in *Glass Co. v. Ludlum*, 8 Kan. *46. Being a court of special jurisdiction, it must follow strictly the terms and authority prescribed by law. *Gridley's Heirs v. Phillips*, 5 Kan. *354; 2 Washb. 570; *Gregory v. McPherson*, 13 Cal. 577; *Thatcher v. Powell*, 6 Wheat. 127. See, also, as to the sale of personal property, *Ventress v. Smith*, 10 Pet. 175. In Gen. St. 443, (Executors' Act, § 62,) is prescribed the duty of the administrator as to choses in action. He must collect the assets within one year, as far as he is able. Sections 63 and 68 prescribe explicitly the duty of the administrator as to doubtful or desperate claims, or when the debtor is insolvent. These sections are complete in themselves upon this subject, and prescribe clearly and fully the course to be pursued, the remedy to be taken, and the manner of the adjustment between the administrator and the debtor. The rights of the heirs and the creditors are fully protected. There seems to us no implication that another, and a wholly different, remedy and course can be pursued, as has been attempted in this case. "May," in section 62, is to be construed as "must." *Kansas Pac. Ry. Co. v. Reynolds*, 8 Kan. *628; *City of New York v. Furze*, 3 Hill, 612; *People v. County of Otsego*, 51 N. Y. 407.

Aside from the plain provisions of the statute, the policy of the law forbids the authority here sought to be exercised. It
*14 would open the door for fraud and collusion. Speculators, *by skillful manipulation, would buy these claims for a trifling consideration, and then invoke the aid of the courts to enforce full payment, to their own advantage, and to the injury of heirs and creditors. The law seeks to bring the embarrassed debtor and the representative of the estate together, without the interference of a *middle-man*, to the end that the claim may be compromised and settled to the best advantage of the estate.

But it may be urged that this claim is "personal property," and subject to sale as personal property. If so, then the attempted transfer is void. There was no appraisement as required by law. See sections 42, 46, 47, and also section 61, of Executors' Act. These sections distinctly provide for an appraisement of all personal property, and an approximate estimate of the amount that can be collected on all notes, bills, claims, choses in action, and accounts due the estate. The order to sell at private sale, with no appraisement, and without providing that it should not be sold for less than three-fourths of its appraised value, is clearly unauthorized and void. See section 71, Executors' Act. We insist that this claim is not personal property, within the meaning of that act, and the sections cited clearly draw the distinction between personal property to be appraised on actual view, and notes, accounts, etc., as to which it is made the duty of the appraisers to make an approximate estimate of what can be collected thereon. Sections 46, 47. Section 69 makes it the duty of the administrator to sell all the "personal property" within three months, which section, construed with sections 62, 63, and 68, clearly points out the distinction between those classes of assets. The law nowhere authorizes such claims to be sold. There is authority for a *compromise*, under certain conditions and restrictions; or it may be filed for the benefit of the heirs or creditors. Sections 63, 68. In either view of this case, whether it be deemed a chose in action, and governed by sections 63 and 68, or personal property, and governed by the other sections referred to, the law has been disregarded and violated in this attempt to speculate in the assets of the estate.

*15 *The record and exhibits of the probate court are incomplete.

It being a court of inferior and limited jurisdiction, nothing is presumed as to its powers. The complete record should have been produced. No order could be made without a petition therefor, and no order of sale at private sale could be made for less than three-fourths of the appraised value. Section 70.

BREWER, J. The question in this case was raised on demurrer, and the substantial facts are these: One James R. Herd had, in his life-time, a claim against the defendant for services performed in the location of a land certificate. After his death, the claim not having been paid, the administrator *de bonis non* of his estate, by order of the probate court, sold and assigned it to this plaintiff. In reference to this sale and assignment two propositions are asserted by counsel: *First*, that the probate court had no power to order, and the administrator none to make, such a sale or assignment; and, *second*, that if the power existed, it was not so exercised as to accomplish a valid transfer.

In reference to the first proposition, we think the court had the power to order the sale of such a claim. At common law the full legal title to the personal estate of a decedent was vested in his ad-

ministrator, and such administrator could dispose of it, passing a good title as freely and fully as the decedent himself could in his life-time. His indorsement transferred the title to negotiable paper. *Riddick v. Moore*, 65 N. Car. 382; *Thomas v. Reister*, 3 Ind. 369; *Hamrick v. Craven*, 39 Ind. 241. In *Dayton on Surrogates*, at page 259, it is said: "But generally speaking an executor or administrator, in his own life-time, may dispose of and alien the assets of the testator. He has absolute power over them for that purpose, and they cannot be followed by the creditors of the deceased." See, also, same volume pp. 307, 310; *Williams, Ex'rs*, 562; *Anderson v. Gregg*, 44

Miss. 170; *Booyer v. Hodges*, 45 Miss. 78; *Harth v. Heddlestone*, 2 Bay, 321. The provisions of our statutes, and similar ones in other states, prescribing the manner and conditions of sale, are to be regarded rather as restrictions upon this otherwise absolute power than as original grants of power. The administrator who, independent of such provisions, could sell when he pleased, and upon such terms as suited him, responsible to the creditors and heirs only for reasonable fidelity in his trust, must now proceed in accordance with the regulations of the statute. Whatever an administrator can do without an order, the court has power to order him to do. He has power, and it is his duty, to sell at public sale the personal property; and the term "personal property," which, according to its ordinary significance, as well as its statutory definition, (Gen. St. 999, cl. 9,) includes such a claim as the one in question, is expressly, in the section requiring him to sell, made to include such a claim. "The whole of the personal property belonging to the estate, which is liable to the payment of debts, and is assets in his hands to be administered," is the language used. *Executors' Act*, § 69.

It is true, bonds, notes, bills, and accounts are not ordinarily sold, and in most cases ought not to be. They are regarded as personal property, in a sort of intermediate condition between goods and chattels and money, the standard of value; as it were, the former in process of reduction to the latter. Hence, the interests of the estate are generally promoted by the collection, rather than the sale, of such property. But nevertheless they are personal property, and, as such, subject to sale. Nor does section 63, cited by counsel, remove this power of sale. The purpose of that section is to enable the administrator to obtain proper credit for doubtful claims without subjecting the estate to expense. It permits the court to authorize the administrator to compromise certain doubtful claims, or file them in court for the benefit of such heirs, devisees, or creditors as will sue for them, and declares that such order of the court shall be a sufficient

*17 voucher. Granting authority to com*promise does not take away the power to sell.

In regard to the second question we do not think it is fairly before us. We think the allegations of the petition are sufficient, as against

a demurrer. It alleges that the administrator was duly authorized to sell by an order of the probate court; that in pursuance thereof he sold, and, with the approval of such court, executed and delivered a written assignment of such claim. The order of the court and the assignment are attached to the pleading. The first, after showing that a petition therefor had been filed, orders the administrator to sell "at private sale, for cash in hand, and for the highest and best sum, in his opinion, obtainable for the same." The second is simply an assignment of the claim, declaring that it was made in pursuance of the order of the probate court. The order does not direct the administrator to sell for not less than three-fourths the appraised value, and the assignment does not show for what sum the sale was made, nor that it was for not less than three-fourths of such value. But we think it is unnecessary that this should appear either in the order or the assignment. The statute reads: "The probate court may order the executor or administrator to dispose of said personal property at private sale, at not less than three-fourths of its appraised value." Gen. St. 446, § 71. The statute fixes the lowest limit at which personal property may be sold at private sale, viz., three-fourths the appraised value. It authorizes the court to fix a higher limit. In ordering a private sale it may require four-fifths, or even the entire appraised value, or more. If the order is silent, the law fixes the limit; for this section must be understood, not as specifying the language of the order, and leaving all discretion as to the amount above the statutory limit to the administrator, but rather as limiting the power of the court, and prescribing the amount below which the court may not order a sale. Here the order is silent. In the absence of any showing to the contrary, we must presume that both court and administrator kept within the requirements of the *18 law, and that the *sale was made for not less than three-fourths the appraised value. If it should hereafter appear that no appraisement was made, or that the sale was for less than three-fourths of the appraised value, it will be time enough then to consider the effect of such omission.

The judgment of the district court will be reversed, and the case remanded, with instructions to overrule the demurrer.

(All the justices concurring.)

A. B. STODDART v. R. J. VANLANINGHAM.

July Term, 1874.

1. **Injunction: Evidence on Motion for Temporary Order.** On an application for a temporary injunction, where notice of the same has been required to be given to the defendant, and notice has been so given, the defendant may, on the hearing of the application, even before answer filed, introduce any legal evidence that would tend to show that the injunction should not be granted. He is not confined to evidence that merely tends to disprove the allegations of the plaintiff's petition.
2. **Contested County-Seat Election: Another Action: New Parties: Discretion: Refusal of Injunction not Error.** Where an election for the location of a county-seat has been held, and two places are voted for,—one place being at the time the county-seat, and the other place not; and the board of county commissioners afterwards duly canvass the votes, and declare that the other place has received a majority of all the votes cast, and has thereby become the county-seat; and a certain person, being friendly to the old county-seat, afterwards commences an action, under section 5 of the act providing for the contest of county-seat and other elections, (Laws 1871, p. 192,) against the county clerk, to perpetually enjoin him from moving his office from the old county-seat to the new county-seat; and the said action is prosecuted in good faith, in the district court, to final judgment, upon its merits, and the final judgment is rendered in favor of the defendant and against the plaintiff; and where another person, also friendly to the old county-seat, immediately afterwards commences another action, under said section 5, to perpetually enjoin the register of deeds from moving *his office from the old county-seat to the new one; and also, at the same time, applies to the judge of the court at chambers for a temporary injunction to restrain said register of deeds from moving his office until the action could be heard and finally determined; and notice of the application is required and given to the defendant; and the judge, upon the hearing of the application, refuses to grant the temporary injunction: *held*, that the judge, exercising a sound judicial discretion, did not commit any error.¹

Error from Neosho district court.

Injunction, brought to contest the county-seat election held March 26, 1872, and the same election which was in controversy in the case of *Butler v. McMillen*, 13 Kan. *385. Final judgment was entered in the *Butler-McMillen* case, in the district court, on the tenth of July, 1873. On the eighteenth of said July, Stoddart filed his verified petition in the same court against Vanlaningham, register of deeds, to enjoin defendant from removing his office from Osage Mission to Erie. The board of county commissioners, as canvassers, had determined that 3,391 votes were cast in the county,—1,712 for Erie and 1,679 for Osage Mission; majority for Erie, 33. The poll-books returned

¹ Discretion of court in the refusal of a preliminary injunction, considered. See *Conley v. Fleming*, *post*, *385; *Olmstead v. Koester*, *post*, *463; *Akin v. Davis*, *post*, *143; *Wood v. Millsbaugh*, 15 Kan. *14; *Leavenworth, L. & G. R. Co. v. Clemmans*, *post*, *91.

from Erie precinct showed 595 votes cast at that precinct,—590 for Erie and 5 for Osage Mission. The ground of contest stated in Stoddart's petition was "that 168 of the votes returned from Erie precinct [setting forth the names and numbers of the illegal electors, as they appear on the poll-books] were illegal, false, and fraudulent; and more than 100 others, the names and numbers of which plaintiff cannot give, were illegal, as Erie precinct only contained 300 legal voters at the time of the election."

Application being made for a temporary injunction, the district judge required notice to be given to defendant of the hearing of such application, and such notice, with notice that affidavits would be read in support of said motion, was served on defendant. The application was heard before the district judge, at chambers, on the third of August. In support of his application Stoddart read his verified petition,

and the affidavits of several parties relating to the conduct and

*20 validity of "the election held at Erie precinct; and thereupon Vanlaningham, in opposition, over plaintiff's objection and exception, read a large number of affidavits in regard to the validity of said election; and also the affidavit of one Peter Walters, as follows:

"Peter Walters, upon his oath, doth depose and say that heretofore, in the district court of Neosho county, and since March 26, 1872, a certain other action was pending and determined in said court, which said action had the identical objects and purposes in view that the present action has, as will more fully appear by the record, judgment, and decree, a certified copy of which is hereto attached, marked 'Exhibit A,' and made a part of this affidavit. Said action was entitled 'Thomas H. Butler, Plff., v. G. W. McMillen, County Clerk of Neosho County, Deft.' Affiant further states that said Butler was only the nominal plaintiff, and the town of Osage Mission the real plaintiff and party in interest. And the said McMillen, the county clerk of Neosho county, was only the nominal defendant, and the town of Erie, in said county, the real defendant and party in interest. Affiant further states that said action was brought and prosecuted for the express purpose of contesting the election had and held on the twenty-sixth March, 1872, and especially the poll-book used at Erie precinct on said twenty-sixth March, which said election so had and held was an election for the purpose of relocating the county seat at Neosho county. Affiant further states that said action was duly tried, and was determined at the July term of said court, 1873, which more fully appears by said Exhibit A, hereto attached. Affiant further states that said judgment, determination, and decree were duly had and given before the commencement of this present action. Affiant further states that the real parties in this action are the same and not other and different from those in said former action, which judgment is now in full force and effect, and not reversed or modified." Annexed to this affidavit, as said Exhibit A, was a "certified copy" of the journal

entry of July 18, 1873, in the Butler-McMillen Case, showing the findings of fact, conclusions of law, and judgment. (The plaintiff in error in this case, Stoddart, claims in this court that the *original* "certified copy," offered and read in evidence as part of Walters' affidavit, although duly signed by the clerk, was not authenticated

*21 *with the *seal* of the district court.)

To the reading of Walters' affidavit, and said Exhibit A, in evidence, before the district judge, plaintiff interposed at the time the following objection: "The affidavit is incompetent, immaterial, and irrelevant, and consists of statements of law, arguments, and conclusions of law, and not of statements of facts; and said exhibit is incompetent, irrelevant, and immaterial; that no plea or answer to the petition of plaintiff has been filed; that a plea in bar of this action could not be heard and determined at chambers; and, further, neither said exhibit nor affidavit contains a transcript of the case of T. H. Butler v. McMillen, or any other case; that no foundation has been laid for the introduction of said testimony; that the pleadings in said case of Butler v. McMillen were the only proper evidence of the issues in said case; and that the same should be introduced before said exhibit; and said exhibit is not any evidence of any fact in issue on the application for an injunction in this case." Said objections were overruled, and the affidavit and exhibit were read. The judge refused a temporary injunction.

C. F. Hutchings, for plaintiff in error.

The case presents for consideration by this court the following questions: (1) Where the verified petition, under section 5, p. 192, Laws 1871, states a cause of action, and is supported by affidavits, can the judge, on application, before answer is filed, refuse to grant a temporary injunction? (2) Can the judge at chambers, on such application, hear and determine the merits of the case on affidavits, and, by refusing a temporary injunction, thereby refuse to permit plaintiff to contest the election *in the court*, on evidence? (3) Can the defendant, on an application at chambers for a temporary injunction, before answer, in a proceeding under the above statute, set up a plea in bar, as an estoppel by former judgment? (4) If so, is the affidavit of Walters, that the case is *res adjudicata*, evidence of that

fact, even though it be accompanied by what purports to be
*22 a copy of a judgment not even certified under *the *seal* of the court? (5) Is a copy of a judgment, even though duly certified under the seal of the court, or proved, sufficient evidence, without the pleadings or any other part of the record, to sustain a plea of *res adjudicata*? (6) Is a judgment in the case of Butler v. McMillen a bar in action between Stoddart v. Vanlaningham, where there is no privity between the parties to the two actions? (7) Is a judgment in an action to contest an election, on the ground that the poll-books returned from Erie precinct *are forged*, a bar to an action to contest the same election on the ground that "John Snobb" and

167 others, whose names were returned on the poll-books of Erie precinct, are fraudulent voters? (8) Are the rules of evidence so much less applicable to proceedings before judges at chambers than before judges and juries in term, that affidavits containing mere conclusions of law, and nothing else, (such as, "the election in Erie was conducted according to law," and transcripts of courts of record certified *without seals*,) can be read, against objection?

The law of evidence is equally as binding on judges at chambers as in term. Besides the formal part of the affidavits, (except that of Walters,) they contain nothing but a mere conclusion of law, to-wit, "the said election was conducted according to law." This is never competent evidence. If the affidavits contained *any* competent evidence, it might be said the judge could and would be presumed to consider only that which was competent; but as no part of these affidavits was competent, we must believe that the judge considered the statement "that the election was conducted according to law," as competent and sufficient evidence that the votes cast at the election were legal. And, if he did consider such affidavits as competent evidence, is there any doubt that we were prejudiced? There was no question raised as to the legality of the election, but only as to the legality of certain votes. The affidavits of C. C. Miller and others were introduced, we suppose, to affect the credibility of plaintiff's witnesses, whom they disputed. We claim that these affidavits were in-

*23 competent, because the judge is not, under the law, authorized to try the case at chambers. This proceeding to contest the election is an anomalous statutory proceeding, and must be construed and carried out so as to effect the result intended. The election is to be contested by *the court*, and not by *the judge*. If the judge at chambers refuses to grant a temporary injunction, it is useless to have any such proceeding, for the officer removes, and a judgment against him on final hearing is fruitless. The object of this proceeding is to prevent officers from moving until the election is contested. The plaintiff is required to verify his petition, and set forth the names of alleged illegal voters. It is clearly intended that any party filing the proper verified petition may contest the election, and a temporary injunction shall issue *of course*, on a *prima facie* showing; otherwise the law is futile, as the judge may say: "You shall not contest the election; I will try this case at chambers, and decide on the preponderance of affidavits, and you shall not go into court, where you can subpoena witnesses." The refusal of the temporary order is simply a denial of the remedy pointed out by law, and the attempt to try the case by affidavits is simply a farce. To so construe the statute is to say that a person may contest the election, and have the benefit of an injunction to keep matters in *statu quo* until the final decision, provided he can produce more affidavits before the judge than the other party. The object of contesting the election is to ascertain which place received a majority of the legal votes; but the theory of

the district judge was that you must prove which place received a majority of the legal votes before you can be allowed to contest.

But, surely, even if the judge at chambers could hear and determine the truth of the petition upon the preponderance of affidavits, he could not hear and determine the truth of a *plea in bar by the defense*, before answer, on affidavits, or any other testimony. While in ordinary applications at chambers, for temporary orders, the truth of the motion or petition will be heard and determined, we believe it has never been the practice, and would be destructive of the

*24 rights of *all plaintiffs in such applications, if the defendant before answer, and without notice, could set up a temporary plea in bar, which depends upon record testimony almost entirely for proof or rebuttal, and require the truth of it to be determined. Again, no provision is made for the production of other evidence than affidavits, on an application for injunction. The Code, by implication, says affidavits alone shall be used on applications, (Civil Code, § 249;) hence the plea of *res adjudicata* could not be interposed in an application at chambers, and the admission in evidence of the affidavit of Walters, and the pretended record of a judgment, was error.

But, reasoning from the hypothesis that any defense may be made by affidavit, on a motion at chambers for a temporary injunction, that could be made to the action, and that the application is fully tried on the petition and temporary defense, and decided on the preponderance of affidavits and other testimony; or, in other words, that the case must be tried once at chambers, on the petition, and whatever defense the caprice of counsel may suggest, and again (if the application is sustained) in term, on the petition, and perhaps some other defense, or many others: is the evidence offered in this case in support of defendant's plea sufficient to sustain such plea? "Estoppels are not favored in law. That a party alleging them can take nothing by intendment, argument, or inference, is well established." "No presumption should be indulged in favor of an estoppel which is designed to conclude a party by excluding evidence of the truth." *Dunckel v. Wiles*, 11 N. Y. 420; 1 Greenl. Ev. § 528. The affirmative of the issue was on defendant. He must make a clear case that the precise point in issue had been once adjudicated between the same parties or their privies. How could he prove, or how could the court determine, what (if anything) had been adjudicated, without the pleadings? The judgment or decree proves nothing of itself. "It is a very familiar principle that the judgment concludes the parties only as to the facts covered by it, and the facts necessary to uphold it; and although a decree, in express terms, professes to affirm

*25 a particular fact, *yet if such fact was immaterial, (under the pleading,) and the controversy did not turn upon it, the decree will not conclude the parties in reference to that fact." *People v. Johnson*, 38 N. Y. 65; *Sweet v. Tuttle*, 14 N. Y. 465.

The defendant and the district judge were undoubtedly misled in reference to the sufficiency of *the judgment* alone as evidence. In New York, where the question has frequently recurred, the books speak of a "judgment record." This, as all lawyers familiar with the New York practice know, is not merely the "judgment," but contains *the pleadings*, and every step taken in the case. It is precisely such a record as is described by section 417 of our Civil Code. Gen. St. p. 707. This "complete record," as it is usually called in this state, is made only by order of the court. In New York such a record is made in every case, and is called a "judgment record." And where the books speak of such evidence being introduced to support the plea of *res adjudicata*, it means, not the judgment *alone*, but all other matters necessary to make a "complete" or "judgment" record, as above described. A judgment, we contend, is conclusive on nobody as to any questions except those legally raised by the pleadings. The judgment must respond to the issues legally made in the case, and if it goes outside of this it is not conclusive; hence it must be shown, "either that the matter was *actually determined in the former suit*, or that it might have been litigated *under the issue then joined*." Campbell v. Consalus, 25 N. Y. 616; Campbell v. Ayres, 6 Iowa, 339; 26 Ind. —. In the case at bar it was not shown what the issues were.

But the copy of the judgment was not even *legally certified*, but was attempted to be proved by the affidavit of Peter Walters. The affidavit of Walters is a novelty. It does not state, properly speaking, a single fact. It is a summary of the law of the case, sworn to by him. Why should a learned judge occupy the bench to determine abstruse legal controversies, if *Peter Walters* can settle all these disputed questions of law in an affidavit of five folios? It must be
 *26 evident that the judge either considered the pretended copy *of the judgment as importing absolute verity, and concluding the plaintiff as to everything recited therein, or must have considered Walters' affidavit as conclusive of the law and fact, or he *must have taken judicial notice of what was adjudicated*, (which is insisted upon by defendant's counsel.) In either case the error is glaring. Fitzpatrick v. Gebhart, 7 Kan. *44, shows the practice in this state as to introducing the pleadings, etc. People v. Johnson, 38 N. Y. 63, as to "judgment record," shows the pleadings were in evidence, and from them the court said the judgment there offered was *res inter alias acta*.

But admitting, *arguendo*, that the affidavit and exhibit of Walters proves the judgment in the case of Butler v. McMillen, does that judgment create an *estoppel* against plaintiff in this case? If the pleadings and record in Butler v. McMillen were before the court, it would not be difficult to show that *the only question* tendered by plaintiff in that case, as held by the court on the trial, was this: "Were the poll-books used at the election in Erie township destroyed, and *forged and*

altered ones substituted and transmitted to the county clerk?" No names were set forth in the petition as illegal voters. The question was not, *whether illegal votes were cast*, but *whether the poll-books were forged*. We claim that the petition in that case does not state a cause of action under the statute. If the petition did not set forth the names of alleged illegal voters, it was not sufficient under the statute. The statute is simply for the purpose of contesting the question of illegal voting; it does not pretend to furnish a remedy by declaring the poll-books spurious. If there were no poll-books, or if the original ones were lost, the court would not declare the election void, but would go behind the poll-books to the election, and ascertain how many legal votes were cast for each party. *Morris v. Vanlaningham*, 11 Kan. *269. Hence the allegation that the original poll-books "were lost" is not sufficient, especially under a statute which requires the names of alleged illegal voters to be set out under oath. If the court *27 had no jurisdiction, or the pleadings did not state a cause of action, the judgment is void, and is no adjudication. *Poin-dexter v. Anderson*, 6 Alb. Law Reg. 100; *Com. v. Peters*, 12 Metc. 387; *Marston v. Jenness*, 11 N. H. 156. The above facts, of course, do not appear by this record, nor can we ask this court to take judicial notice; but we claim that enough is fairly deducible from the judgment and findings to show that the questions involved in the two cases were not identical, or even similar. Taking all the findings in the *Butler-McMillen* suit concerning Erie precinct, and it will be seen that the only question decided is as to the *poll-books*. Not a single word is said as to *illegal votes*, and no finding upon that question, as far as Erie township is concerned, is made. If any such question had even incidentally been raised by the pleadings, of course some finding would have been made concerning it. When we come to the conclusions of law we have this: "That the *election* held in the precinct of Erie, on said twenty-sixth of March, was in conformity to law, and the *returns* from said precinct were properly transmitted to the clerk of said county." And this: "That, as far as appears from the evidence, the determination of said * * * canvassers * * * was * * * in conformity to law." Nothing is said about illegal votes, and the *question of illegal voting* was not raised by the plaintiff, or even incidentally passed upon by the court, so far as Erie township is concerned. There is no identity, then, between the question adjudicated in *Butler v. McMillen* and the question sought to be adjudicated in this case. In order to avail himself of this defense of *res adjudicata*, the defendant in error must *show*, without the aid of presumptions or inference, that the identical question has been adjudicated. Simply because the court determines in one case, upon certain issues, that Erie is the county-seat, does not conclude *every question involved in that proposition*, but simply the question determined in the particular case in order to arrive at such conclusion.

To illustrate: A finding that the poll-books returned from Erie were not forged, does not determine whether John Snobb is a legal voter or not. A finding in one case that a will, though duly executed *28 was not in conflict with the statute, where the action *was to have the will so declared, does not estop the same parties, in another suit, from raising the question of the due execution of the will. *Mason's Ex'rs v. Alston*, 9 N. Y. 28; *Freem. Judgm.* 224; § 259; *Cannon v. Brame*, 45 Ala. 262; *Davis v. Pawlette*, 3 Wis. 304; *Marvin v. Treat*, 37 Conn. 102; *Clegg v. Dearden*, 12 Q. B. 576; *Crockett v. Routon*, *Dudley*, 254; *Kirkpatrick v. Stingley*, 2 Cart. 273; *New England Bank v. Lewis*, 8 Pick. 113; *U. S. v. Cushman*, 2 Sum. 426; *Jones v. Fales*, 4 Mass. 255; *Tyler v. Wilkerson*, 27 Ind. 451.

In the case of *Butler v. McMillen* the evidence was as to the forgery of poll-books; in this, as to the competency of John Snobb and 167 others to vote at the county-seat election. Would the evidence in one case sustain the issue in the other? In *Doty v. Brown*, 4 N. Y. 71, it is held that the question must be "directly involved in the suit," in order that the judgment thereon shall be a bar in a second suit "between the same parties," and that proof *aliunde* is proper and necessary where the pleadings or judgment is indefinite. This is the tone of every decision in that or any other state, and we challenge the production of a respectable authority that militates against it, or holds that a proposition affirmed by a judgment is conclusive between the same parties in another suit, unless such proposition was directly in issue under the pleadings in the first suit. 1 *Greenl. Ev.* § 528; 22 *Iowa*, 368. Would an adverse judgment, in an action contesting the election on the ground that Erie was not within the limits of the county, be a bar to an action to contest the election on the ground of fraudulent voting? Would an adverse judgment, in an action to contest on the ground of illegal votes cast in Chetopa township, be a bar in an action to contest on the ground of fraudulent voting in Erie? If not, then why should an adverse judgment, in an action to have certain "returns" declared spurious and forged, be a bar to an action to show that illegal votes enough were cast to change the result of the election? This court, in *Atchison, T. & S. F. R. Co. v. Commissioners of Jefferson Co.*, 12 Kan. *127, (following *Benz v. Hines*, 3 Kan. *390,) have said that, "to make a matter *res adjudicata* there must be concurrence of the four conditions following, namely: (1) Identity in the things sued for; (2) identity in the cause of action; *29 (3) identity of *persons* *and *parties* to the action; (4) identity of the quality of the persons for or against whom the claim is made." Has the defendant brought himself within these requirements? There is no identity of parties. The statute (section 5, p. 192, Laws 1871) gives "any elector or electors" the right to contest the election. The maxims *nemo debet bis vexari pro una et eadem causa*, and "that the judgment of one court directly upon the point

is, as a plea, a bar between the same parties, upon the same matter, directly in question, in another court," (Broom, Leg. Max. 321, 328,) are of no more force than the other: "that a transaction between two parties ought not to operate to the disadvantage of a third." Greenleaf says that "parties," in this connection, includes "all who are directly interested, and had a right to make defense, or to control the proceedings, and appeal from the judgment. This right also involves the right to *adduce testimony* and to *cross-examine*. Parties not having these rights are strangers to the cause." 1 Greenl. Ev. §§ 522, 523.

Tested by this rule, is Stoddart concluded? The doctrine of estoppel was never intended as an instrument wherewith, by artifice, cunning inferences, and sophistical presumptions, to weave a web in which to imprison truth. Stoddart had no notice of the action of *Butler v. McMillen*. Butler was not a public officer, representing the interests of Stoddart, his constituent, nor did he have any interest in common with Stoddart, so far as the record shows. Stoddart had no more control over, or opportunity to be heard, to introduce testimony or cross-examine, or to appeal from, the judgment in the case of *Butler v. McMillen*, than Walters, or any other stranger. Stoddart, upon his application for an injunction at chambers, was confronted with a pretended judgment, in a case to which he was as much a stranger as the sultan of Turkey, and it was sought to conclude him thereby. When he examined that judgment he did not even find it certified under the seal of the court in which it purported to have been rendered. When he inquired what the issues may have

*30 been in that case, no pleadings were presented, but he was informed that every fact which was affirmed by the decree therein, whether in response to questions presented by the pleadings or not, was binding and conclusive on him. He had not been notified by the filing of an answer, or otherwise, that such a defense would be made to his application. When Stoddart inquired who the man Butler might be that it was claimed had represented, and in another action concluded, him, he was pointed to the affidavit and exhibit of Peter Walters, but found nothing to show whether Butler was a citizen and elector of Neosho county; and for aught the affidavit of Walters, the findings, judgment, and other evidence, disclosed, Butler may have been a citizen of Erie, whose interests were directly antagonistic to those of Stoddart, or he may have been a non-resident of the county. We submit that the order of the judge refusing the temporary injunction, and thereby sustaining the plea of *res adjudicata* at chambers, was so totally at variance with the enlightened and equitable doctrine of estoppel, and is based upon such unfair and unsatisfactory evidence, that the order should be reversed.

Carpenter & Jones and John T. Voss, for defendant in error.

This is another county-seat case, growing out of the same election, and has the same objects and purposes in view. Each was com-

menced and prosecuted by the friends and supporters of Osage Mission, which point, by a multiplicity of suits, and some legerdemain, has succeeded in holding the county-seat at Osage Mission for nearly two years, against the declared wishes of the people. This action was not commenced until the Butler-McMillen Case was all heard and determined in the district court. That was an action, as the court will see by a view of the records, brought by Butler v. McMillen, for the express purpose of contesting the election held on the twenty-sixth of March, 1872; and the prayer of the petition was, among other things, that Osage Mission be declared the county-seat of said county; but the very object of said action was to ascertain *31 which *point was legally elected to be the county-seat,—Erie or Osage Mission. And the court, after sore trouble and mature deliberation, held and decided that Erie, and not Osage Mission, was the shiretown of said county. Now, in that case, McMillen (the defendant) was successful, and that case decided the very thing to be decided in this case. We make the point that, under the statute of 1871, but one contest can be had, no matter who the nominal parties to the record are; that the real parties in interest are the candidates that were voted for, to-wit, Erie and Osage Mission; unless, perchance, it may be said that the friends and supporters of each place are the real parties in interest, which, of course, does not alter the proposition, because each point is represented by the mere nominal party on the record, which, in this case happens to be, for plaintiff, A. B. Stoddart; and it might have been any other qualified citizen of said county, but it happened to be Stoddart, instead of its happening to be some other person whose qualifications were in some respects the same. Now, when Stoddart commenced this action he represented, and was the next friend of, every party in said county who favored Osage Mission for county-seat, and his action was equally binding upon others as well as himself. The nominal defendant is a mere accident. Had any other citizen held the same official position as this one, he, and not this nominal defendant, would have had the pleasure of having his name marked high on the escutcheon of fame, free of charge.

Our view of this case is that we have sufficiently raised the question of *res judicata* as to utterly preclude the plaintiff, or any other citizen, from maintaining this or any other second action. Can it be possible that the proper construction of this statute can be that when any citizen has commenced and carried on any action, under the county-seat act of 1871, against any county official, that so soon as he is done, any other one, or as many as may elect so to do, can commence and carry on another? If so, in one case a plaintiff may be successful, in another the defendant may be successful, and in the next the *32 plaintiff may again be successful; *and so on alternately, until the court records may be plastered all over with varying judgments and decrees,—one declaring one point the county-seat,

and another, the other point, and so you may have many decrees of equal validity, declaring each point the county-seat of the same county. Under the statute, if such be its construction, a citizen of one point may apply to the court for a writ of *mandamus* against a county clerk, and a citizen of the other point against the same officer by injunction, and in both cases, should the plaintiffs be successful, the officer would be compelled to hold his office at both points, or be in constant contempt of the court, and in constant contempt of the court as to one of the points all the time. This is what this action, if maintained, leads to.

But, says plaintiff, if your theory of this case be true, you cannot raise this question at chambers; that it is trying the main case on its merits and upon affidavits, and this the law does not allow. Then, suppose for a moment that plaintiff is right in his view, and that the plea of *res judicata* cannot be interposed at chambers, nor at any other time when plaintiff is applying for an injunction, then the effect, or the practical effect, will be precisely the same. Now, for an illustration: Very frequently, and nearly always, what a point wants particularly when it is the point at which the county-seat is where the election is held, is some means by which it can still hold the county-seat, after the election is over, a long time, against the legally expressed will of the people. Well, this is just the case with the friends of Osage Mission. Now, you cannot raise the question, when a party is applying for an injunction, nor upon a motion to dissolve, but only upon and after a full and fair trial, which takes and means about eighteen months in Neosho county; and just as soon as one plaintiff is beaten, another opens up his battery, and another eighteen months is consumed in settling and determining a question which all know just how it will be decided. Yet we must wait until the slow process of the court is gone through with,—rather, had we not better say, the farce of a trial?

*33 The injunction in this case was rightfully denied. It was *sufficiently shown to the judge at chambers that a judicial battle had been fought between the real plaintiffs and defendants herein, and that a victory had been lost on the one side and gained on the other. In this action they renew the same battle, attempting to fight the same cause over with a change of officers as plaintiff and defendant. Now, we ask, who were the real parties in interest in this fight and suit? The answer can only be: Osage Mission on the one side and Erie on the other. Now, just what does appear to be the best mode of raising this question does not so readily appear; but we think the affidavit of Peter Walters, accompanied by the judgment and decree rendered in that case, does seem to fairly raise the question, and this decree is presumed to be a proper response to the issues in said cause. Besides this answer to plaintiff's application for injunction, we think the proof by affidavit beats them, and outweighs plaintiff's affidavits and proofs.

Again, the statute, in this case, provides that both parties may set up any and all votes alleged on either side to be fraudulent and spurious, or legal votes that may have been properly offered at the various polls in the county, and rejected. Now, take the case which is pleaded in bar of this action, and say defendant in that action, having set up all the votes he claimed that were fraudulent as against him, and all that he claimed were legally offered for him and rejected, would not these votes have been *res judicata*, and could he again use them in another action? If he used them in the first, these proper votes being rejected, and these fraudulent ones being received, would, as a rule, be the very votes that would change the result of the election. Now, in the first action, the votes above mentioned might be just what changed the result, and of course if they were not, and could not be, used in this case, the want of their use would again change the result of the suit in favor of the other place. This result must be reached, or the same votes could be adjudicated a thousand times just as well as to be used a second time. Once admit the principle that they can be used a second time, and no good reason can be given why they could not be used *ad infinitum*. The principle contended for by the plaintiff would never end a county-seat contest.

The main question to be determined in this court is, was plaintiff entitled to his injunction upon the papers and evidence, as set out in the record herein filed? We do not think anything can be shown by defendant upon plaintiff's application for injunction which will defeat plaintiff's right to an injunction. The law will not take a circuitous route when the same thing can be accomplished directly. Courts of equity have ample powers in such emergencies, and will look well to the great interests involved, and act in accordance with justice to all concerned. It would not be stating the case too strongly to say that the judge of the district court could take judicial notice of the former case, it being a public record of his own court, and notice to the world as such record.

VALENTINE, J. On March 12, 1872, an election was held in Neosho county for the relocation of the county-seat of that county. No place received a majority of all the votes cast, but the towns of Erie and Osage Mission were the two towns which received the greatest number of votes. On March 26th a second election was held for the relocation of said county-seat, at which election the towns of Erie and Osage Mission were voted for. The returns of the election were duly canvassed by the board of county commissioners, and it was determined by them that the town of Erie had received a majority of all the votes cast at said election, and that said town of Erie had thereby become the county-seat of said county. Thomas H. Butler, a friend of the town of Osage Mission, felt aggrieved at the decision of the board of county commissioners, and commenced an action in

the district court of said county, under chapter 79 of the Laws of 1871, to contest said election. He commenced his action, under section 5 of said act, against George W. McMillen, *county clerk of said county, to perpetually enjoin said county clerk from moving his office from the town of Osage Mission to the town of Erie. The action was prosecuted and defended in good faith, and finally determined by the district court in favor of the defendant, and in favor of the town of Erie. The case was afterwards brought to this court, and is reported in 13 Kan. *385. The case was determined at the July term of the district court in 1873. Immediately after said case was determined the present case was commenced. It seems that the plaintiff in this action, (A. B. Stoddart,) who is also a friend of the town of Osage Mission, also felt aggrieved at the decision of the board of county commissioners in declaring the town of Erie to have received a majority of all the votes cast at said election, and in declaring said town of Erie to be the county-seat. He therefore also commenced an action under said section 5 of the act of 1871, for the purpose of contesting said election. He made R. J. Vanlaningham, register of deeds, the defendant, and prayed for a perpetual injunction to restrain said defendant from moving his said office from the town of Osage Mission to the town of Erie. He also asked for a temporary injunction to restrain said Vanlaningham from moving his said office until said action could be finally heard and determined. The court below required notice to be given to the defendant of the application for said temporary injunction. Notice was so given, and the application was heard by the judge of the district court at chambers, on affidavits and other evidence, on August 5 and 6, 1873. At the time of hearing, the defendant had not yet answered the petition of the plaintiff. The judge refused to grant said temporary injunction, and the plaintiff now brings the question here for review.

Did the judge of the court below err? We think not. On an application for a temporary injunction, when notice of the same has been required to be given to the defendant, and notice has been so given, the defendant may, on the hearing of the application, and *36 even before answer filed, introduce any legal evidence *that would tend to show that the injunction should not be granted.

He is not confined to evidence that merely tends to disprove the allegations of the plaintiff's petition. Indeed, it has been held that a party applying for a temporary injunction has no right to withhold or omit facts important for the court to know in granting the injunction. Joyce, Inj. 1263-1266, 1306; High, Inj. §§ 990, 991. It seems everywhere to be held that the granting or refusing of a temporary or preliminary injunction rests largely in the sound judicial discretion of the court or judge to whom the application is made. Hill, Inj. 15, § 17. And it would seem, in England, that "in granting an injunction the court is bound to consider the amount of injury which may be thereby inflicted on strangers to the suit and third par-

ties." 1 Joyce, Inj. 497. In the case of New York Printing & Dying Establishment v. Fitch, 1 Paige, 98, Chancellor WALWORTH uses the following language: "There are many cases in which the complainant may be entitled to a perpetual injunction on the hearing, when it would be manifestly improper to grant an injunction *in limine*. The final injunction is, in many cases, matter of strict right, and granted as a necessary consequence of the decree made in the cause. On the contrary, the preliminary injunction before answer is a matter resting altogether in the discretion of the court, and ought not to be granted unless the injury is pressing, and the delay dangerous." And injunctions are often allowed to prevent a multiplicity of suits. In this case it would seem that the plaintiff is in favor of a multiplicity of suits, and wants the court to assist him therein by allowing a temporary injunction. Now, after the main and substantial question in this case, the question whether Osage Mission or Erie is the county-seat of Neosho county, has been twice decided against the plaintiff,—once by the canvassing board and once by the district court,—after a full and fair trial, in an action litigated in good faith by both sides, we think it would be at least an abuse of judicial discretion for the court or judge to allow a temporary *injunction to restrain a county officer from moving his office to the place so declared to be the county-seat, merely for the purpose of keeping the office at the old county-seat while the plaintiff should again litigate the question as to which place is the county-seat. The minor issues in the case of Butler v. McMillen were in some respects different from the minor issues in the present case, but still the main issue was the same in both cases.

The order of the judge of the court below refusing to grant said temporary injunction is affirmed.

(All the justices concurring.)

KANSAS PAC. RY. CO. v. GRANVILLE D. POINTER.¹

July Term, 1874.

1. **Negligence: Railroads: Management of Moving Train.** Where a person has been run over by a railroad train and injured, in an action for damages therefor, a finding that the injury was caused by the gross negligence of the company will not be set aside when it appears that he was run over by a train consisting of a locomotive, tender, one baggage and two passenger cars, which was started backward over a public crossing, in a populous city, with the brake on the engine out of repair and useless, with no brakeman at the other brakes, with no flag-man or other person at the rear of the train, or at the crossing, to warn persons of their danger, and no one on the train except three persons, who were all on the locomotive, without the blowing of any whistle, though with the ringing of a bell, and along a track which from the locomotive could not be seen for a distance of from forty to fifty feet from the rear of the train.
2. ———: **Ordinary Negligence.** Where the term "negligence" is used without any qualifying word, it will be generally understood that "ordinary negligence" is meant.
3. ———: **Contributory.** Where the plaintiff is guilty of ordinary negligence, contributing directly to the injury, he cannot recover, except perhaps in cases of wanton and willful injury.
- *38 *4. ———. Contributory negligence on the part of the plaintiff is matter of defense; and if the record shows negligence of the defendant, and is silent as to the conduct of the plaintiff, a judgment for the plaintiff will be upheld.
5. **Special Findings: Practice.** Where any one of the findings in a special verdict is not specific and certain, either party may require that it may be made so before the jury is discharged.

¹ If it appears that the deceased contributed by his own negligence to the injury which caused his death, the plaintiff cannot recover. *Gibson v. Wyandotte*, 20 Kan. 156. It is now well settled in this state and elsewhere that, if the ordinary negligence of the plaintiff directly or proximately contributed to his injury, he cannot recover unless the injury was intentionally and wantonly caused by the defendant. *Union Pac. Ry. Co. v. Adams*, 38 Kan. 429, S. C. 6 Pac. Rep. 529, and cases there cited.

In the absence of evidence tending to show either that the plaintiff was negligent or not negligent, the court should direct the jury to find that he was not negligent. *Central Branch U. P. R. Co. v. Hotham*, 22 Kan. 50. The burden of proof to show contributory negligence is on the defendant. *Moulton v. Aldrich*, 28 Kan. 314. Same principle applied, *Kansas City L. & S. R. Co. v. Phillibert*, 25 Kan. 586; *Central Branch U. P. R. Co. v. Walters*, 24 Kan. 505. An instruction to the jury that "if there was negligence on the part of both parties, and they find that the negligence of the plaintiff was only slight compared with that of the defendant, their verdict must be for the plaintiff," is erroneous. *Atchison, T. & S. F. R. Co. v. Morgan*, 31 Kan. 77; S. C. 1 Pac. Rep. 298. See, also, *Kansas Pac. Ry. Co. v. Richardson*, 25 Kan. 410.

As to negligence generally, see *Union Pac. Ry. Co. v. Rollins*, 5 Kan. 167, and note; *Moore v. Cass*, 10 Kan. 288, and note; and the notes to *Myers v. Indianapolis & St. L. R. Co.*, 1 N. E. Rep. 899; *Boss v. Providence & W. R. Co.*, 1 Atl. Rep. 15; *Ivens v. Cincinnati, W. & M. Ry. Co.*, 2 N. E. Rep. 136; *Cincinnati, H. & I. R. Co. v. Butler*, 2 N. E. Rep. 144; *Copper v. Louisville, E. & St. L. R. Co.*, 2 N. E. Rep. 752; *Lawson v. Chicago, St. P. & M. O. Ry. Co.*, 24 N. W. Rep. 622; *Kansas Pac. Ry. Co. v. Peavey*, 8 Pac. Rep. 791; *Butcher v. Vaca Val. R. Co.*, 8 Pac. Rep. 179; *Wolff v. Chicago, M. & St. P. Ry. Co.*, 25 N. W. Rep. 63.

6. —. Where a finding, either regarded by itself or in the light of other findings, is not specific and certain, and the jury is discharged without any objection to it, or any effort to have it made specific and certain, it will thereafter be construed against the party in whose favor it is found.
7. —: **Construction of: Negligence.** In this case the jury found that the defendant was guilty of gross negligence, immediately causing the injury. They also found that the plaintiff was guilty of negligence contributing to the injury, without specifying what degree of negligence, or whether proximately or remotely contributory. *Held*, that it was apparent from the other findings, and the instructions of the court, that they intended only such slight negligence as was consistent with a right to recover compensation.
8. **Negligence: Question for Jury.** Where the facts are disputed, negligence is a question of fact for the jury; where the facts are undisputed, and but one deduction is to be drawn from them, it presents a question of law for the courts; but where the facts are undisputed, but are of such a nature that different minds will draw different conclusions from them as to the reasonableness and care of a party's conduct, it is a proper question for the determination of a jury.
9. **Verdicts: Concurring: Supreme Court.** Where three successive juries have, on a doubtful question of negligence, found for the plaintiff, this court should be clearly convinced of the existence of error before it orders the setting aside of the third verdict.

Error from Atchison district court.

This case was here once before, and is reported in 9 Kan. *620 *et seq.* On being remanded to the district court, another trial was had at the June term, 1873. The facts were set forth in a special verdict, which will be found in the opinion. The jury found for the plaintiff, Pointer, and assessed his damages at \$5,000.

*39 *J. P. Usher and T. A. Hurd*, for plaintiff in error.

The jury, by their twelfth finding, found that Pointer's injury was caused by the want of ordinary care, and by the gross negligence of the defendant in the manner of running the train, and by the failure of the defendant to keep a lookout of any kind for persons who might be on the track,—thereby explaining *in what respect* there was a want of ordinary care; and in the fourteenth finding they further explain what was meant and intended by the language used in the twelfth finding; and they further, by the twentieth finding, find that the train was handled on that occasion in the usual manner in which said train was handled while backing up to be switched, and was manned as was usual in operating such train; and by the eighth finding, find that the bell upon the engine was rung until the collision with the plaintiff. Taking these findings together, they show on what facts the jury predicated the finding of negligence on the part of the railway company. We contend that these findings of fact do not show negligence on the part of said company. The jury has found the facts on which they predicated negligence on the part of defendant below, and such facts do not in law constitute negligence. *Ernst v. Hudson River R. Co.*, 39 N. Y. 61; *Beisiegel v. New York Cent. R.*

Co., 40 N. Y. 9, 34; *Harty v. Central R. Co.*, 42 N. Y. 468. The defendant below was not bound to keep a flag-man on its track to warn persons off, nor to keep a lookout from the rear end of the train for a like purpose, nor keep a man upon the train for like purpose. The persons in charge of the train were not bound to anticipate defendant in error upon the track, and were not bound to make any provisions for his safety; and, if they had seen him, they were not bound to use any care towards him until they had reason to suppose that he would not take care of himself. Had they seen him, they would have had the right to suppose that he was a man of good sight and hearing, and that he would take reasonable care to protect himself. The bell was rung in time for him to escape, and he was bound to have left the track or suffer the consequences. *Finlayson v. Chicago, B. & Q. R. Co.*, 1 Dill. 579; *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358; *Dascomb v. Buffalo & S. L. R. Co.*, 27 Barb.

*40 *22; *Grippen v. New York Cent. R. Co.*, 40 N. Y. 34; *Harty v. Central R. Co.*, 42 N. Y. 468; *Herring v. Wilmington & R. R. Co.*, 10 Ired. 402; *Illinois Cent. R. Co. v. Baches*, 55 Ill. 379; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274. The question whether this ground was used by the public to walk across or go upon it, gave the public no rights there; and whether plaintiff in error knew the ground was so used, or permitted the same, was entirely immaterial.

By the thirteenth finding the jury find that Pointer was guilty of negligence which contributed to the injury he received. This finding is decisive of the case, and the judgment below must be reversed, and a final judgment for the plaintiff in error entered. *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358, 368; *Havens v. Erie Ry. Co.*, 41 N. Y. 296; *Gorton v. Erie Ry. Co.*, 45 N. Y. 660; *Grippen v. New York Cent. R. Co.*, 40 N. Y. 34; *Jewett v. Home Ins. Co.*, 29 Iowa, 562; *Hunt v. Chicago & N. W. R. Co.*, 26 Iowa, 363; *Donaldson v. Mississippi & M. R. Co.*, 18 Iowa, 280; *McAunich v. Mississippi & M. R. Co.*, 20 Iowa, 338; *Hoben v. Burlington & M. R. R. Co.*, Id. 562; *Sherman v. Western S. Co.*, 24 Iowa, 515; *Haley v. Chicago & N. W. Ry. Co.*, 21 Iowa, 15. If there is any doubt whether the jury, by the thirteenth finding, intended to find that the negligence of the defendant in error contributed proximately to his injury, that doubt is removed by the ninth, seventeenth, eighteenth, nineteenth, and twentieth findings. The last-mentioned findings are fully sustained by the evidence.

Even if the thirteenth finding be omitted, the facts stated in the seventeenth, eighteenth, and nineteenth findings defeat the action. The facts therein found show culpable negligence on the part of defendant in error. *Illinois Cent. R. Co. v. Baches*, 55 Ill. 379; *Finlayson v. Chicago, B. & Q. R. Co.*, 1 Dill. 579; *Ernst v. Hudson River R. Co.*, 39 N. Y. 61; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274. If there is negligence on the part of both parties which contributed in any degree to the accident, or if plaintiff below was guilty

of negligence, he cannot, as a matter of law, recover, although defendant also may have been negligent, or may have neglected to perform some statutory requirement. *Artz v. Chicago, R. I. & P. R. Co.*, 34 Iowa, 158; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274; *Finlayson v. Chicago, B. & Q. R. Co.*, 1 Dill. 579. The evidence shows that the plaintiff was walking laterally upon the railroad track *owned by the defendant*, and further shows that he did not look back to see whether cars were approaching; that he gave no attention to his own safety; and that, except for his own gross carelessness in going upon and walking along the track, without using all his faculties to discover approaching trains of cars, he would not have been injured. The rule of law upon this point is that it

*41 is negligence for an intelligent person to be upon the track of a railroad constantly used, unless for the purpose of crossing the same; and if a person travel along a railroad track where cars are frequently passing, even for the purpose of crossing a public highway, he is guilty of such negligence as will prevent a recovery for any injury he may receive, unless from gross and wanton negligence on the part of the employees of the railroad company; and the fact that plaintiff was run over is not presumptive evidence of such negligence on the part of the employees. *Illinois Cent. R. Co. v. Baches*, 55 Ill. 379; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274; *Bellefontaine Ry. Co. v. Hunter*, 33 Ind. 335; *Baltimore & O. R. Co. v. State*, 36 Md. 366; *Haight v. New York Cent. R. Co.*, 7 Lans. 11; *Maginnis v. New York Cent. & H. R. R. Co.*, 52 N. Y. 215.

The ground on which the plaintiff was injured, was not a public street. It is true, the council of the city, in 1863, passed an ordinance declaring certain lands to be a street, but no damages were ever assessed or paid as required by law, and nothing was done towards establishing a street beyond the mere passage of the ordinance. See twenty-first finding. We submit that this ordinance did not establish a street; and, if it did, the defendant in error had no right to go upon and walk laterally upon it. He avers in his petition that this land belonged to plaintiff in error. *Ewing v. City of St. Louis*, 5 Wall. 413; *Illinois Cent. R. Co. v. Baches*, 55 Ill. 379.

The third instruction is in these words: "If the defendant was running its train in the limits of a populous city, where it was reasonable to anticipate the presence of many persons on the track, then its duty was to keep a vigilant lookout to avoid injury to persons on the track, and any violation of that duty would be negligence on its part; and if the plaintiff in this case was injured by reason of such negligence, and through no want of reasonable care on his part, then the plaintiff is entitled to recover full compensatory damages for all injuries so sustained,"—was improper for any form of verdict, and the court erred in giving it. And the following instructions, asked by plaintiff in error, were proper, and the court erred in refusing to give them, to-wit:

"(4) The plaintiff has shown by his own testimony that he stepped onto the track of defendant a short distance in advance of
 *42 the train by which he was injured; that he proceeded down the track in the same direction in which the train moved, and that, after he stepped on the track, he did not look behind him until the train was close upon him; and that, if he had looked at any time after he stepped upon the track, he could have seen the train if it was approaching, and it is the duty of the jury to so find."

"(8) The defendant had the exclusive right to the use of its track at the point where the injury is testified to have occurred, and was not bound to anticipate the presence of the plaintiff or any other person on its track at that point, or that they would walk there in the way of its operation of its road."

"(11) If the servants of the defendant, upon the starting and backing of the train from the depot, rung the bell, and continued to ring the same, and if, as soon as they ascertained the plaintiff was in danger, they stopped the train as soon as it could be done with the usual and ordinary appliances, then these facts tend to prove due care on the part of the defendant."

"(17) If the plaintiff went on the track of the defendant, without the precaution of looking out for approaching trains, and if he neglected to use all his faculties to discover the danger he was in from approaching trains, it was gross and culpable negligence on his part."

The judgment upon the special verdict is contrary to law. The judgment is against the evidence. The further findings of fact asked by defendant below were warranted by the evidence, and the court erred in not directing the jury to make further findings.

Stillings & Fenlon, for defendant in error.

The findings in this case show—*First*, that defendant in error went upon the track of plaintiff in error on his way to the ferry-landing at a place usually frequented and used for such purposes by men, women, and children; that before going upon the track he looked, and saw that no train was in motion; *second*, that the train which caused the injury was started in motion after he was on the track, and the employees who moved the train did not see defendant in error, so that they must have started the train in motion without looking to see
 *43 whether the track was clear or not; *third*, that the train was moved backward without brakemen, or any persons at or near the rear end of the cars to look out for or warn any person of danger, or to check the train, if necessary, and at a place where there was much noise and confusion, and the blowing of the whistle of the Missouri Pacific engine at a distance of 100 feet away; *fourth*, that the gross negligence of plaintiff in error in the manner in which the train was so operated, was the immediate cause of the injury. It is claimed, however, by plaintiff in error that, although guilty of gross negligence, it is not liable, because the findings show Pointer guilty of negligence contributing to the injury. The acts of Pointer which the jury say are negligence contributory to the injury are set out by them: *First*,

that Pointer, although he looked before stepping on the track to see that no train was coming, failed to turn round and look back for this train in the brief time he was going along and across the track; second, that Pointer could have gone further without getting on the track of the railroad, and then gone directly across the track. But the jury make the distinction as to whether the negligence on the part of Pointer was proximate or remote as clearly as could be expected of them in the preparation of a special verdict. They say that the negligence of the plaintiff "was gross," and was "the immediate cause of the injury;" and, while they do not in so many words define the negligence imputed by them to the defendant in error as remote, the qualifying words used by them in the one case, and omitted in the other, show clearly that they intended to so find.

Counsel for plaintiff in error do not, if we correctly understand them, claim but that the company would be liable on the findings but for the acts of negligence set out in the verdict claimed to be contributory negligence on the part of defendant in error, but claim that he is barred of recovery by the acts of negligence imputed to him. In this, we think, counsel are wrong. The rule, as laid down in *Pendleton St. R. Co. v. Stallmann*, 22 Ohio St. 20, would apply, and that the case, as shown by the findings, comes within the exceptions to the rule of contributed negligence barring recovery. The same

*44 principle is sustained *by this court; the court holding that, in order to defeat plaintiff's claim, his negligence must "proximately contribute to the injury." *Sawyer v. Sauer*, 10 Kan. *472. And see *Bridge v. Grand Junction Ry. Co.*, 3 Mees. & W. 348; *Lynch v. Nurdin*, 41 E. C. L. 426; *Robinson v. New York Cent. & H. R. R. Co.*, 65 Barb. 146; *West Chester & P. R. Co. v. McElwee*, 67 Pa. St. 311; *Railway Co. v. Whitton's Adm'r*, 18 Wall. 270; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521. That the backing of a train through a place frequented by the public, without any precaution being taken to guard against injury to men, women, or children, and that, too, at a place where the blowing of whistles and noise would likely prevent persons from observing it, is properly characterized by the jury as gross carelessness.

There is not a single finding of fact by the jury which there is not some evidence tending to establish. This being the case, by repeated decisions of this court, the court is not at liberty to set aside such findings, it being the sole province of the jury to determine whether a fact is established when there is any evidence tending to prove such fact. And as this court has already laid it down as law that an action wherein it is found that the proximate cause of the injury complained of was the negligence of the defendant can only be defeated when it is also found as matter of fact that the plaintiff "proximately" or immediately contributed to his own injury, and as there is a finding based on evidence that the "immediate," the "proximate," cause of the injury here was the negligence of plaintiff in error, and

no finding that Pointer "proximately" contributed, it seems plain to us that this court is bound by its own rulings to sustain the judgment herein.

This is the second time this case has come to this court by appeal on behalf of the railroad company, and we submit that the jury having twice found for defendant in error is entitled to some consideration in this court.

BREWER, J. This was an action brought by Pointer in the district court of Leavenworth county, for personal injury by being knocked down and run over by the cars of plaintiff in error, near the *45 railroad depot in the city of Leavenworth, *on the fourth of February, 1870. The venue was changed to Atchison county, and the cause was tried before a court and a jury in June, 1873, and the jury returned the following special verdict:

"We, the jury, find, for a special verdict in the above-entitled action, the following:

"*First.* That on or before the fourth of February, 1870, the plaintiff was passing across and along the railroad track of the defendant in that part of the city of Leavenworth traversed by the road of the defendant, and while so passing at or near the junction of Walnut street with Chestnut street, which streets are nearly at right angles with each other, the plaintiff was knocked down and run over by the cars of the defendant; that two passenger cars, one baggage car, and a locomotive tender passed over the body of the plaintiff, and he was pulled out from between the wheels of the engine and tender in bruised, wounded, and otherwise injured condition of body, and in an unconscious state of mind.

"*Second.* That, by said cars knocking him down and running over him, the plaintiff had his shoulder dislocated, and had two of his ribs broken; that, in consequence of the injuries then received by the plaintiff, he suffered great pain and agony for a long time, and was confined to his bed for a period of about three months, and remained feeble and weak for a period of about six months, and during all of said last-mentioned time was under the care and direction of a physician; that the plaintiff is a man between fifty and sixty years of age, and in consequence of said injuries his health and strength are permanently impaired.

"*Third.* That it was necessary for him to procure said medical attendance, and the cost of the same was five hundred dollars.

"*Fourth.* That the road of the defendant, at the place the plaintiff was struck and injured, was at that time commonly used by persons for passing over and across the same from the city of Leavenworth to the ferry-landing, the same being a public ferry across the Missouri river at that point, and the only means of travel at that point between the west and east banks of the Missouri river; and the same has been so used before the location of the defendant's road at that place.

and continued to be so used, with the knowledge of and without objection by the defendant, up to and including said date, and
*46 that there was no way of reaching the ferry except by crossing the road of the defendant at that, or some point near that place.

"Fifth. That the streets of the city had never been graded or improved at that or any other place leading to the ferry-landing, so as to show on the surface of the ground where they were.

"Sixth. That the injuries occurred to the plaintiff at a place at which persons were in the habit of passing and repassing continually, with the knowledge and without objection on the part of the defendant.

"Seventh. That the place where the plaintiff was injured was on ground which had been used by the public as a thoroughfare from the city of Leavenworth to the landing of the public ferry across the Missouri river ever since the year 1855 up to and inclusive of the day of the injury, and which ground formed part of a tract of territory which, by ordinance of the city of Leavenworth approved the twenty-first of October, 1863, was created into a street of said city, designated as Water street

"Eighth. That the train so moved was being backed southward with an engine, upon which the brake was out of repair, so that such brake could not be worked, and was wholly useless to aid in stopping the train; that there were no brakemen at any of the other brakes on the train, to use them in controlling the train, and no flag-man or other person or thing on the train to warn persons of danger, or to warn the engineer; nor was there any flag-man at any point on the track between the depot from which the train moved to the place where the plaintiff was injured; nor was there any whistle blown on that train, but a bell was rung by them.

"Ninth. That the plaintiff, at the time of the injury, was with his back to the approaching train, at a point where there was much noise other than that made by the train, and was unconscious of the approach of the train; that, when approaching the road near the same, plaintiff looked up the track towards the depot, and no train was then moving.

"Tenth. That if there had been a brakeman or flag-man on the rear end of the train, or at any point on or near the track and near the moving train, he could easily have seen the danger the plaintiff was in, in time to have warned the engineer and caused the train to stop before the injury, or could have apprised the plaintiff of the impending danger in time for him to escape.

*47 "Eleventh. That the train was moving backward, and there was no person on the rear end of the train to warn persons of danger, or to notify the engineer to check the train.

"Twelfth. That the injury to the plaintiff was caused immediately

by the defendant's failing to use ordinary care, and by its gross negligence in the manner of the running of the train at that time and place, and by the failure of the defendant to keep a lookout of any kind for persons who might be on the track.

"*Thirteenth.* That the plaintiff was guilty of negligence contributing to the injury.

"*Fourteenth.* That the injury to the plaintiff was caused by a failure on the part of the defendant, through its agents and servants, to use ordinary care in moving the locomotive and train at that time and place; that the place where the plaintiff was injured was within the corporate limits of the city of Leavenworth, which was a city of over twenty thousand inhabitants at that time, and a place where persons—men, women, and children—had been and were in the habit of passing and crossing with the full knowledge of the defendant, and without any protest or objection on its part.

"*Fifteenth.* That the only employes of the defendant on the train at the time the plaintiff was injured, were three men,—an engineer, a baggage-master, and a yard-master,—and these three employes were on the engine, the most remote point on the train from the rear end thereof, and from which place they could not see the track for forty or fifty feet from the rear end of the train.

"*Sixteenth.* That on or before the fourth of February, 1870, the Kansas Pacific Railway Company was the owner of and was operating its railroad from the city of Leavenworth to Lawrence.

"*Seventeenth.* That the ground occupied by the aforesaid railway company, running south from the depot in Leavenworth, was formerly uneven, and only passable for foot passengers; that the railroad company graded said ground, making it level, for the purpose of laying their track, and that in so doing, in conjunction with the Missouri Pacific or Missouri River Railroad, so graded said ground about the width of two hundred feet from, and running parallel with, the Missouri river at the point whereat or about the said injury occurred and that there was a space of level ground between the Pacific tracks and the Kansas Pacific Railway tracks, of fifty feet, upon which

*48 foot passengers could walk at the said point; and that on the west side of the Kansas Pacific track, and running parallel thereto, was a road that was passable for wagons and teams. Said road was about thirty or forty feet wide, and bounded on the west by a precipitous bluff about fifty feet high. Said road ran south about one thousand feet from the depot, and was used at and previous to the time of the plaintiff's injury as a thoroughfare by which the public passed to the ferry across the Missouri river, a point nearly opposite the landing of the public ferry crossing the Missouri river between Kansas and Missouri, at which point the travel crossed the track of the Kansas Pacific and Missouri Pacific Railways to reach the aforesaid ferry.

"Eighteenth. That the plaintiff could have reached the ferry by keeping west of defendant's 'tracks' to a point directly opposite the ferry-landing, and thence east across said railway, not more than ten feet wide, to said ferry.

"Nineteenth. That the plaintiff was passing upon the track with his head down, and persons near by, apprehending that he was in danger, called to him with a loud voice warning him of his danger,—these persons standing, one upon the cars of the Missouri-Pacific Railway Company, about fifty feet away, and the other in the space between the tracks of the Missouri Pacific and the Kansas Pacific Railways; that the whistle of the locomotive of the Missouri Pacific Railway was blown, which was about one hundred feet from the plaintiff; that his attention was not attracted by the signals of warning, nor did he look up, but kept in the same position, with head bent forward until he was struck in the back by the 'bumper' or 'drawhead' of the rear car upon the end next to him, when, from the force of the blow he fell forward, when the train—two passenger cars, one baggage car, and the engine and tender—passed over him.

"Twentieth. That the defendant's train was handled on the day of the injury in the usual manner in which said train was handled while backing up to be switched and left on the side track. The train was in charge of the yard-master, and neither he nor any of the persons on the train knew the plaintiff was upon the track, and in the way of the train, until after his injury.

"Twenty-first. That on the twenty-first of October, 1863, the council of the city of Leavenworth passed an ordinance laying out a street called 'Water Street,' and there is no evidence that anything more was done in the premises by the authority aforesaid.

*49 **"We the jury, find for the plaintiff, and assess his damages at five thousand dollars."*

Before the jury was discharged, the defendant requested in writing that the court direct the jury to make further findings of fact, which was refused. The motion for a new trial was duly made by the defendant, and overruled, and defendant's motion for judgment was also overruled. The court rendered a judgment in favor of Pointer, upon such special verdict, for the sum of five thousand dollars, and costs of suit, and defendant brings its petition in error in this court.

Upon this case two principal questions arise: *First*, is such negligence shown on the part of the company as, independent of the conduct of Pointer, will render it liable for the damages sustained? and, *second*, does there appear such contributory negligence on the part of Pointer as will defeat his recovery?

With the first question we have little trouble. The jury found specifically (twelfth finding) that the injury was caused by the gross negligence of the company, and if we turn to the other findings in which the circumstances of the injury are narrated, or to the testi-

mony in the case, the whole of which is before us, we find ample warrant for this finding. A train consisting of two passenger and one baggage car, a tender, and locomotive, is started backward over a public crossing, in a populous city, with the brake on the engine out of repair and useless, with no brakeman at any of the other brakes on the train; with but three persons on the train, and all of them in the locomotive; with no flag-man on the rear end of the train, or at the crossing, to give warning to persons on the track, or to the engineer, without the blowing of a whistle, (though with the ringing of a bell,) and along a track which from the locomotive could not be seen for a distance of forty or fifty feet from the rear of the train. Add to this that there was at the time much noise other than that made by the train, and we think a jury might properly say there was gross negligence.

The other question is embarrassing and difficult. By the thirteenth finding the jury say "that the plaintiff was guilty of *negligence contributing to the injury." Did they mean thereby such negligence as will defeat a recovery? Do the facts, as shown by the other findings, or the evidence, disclose such negligence? As a general rule, whenever the word "negligence" is used without any qualifying term, we understand that ordinary negligence is meant; and where the triple distinctions of slight, ordinary, and gross negligence are recognized, as in this state, ordinary negligence on the part of the plaintiff will, except perhaps in the case of wanton and willful injury, defeat a recovery. It is settled in this state that where the negligence of the plaintiff is but slight, or only remotely contributing to the injury, it will not defeat a recovery. *Union Pac. R. Co. v. Rollins*, 5 Kan. *167; *Sawyer v. Sauer*, 10 Kan. *466. It seems to us also correct to hold that the *onus probandi*, as to the negligence of the plaintiff, is on the defendant; that if the record shows negligence on the part of the defendant, and is silent as to the conduct of the plaintiff, it makes out a case for recovery. We are aware of contrary decisions, and that in some states it is held that the burden is on the plaintiff to show affirmatively that he exercised due care, and was without fault. But if it is shown that a party has done wrong, and caused injury thereby, is not a *prima facie* case for compensation made? Logically, the wrong-doer should always compensate, and the wrong and the injury always entitle to relief. When the wrong of both parties contributes to the injury, the law declines to apportion the damages, and so leaves the injured party without any compensation. This is not strictly justice. The wrong-doer causing injury ought not to be released from making any compensation, simply because the injured party is also a wrong-doer, and helped to produce the injury. But many considerations, especially the difficulty of correctly apportioning the damages, and determining to what extent the wrong of the respective parties was instrumental in causing the injury,

uphold the rule so universally recognized that where the wrong, the negligence, of both parties contributes to the injury, the law
 *51 will not afford any relief. But if the wrong-doer ought always to compensate for the injury he has wrought, and is relieved from the obligation to compensate only by the fact that the wrong of the injured party helped to cause the injury, it is incumbent on him to show such wrong. It is matter of defense, to avoid the consequences of his own wrong. In the case of the Union Pac. R. Co. v. Hand, 7 Kan. *888, the question was incidentally noticed, and the intimation was in favor of the views herein expressed. See, also, Shear. & R. Neg. §§ 43, 44, and cases cited in notes, and the late case of Railroad Co. v. Gladmon, 15 Wall. 401, where the supreme court of the United States lay down the rules as given above. It seems to us to follow from this that, where the special verdict shows an injury caused by the gross negligence of the defendant, a recovery must be sustained, unless it is also apparent that there was such contributory negligence as to relieve the defendant of responsibility; and that, where it is uncertain whether such negligence is apparent, the doubt must be resolved against the defendant.

In this case negligence and contributory negligence were not matters collateral and subordinate to the main issue, but were the vital and principal questions. To them the attention of counsel was mainly directed. The degree of negligence essential to defeat a recovery had been already settled by this court, and was doubtless known to counsel. The instructions are full of references to the different degrees of negligence. The jury specified in their verdict the degree of negligence of which they found the defendant guilty, and declare that it was the immediate cause of the injury. If any of the findings were not sufficiently definite and certain, either party could have called the attention of the court to it before the discharge of the jury, and had it made so. *Arthur v. Wallace*, 8 Kan. *267. And if the party whose interest it is to have it made definite and certain fails to do so, the omission will be taken against him in the construction of the finding. At the time this verdict was returned, the

company objected that it was partial, incomplete, and inconsistent, *and specified a number of points in which it desired
 *52 corrections, but said nothing as to this thirteenth finding. It appeared to be content with it. Turning now to the verdict, and we find that after the separate findings of fact, and as a part of the verdict, the jury return as follows: "We, the jury, find for the plaintiff, and assess his damages at \$5,000." It appears from this that the jury did not mean by the thirteenth finding to attribute to the plaintiff such a degree of negligence as would defeat his recovery. They intended only such slight negligence, or negligence so remotely contributory to the injury, as was consistent with his right to compensation. It may be said that this was in effect a general verdict, and

that this the jury were not at liberty to return where a special verdict had been ordered. This may all be true; but it does not affect the question we are now considering, viz., the intent of the jury. They failed to specify the degree of negligence of the plaintiff. What degree did they intend? and upon this question of intent this *quasi* general verdict strongly bears.

Nor can it be argued that this general finding was returned in ignorance of the law, and that the jury must have supposed that the mere negligence of the defendant gave a right to recovery independent of the conduct of the plaintiff. By the first instruction, given at the instance of the plaintiff, they were told substantially that the plaintiff could not recover if the injury resulted from his own negligence, but that slight negligence on his part would not defeat a recovery. To a similar effect is the third instruction, given at the like instance. These instructions, and the general finding, point clearly to the intention of the jury in the thirteenth finding, and show that they contemplated only that slight negligence which is consistent with the right to compensation.

Again, it seems that the last instruction, given at the instance of the defendant, throws some light upon this question. That instruction is as follows: "The fact that persons were upon the track or yard of the defendant before was no license to the plaintiff to be there, *53 and was no justification for the plaintiff being there; *and he was guilty of negligence for being on the track, if the jury find that he was on the track."

As, without dispute, the plaintiff was on the track when struck by the train, of course the jury could not find otherwise than that he was guilty of negligence. It is unnecessary to inquire whether this be good law or not, for surely it is a proposition of which *the railroad company* has no cause of complaint. It is enough now that it serves to indicate upon what the thirteenth finding was based. As it was an open question whether the place of the accident was a public crossing, it can hardly be that the court intended to say to the jury that, though this was a public crossing, the presence of the plaintiff on the track was such ordinary contributory negligence as, notwithstanding the gross negligence of the railroad company, would defeat a recovery. It seems to us, therefore, that the jury intended by this thirteenth finding only such slight negligence as does not bar the right to compensation.

But the solution of this question by no means removes the difficulties in deciding the case. It is earnestly insisted by counsel that the facts in reference to the conduct of the plaintiff, (defendant in error,) as they appear from the other findings, as well as from the testimony, show that culpable negligence on his part which will relieve the company from responsibility. It seems to us matter of great doubt, as we read the conduct of the plaintiff as narrated either in the findings

or the testimony, whether this claim of counsel is not correct, and whether plaintiff was not so negligent as not to be entitled to compensation; and, perhaps, this doubt is our best justification for upholding the verdict. This question of negligence is said to be a mixed question of law and fact. When the facts are disputed, it makes a question for the jury; when the facts are undisputed, and but one deduction is to be drawn from them, there is simply a question of law for the court; but where the facts, though undisputed, are such that, when taken singly or in combination, different minds will come to different conclusions as to the reasonableness and care of the party's conduct, the question is one which may properly be left to the determination of the jury. *Railroad Co. v. Stont*, 17 Wall. 657; *Detroit & W. R. Co. v. Van Steinburg*, 17 Mich. 99. In this case three separate juries have found for the plaintiff, and that, notwithstanding any imputations that could be made on his conduct, he was entitled to compensation. While we are not disposed, even if it were possible, to avoid any responsibility that properly belongs to us, or leave with a jury the burden of determining questions which we ought to decide, and while we should never permit the perpetration of a glaring wrong upon a party, no matter how many successive juries should attempt it, yet the unanimous judgment of thirty-six intelligent, candid men as to the reasonableness and care of a party's conduct at the time of an injury ought to have no little weight with us.

We have outlined, in considering the first question, the conduct of the company. A similar outline is proper as to that of the plaintiff. It appears that there is a space south of the old depot in Leavenworth about 1,000 feet in length, and 200 feet in width, shut in between the Missouri river on the east, and a steep bluff on the west. At the lower end of this space was, at the time of this injury, and had been for years, a grist-mill built against the bluff, and also, at times, the landing place of the ferry-boat. The boat changed the landing-place from time to time to accommodate itself to the different changes of the water, so that only part of the time did it land at or near this space. Over this space the Missouri Pacific Railroad and this defendant had constructed four or five tracks, which were used in the making-up of the trains; the tracks of the Missouri Pacific road being next the river, and those of the defendant near the bluff. At the north-west corner of this space two streets came together, and prior to any occupation by the railroad companies the city had passed an ordinance for the opening of a street from the junction of these streets southward over this ground. But nothing more had been done towards securing the appropriation of the ground for street purposes.

*55 Both before and subsequent to the occupation by the railroad companies, and at the time of this injury, there was a traveled way from the junction of the streets across this space, and over the tracks of the companies at the ferry-landing, and the traveled way, the plaintiff was going to the ferry at the time he was run over. Be-

tween the tracks there was ample space and level ground for one to walk in safety, and west of this defendant's track, and close to the bluff, was a carriage-way, which ran along the whole length of the space, and crossed the track at right angles at the mill. The plaintiff could have walked along this carriage-way, or between the tracks, and been out of danger, except at the very moment of crossing. Instead of doing this, he got onto the track at about the junction of the two streets, and walked southward on it towards the ferry. At the time he got onto the track he looked, and no train was in motion. As he passed down the track the defendant's train started out from the depot, and the engineer on the Missouri Pacific train, seeing plaintiff's danger, whistled to alarm him, and the yard-master of the Missouri Pacific Company shouted and tried to attract his attention, but in vain.

From this outline it can but be seen that the plaintiff was guilty of some negligence; that he did not act with the highest prudence. Indeed, as before remarked, honest minds might well differ as to whether his negligence was not so great as to disentitle him to relief. In comparing, however, the conduct of the two parties, it will be generally conceded that the negligence of the company was of a higher degree and a grosser character than that of the plaintiff. This case must be distinguished from those where a party approaches and crosses a track without looking to see whether any train is coming; for here the plaintiff looked, and not only did he see no train coming, but in fact there was none. The train started after he got on. Nor must it be confounded with those cases in which the injury occurs on ground in the exclusive occupation of the railroad company. It was on ground of which the public and the company were in joint occupation; on ground which, without objection by the company, the public was occupying and using as a street, over which the plaintiff was then passing on his usual way to his home, on the east side of the river. For a case which, while its facts are not altogether similar, has many elements in it to make it a most appropriate citation in this, see *Butler v. Milwaukee & St. P. Ry. Co.*, 28 Wis. 489. See, also, *Railway Co. v. Whitton*, 13 Wall. 270. It seems to us, after a full and careful examination of this case, that the judgment must be affirmed.

Other objections are made by the learned counsel for plaintiff in error, but they are of minor importance. The record is voluminous, and many exceptions were taken. But this case has been once before to this court, and a judgment in favor of the plaintiff reversed, (*Kansas Pac. Ry. Co. v. Pointer*, 9 Kan. *620;) and only such errors as are clearly prejudicial to the substantial rights of the plaintiff in error should be regarded.

The judgment will be affirmed.
(All the justices concurring.)

MOTION FOR REHEARING.

The foregoing opinion was filed December 22, 1874. On the second of January, 1875, the railway company filed a motion for reargument and review. Said motion was heard at the January Term, 1875, of this court, and was argued orally by J. P. Usher and T. A. Hurd on the part of the railway company.

J. P. Usher and T. A. Hurd, in support of the motion.

It seems to us that this court has mistaken and misapprehended the facts in this case, as shown by the record. The decision affirming the judgment upon the ground that the "general finding" of the jury gave character to, limited and controlled the *special findings of* *57 *facts* has operated a complete surprise upon plaintiff in error; the ruling in this respect being contrary to and a departure from the well-settled rules of law. The record shows that plaintiff in error demanded a special verdict. It was error to receive a general verdict over the objection of the plaintiff in error. The record shows that plaintiff in error moved the court to strike out the general finding, and that the said court overruled the motion. It was error, and this court has overlooked the record in that particular.

Twelve distinct objections to the verdict by plaintiff in error are set out in the record. These were made before the jury was discharged, and the court was requested to require the jury to make the proper findings, which request was overruled and exceptions taken. This court evidently overlooked the record in this particular, to the prejudice of plaintiff in error, for the thing was done which this court decides ought to have been done, and holds the plaintiff in error prejudiced because it was not done.

Again, this court erroneously assumed and held that there was a street-crossing where this accident happened. The verdict is contradictory on this subject. The seventh and twenty-first findings are in conflict. All the evidence tending to prove a right in the public to pass there was objected to, which objections have not been passed upon by this court, but it is taken for granted and decided that Pointer was injured at a public crossing, which is not true.

The decision of this court in this cause upon the question of contributory negligence is so great a departure from the established rules of law as to deprive corporate and other unpopular suitors of all protection by the courts. With profound respect for the court, we are compelled to say that we believe a great mistake has been made, and injustice done. Upon the trial of the cause in the court below, and at its very commencement, a special verdict was demanded. This court has often decided that the right to such verdict could not be denied, and in the case of *National Bank v. Peck*, 8 Kan. *661, the office of a special verdict is remarkably well stated. The ver- *58 dict in this case contains a *special* and a *general* verdict, upon which general verdict a stress has been laid. Indeed, it may be said to be the turning-point in the case, and, in our opinion, the

decision of the court changes the plain meaning of the thirteenth finding. Now, we think all will agree that the clause of general verdict should have been struck out upon the motion of plaintiff in error. Generally and specifically the district court was besought to make this verdict conform to and be a special verdict. On the record all this appears. The court was specially requested to instruct the jury to amend the last finding in their verdict so as to change the same from the form of a "general finding," and to read, "That if plaintiff is entitled to judgment upon the foregoing facts, we find for plaintiff, and assess his damages at \$5,000." That application the district court overruled, and the defendant excepted. And here we earnestly ask, what authority or right existed in the trial court to receive anything else from the jury than a lawful special verdict? The last finding was not a finding of any fact, and it ought not to have any weight in a special verdict. In the case of *People v. Williamsburgh Turnpike Co.*, 47 N. Y. 586, the jury found several special findings upon which the court directed a general verdict, and the court of appeals decided that the findings were defective, and said: "The defects cannot be cured by intendment. *Where the verdict is special the jury cannot be presumed to have found more than is specified in their verdict.*" And see *Fraschieris v. Henriques*, 6 Abb. Pr. (N. S.) 263; *Foster v. Jackson*, Hob. 58. It is one of the maxims of the law, old as the law itself, which we hope is not yet obliterated in Kansas, that "where the court cannot take judicial notice of the fact, it is the same as if the fact had not existed." Under this maxim, in *Broom*, Leg. Max. marg. p. 164, the author says: "So on writ of error for error in law, the court will not look out of the record; and, on a special verdict, they will neither assume a fact not stated therein, nor draw inferences of facts necessary for the determination of the case from other statements contained therein." The decision in this

*59 *Pointer case is directly in conflict with this maxim. It is as certainly so as it is possible for the human mind to comprehend. Certainly, this court does not mean to put itself in conflict with all authority. In a former case in this court, that of *McGonigle v. Gordon*, 11 Kan. *167, a general finding was wholly ignored by this court; and we could have hardly expected a resort to an irregular general verdict in this case to sustain a judgment upon an intendment imagined to be found in such general verdict, which was erroneously allowed to have a place in the special verdict. The quotation from 47 N. Y. shows that in the judgment of the court of appeals that could not be done.

We insist that if such general verdict is to make any figure in this case now, we were entitled to a new trial, because it was allowed to be returned in the special verdict. We exclaim, What kind of justice is it that allows a jury to return a general verdict against the law, and our sturdy opposition from first to last, and that same verdict invoked to sustain a judgment! We cannot believe the court fully

comprehended, and we fain believe it must have overlooked, that we strove to purge from the verdict this improper finding. We cannot avoid asking, Was this general finding justified by the law? Did the defendant company object and protest against it? Were its objections disregarded? Did the trial court err in doing so? And would this court, upon the verdict, if shorn of that illegal general verdict, have pronounced the judgment it has? In all sincerity and fairness, must not all these inquiries be answered in favor of the railroad company? We have shown that the general verdict could not be resorted to to abate from the force and meaning of the other parts of the verdict, but we ought not to be put to that argument, because in all fairness and justice that clause of general finding should have been struck from the record; and if the plaintiff, Pointer, claimed that the company was guilty of great negligence, and he of but slight, it was his duty to ascertain from the jury whether they so intended to find, and

that in direct words, leaving nothing to inference. There is
 *60 no ambiguity whatever in the thirteenth finding. The jury found that the plaintiff was guilty of negligence contributing to the injury, a finding of unqualified "negligence." There is no occasion to resort to other parts of the verdict to learn what these words mean; and it does seem remarkable to us that we could be admonished that if we did not understand this to be a finding of slight negligence on the part of Pointer, we should have made further inquiry of the jury what they meant. The only difference in the two findings, twelfth and thirteenth, one for the plaintiff and the other for the defendant, is in the use of the word "gross" launched against the company. This word is said by Redfield to be a vituperative epithet, (2 Redf. Rys. 201, 202;) and if we go to the very marrow of the case,—the accident itself,—we have only to borrow the words of the exchequer court in Ireland to show that there was no culpability on the part of the defendant below, even within the present decision of this court. We quote from section 23, p. 202, Redf. Rys.: "The plaintiff cannot recover unless the injury is caused by the negligence of the defendant, nor even then if he has so far contributed to the accident, by want of ordinary care, that but for that the accident would not have happened." It is admitted by everybody that Pointer was negligent in going onto the track, and walking along it. He had no right there. If he had not been on the track, he would not have been hurt. If he had used ordinary care in listening or watching for the train, he would not have been hurt. See *Finlayson's Case*, 1 Dill. 579. Why is negligence imputed to the company for moving its train where there was noise, and no imputation upon Pointer for going upon the track at such time? Why is complaint made of the company for not having a watchman upon the rear end of the train when its bell was rung, a whistle was blown, and men standing close at hand shouted to Pointer to get off the track? Why is the company complained of for

operating its train on that day in the manner it did, when the train had been thus operated ever since the road had been built?

*61 *We will not conceal from the court the surprise which this decision has occasioned. We are constrained to say that the most appalling consequences may be expected to flow from it. In cases where negligence is the issue, and the defendant an unpopular suitor, this decision cuts to the bone. The trial court under it will be bound to instruct the jury that if they believe from the evidence that the injury to plaintiff was caused by the gross negligence of the defendant, though the plaintiff was guilty of negligence contributing to the injury, the jury are to find for the plaintiff. So everybody must and will understand the decision. We do not believe the court intends to enunciate any such principle of law. But we think the law respecting special verdicts is that the jury should find facts only, leaving the court to apply the law; that mixed questions of law and fact cannot be submitted to the jury; that the question of negligence being a mixed question of law and fact, the trial court had no right to submit that question to the jury in this case. If the jury make findings upon questions of law, or upon mixed questions of law and fact, we insist that it is the duty of the trial court to strike them out, and of this court to disregard them. We understand the twelfth, thirteenth, and last findings to be questions of this character, and should not have been submitted to the jury, and should have been stricken from the verdict. Our first instruction asked was that the jury be directed to find facts only. The first innovation upon our theory of a special verdict of which we have knowledge was upon the trial of this cause before appealed to this court. On that trial and on the last we insisted that the jury should be directed to find facts only. We insist that the twelfth, thirteenth, and last findings have no right to be in this verdict. If the jury can find these mixed questions, then the judge has one duty only to perform, and that to determine from the facts found whether the jury found the law properly on these mixed questions.

If the three findings last mentioned be expunged, there can be no question but that the defendant below is entitled to a judgment upon the findings. The nineteenth finding alone is decisive of the case, as we believe. There is no question but that Pointer was walking easterly upon the track, and after he went upon it he never looked in either direction, nor took the least precaution for his own safety. He was in a dangerous place, and knew it, and was bound to do something to protect himself from injury. Having failed to do this, ought he to recover? See a case tried in the United States circuit court, November term, 1873, of *Alcorn v. Pacific R. R.*, before Judge DILLON.

When this cause was first in this court we were notified that if Pointer was on a street, public either in law or in fact, when the acci-

dant occurred, he would not be a trespasser upon the right of the railway company, so as to relieve the company from *reasonable and ordinary care to avoid injuring him*. This court now starts out in its opinion by asserting that the train was started backwards "*over a public crossing*." We are bound to say there is no warrant for this statement, and we have a right to the judgment of the court whether the evidence (which necessarily had to be of record in order to establish that this was a public crossing) did establish such fact. We objected to every particle of it from first to last. The only evidence offered on that point was the city ordinance. It is not pretended that that ordinance gave the public any right to enter upon the premises. After the plaintiff rested his case without any testimony of assessment or payment of damages, the defendant moved to strike the copy of the ordinance from the evidence, and again, by third instruction, that the jury should disregard the ordinance. The court erred in all its rulings and decisions respecting the ordinance. It left the jury to give some effect to the ordinance, and made the conflict in the findings, there being no evidence that there was any such street in law. Was there a street in fact? The evidence that was offered by the plaintiff to establish that point did not prove that the public had ever passed where this man was injured until after it was graded by the railroad company. It was in fact impassable, and whoever

*63 *passed in that direction before the railroad was built, passed along the river bank at a distance of about 148 feet east of where Pointer was injured. We refer to the testimony of W. O. Gould, and assure the court that if a reargument is permitted, we can make good our assertion that there was no street public, either in law or in fact, where the man was injured; that the district court erred in its admission and rejection of evidence respecting the same, and in its charge to the jury; that the whole case touching the street and alleged public way was a flagrant assumption which the jury had no right to find, and which the court below, according to every principle of law, was bound to have set aside. The railroad company proved by several witnesses, among whom were the yard-masters of the railroad companies in charge and direction of the tracks, that they warned and endeavored to keep the public off from them. There was not one particle of evidence to the contrary. The injury occurred in the vicinity of the depot, where the public necessarily had to come to transact its business with the company, and though this was the fact, yet strangers and intruders who had no business there were ordered off, and we endeavored to have the jury find the fact that it was so, and especially requested the court to have them find that fact, and excepted to this decision, and are not a little astonished to find, in the opinion of this court, that this exception was of minor importance, more especially when the court plants the case upon the grounds that Pointer was at a public crossing. We endeavored to have the jury find the exact place where the injury occurred. The testimony

showed that it was sixty-five feet south of Chestnut street, and at no supposed street crossing at all. Almost all our questions propounded upon the coming-in of the jury had reference to this supposed street in one way or another. We cannot be charged with having omitted anything in respect to the alleged street, by which it should be conceded that there was a street public there, either in law or in fact.

It is not to be denied that half the battle, by the former decision of this court, depended *upon the question whether Pointer was in point of fact a trespasser at the time and place where he was injured. The court in its opinion now in question has taken it for granted that he was not. It supposes that the injury occurred upon grounds that would be covered by Chestnut street, if the same was protracted to the river, and upon its crossing at Water street, which the decision supposes to have there been lawfully laid out. In short, that he was injured upon a *street crossing*, where the parties had equal rights to be. The action of the court, in taking it for granted that the accident occurred at a public street crossing, is most disastrous to the plaintiff in error, and in all becoming deference we do pray the court to grant our prayer to be heard upon this question.

BREWER, J. On a motion like this I am not ordinarily inclined to write an opinion. Nor do I now intend to go over the ground traversed in the opinion already written. I merely seek to guard against certain conclusions which counsel erroneously draw from that opinion. And first: The court has not receded from the proposition laid down in the case of *Leavenworth, L. & G. R. Co. v. Rice*, 10 Kan. *426, that a party is entitled to a special verdict, (though upon the law as it now stands, *quære*, see *Laws 1874, c. 91, p. 140.*) Nor has it questioned the doctrine that special matter lawfully found prevails over a general verdict. Counsel contend that the last finding, which is in the form of a general verdict, was unlawfully returned by the jury, and received by the court; that it ought to have been stricken out, or amended, on the motion which was made; and that with that out, the conclusion of this court would have been different. I am inclined to think (and as Judge VALENTINE contemplates writing out his views. I am here expressing my own opinion without consultation with the other justices) that the motion should have been sustained, though the statement prepared by counsel and submitted to the jury as the form of a special verdict is very different from that contemplated by the statute, *(*First Nat. Bank v. Peck*, 8 Kan. *860,) and more resembles a finding upon particular questions of fact, which is proper only in conjunction with a general verdict. But even if the finding had been stricken out or amended, as suggested, its influence would have been the same upon the mind of the court. It was used by us simply as throwing light on the intention of the jury in the thirteenth finding, and in no degree for the purpose of overriding that intention. The intention of a jury is to be sought in

a special verdict, as the intention of a party executing any other instrument. What do they mean by this collection of words, which they have returned as a special verdict? is always the first question. And anything which throws light upon that meaning is proper matter of consideration. Thus and thus only was this last finding used. It was an expression from the jury. Whether ruled out or in by the court, it was still the same expression from the jury. If without any such finding the record disclosed the fact that the foreman of the jury, in the presence and with the apparent assent of his fellows, and upon the return of the verdict, had stated to the court, "we mean by the thirteenth finding slight negligence," could it be doubted that such circumstance would and ought to have great weight with us in determining the intention of the jury? It was not the province of this court to first examine the evidence as it appeared in the record, and form our conclusions as to the negligence of the plaintiff, and then seek to reconcile the finding with those conclusions. That would be making us the triers of the question, rather than the jury. I have no hesitation in saying that if I had conceived that to have been the proper method of examination, I for one should have come to a different conclusion upon the whole case. Rather was it our duty, as I conceive, to ascertain in the first place what the jury intended, and then whether that could be upheld by the testimony. Following this line of inquiry, we sought first to ascertain what the jury intended by the thirteenth finding. Two findings stand side by side, in one of which the jury characterize the conduct of the railroad company as negligent, describe the degree of negligence, (for, under the rulings in this state the adjective "gross" is not a mere vituperative epithet, but a term of classification,) and assert that it was the immediate cause of the injury; in the other of which they characterize the conduct of the plaintiff as negligent, but do not indicate the degree, nor whether it proximately or remotely contributed to the injury. This difference between the two findings naturally indicated that the jury did not consider the conduct of the parties as equally negligent, or as equally contributing to the injury. The court before whom the case was tried construed this finding against the company, and after a patient examination of the whole record we came to the same conclusion. We suggested in the opinion filed some and only some of the more prominent considerations which influenced our judgment. We might have noticed many others. We did not attempt to conceal the embarrassments and doubts we had. And counsel may be assured that questions of such doubt do not pass from us until after a most thorough and patient examination of the record.

The other question, as to whether the verdict, as we construed it, could be upheld, was of no less difficulty. We did not in the opinion, and do not now, indorse the doctrine of "comparative negligence," nor does it seem to us correct that a party guilty of ordinary negligence can recover simply because the other party was guilty of greater neg-

ligence. The rule as we understand it was laid down in *Sawyer v. Sauer*, 10 Kan. *466. In reference to the cases in which it is proper to submit to a jury the question of negligence I can do no better than quote from the language of Mr. Justice HUNT, in *Railroad Co. v. Stout*, 17 Wall. 663. After stating cases on either side in which it is proper to declare as a matter of law that it is or is not negligence, he says: "But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to the intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction from the undisputed facts."

*67 *Certain facts we may suppose to be clearly established, from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases, and those akin to it, that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer,—these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment, thus given, it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." This it seems to me states the true rule, in language most apt and clear. I think the motion for a rehearing should be overruled.

VALENTINE, J., concurring. KINGMAN, C. J., dissenting.

A. G. MAGILL v. CARRIE S. MARTIN.

July Term, 1874.

1. **Tax Deed: Statutory Form: Modification.** While the ordinary rule is that where the statute prescribes the form of a tax deed, a compliance with that form is sufficient, yet where the conditions of the sale are such that to follow the form is to recite an untruth and show an illegal sale, the form must be modified to suit the facts.¹

¹ A tax deed need not be in the exact form prescribed by statute, but the form should be so varied that the deed will in every case state the exact truth. *McCaustin v. McGuire*, *post*, *234. See, also, *Morrill v. Douglass*, *post*, *293.

2. **Tax Sales: Purchase by County.** A county may not enter into competition with individuals as a voluntary bidder at a tax sale; it can only become the involuntary purchaser of what cannot be otherwise sold. [Following *Norton v. Friend*, 13 Kan. *532.]¹

*68 *3. **Tax Deed: Form of.** The statutory form of a tax deed is for voluntary purchasers, and where such a deed is based upon a sale to the county, it must be modified so as to show the conditions upon which a county can lawfully become a purchaser.

Error from Bourbon district court.

Magill brought his action to foreclose a mortgage given by Edwin A. Wade and wife on lot 2, in block 193, city of Fort Scott, to secure the payment of notes given by Wade alone, amounting to \$400. Martin, being in possession of said property claiming title thereto, was joined as a co-defendant. The Wades made default. Martin answered, setting up title in fee in herself under a tax deed issued subsequently to the execution of said mortgage. Trial at the June term, 1873, of the district court. The Wade mortgage was executed April 13, 1871, but was not recorded until April 27, 1873. The defendant, Martin, called the register of deeds, and offered in evidence the official record of a tax deed, (the original not being in the possession or under the control of Martin,) which record is as follows:

"Know all men by these presents that, whereas, the following described real estate, viz., lot 8, in block 126, and lot 2 and lot 11, in block 193, all in the city of Fort Scott, situated in the county of Bourbon, state of Kansas, were subject to taxation for the year 1867; and whereas, the taxes assessed upon said real property for the year aforesaid remained due and unpaid at the date of the sale hereinafter named; and whereas, the treasurer of said county did on the eighth day of May, 1868, by virtue of the authority in him vested by
*69 law, at the sale begun and publicly held on the *first Tuesday of May, 1868, expose to public sale at the county seat of said county, in substantial conformity with all the requisitions of the statute in such case made and provided, the real property above described, for the payment of the taxes, interest, and costs then due and remaining unpaid on said property; and whereas, at the time and place aforesaid, said Bourbon county having offered to pay the sum of \$23.05, being the whole amount of taxes, interest, and costs then due and remaining unpaid on said property for the said lot 8, in block 126, and lots 2 and 11, in block 193, all in the city of Fort Scott, which was the least quantity bid for, and payment of said sum

¹ A tax deed which recites a sale to the county as a competitive bidder is void upon its face. *Babbitt v. Johnson*, 15 Kan. *252. Same rule applied, *Larkin v. Wilson*, 28 Kan. 518. Taxation generally, see *Leavenworth Co. v. Lang*, 8 Kan. 196, and note; as to necessity of assessment, see note to *Worthington v. Whitman*, 25 N. W. Rep. 125; misdescription in tax proceedings, see note to *Carme v. Peacock*, 2 N. W. Rep. 168; exemption from, *Chicago v. Baptist T. Union*, 2 N. E. Rep. 257, and note; *Washburn College v. Shawnee Co.*, 8 Kan. 233, and note.

having been by it made to said treasurer, the said property was struck off to it at that price; and whereas, the said Bourbon county did on the twenty-eighth day of June, 1871, duly assign the certificate of the sale of the property as aforesaid, and all its right, title, and interest to said property to V. McNally, of Washington, D. C., for the sum of \$41.52; and whereas, three years have elapsed since the date of said sale, and the said property has not been redeemed therefrom as provided by law: Now, therefore, I, C. Fitch, county clerk aforesaid, for and in consideration of the said sum of \$41.52 taxes, costs, and interest due on said lands for the years aforesaid, to the treasurer paid as aforesaid, and by virtue of the statute in such case made and provided, have granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said V. McNally, his heirs and assigns, the real property last herein described, to have and to hold unto him, the said V. McNally, his heirs and assigns forever, subject, however, to all the right of redemption provided by law.

"In witness whereof, I, C. Fitch, county clerk aforesaid, by virtue of authority aforesaid, have hereunto subscribed my name, and affixed my official seal, on the twenty-eighth day of June, 1871.

"C. FITCH, County Clerk. [Seal.]

"Witness: T. F. ROBLEY."

This deed was duly acknowledged and certified, and was duly recorded July 7, 1871. To the receiving and reading of said record in evidence plaintiff, Magill, objected, the objections being, as shown by the bill of exceptions, as follows: "(1) That said deed on its face appears to have been executed under the seal of the county clerk, and not under the seal of Bourbon county, but purports to be under the private seal of the clerk; *70 (2) that said deed is void upon its face, in that it states the levy of taxes upon, assessment of, sale of, and attempted conveyance of, *three lots in gross* for taxes levied upon them jointly, and does not show that the lots were assessed and sold separately, as required by law; (3) that said deed does not show that said lot could not have been sold to some other person than Bourbon county, for the taxes and charges; (4) that said deed does not show what taxes and charges 'lot 2, in block 193,' was sold for, or that it had any taxes or charges upon it; (5) that the answer of Carrie S. Martin does not state facts sufficient to constitute a defense to the plaintiff's action; (6) that the said deed, as shown by the record, is not *prima facie* evidence of the regularity of all proceedings, nor that said lot was subject to taxation, or that anything had been done making it lawful to sell it for the taxes of 1867."

These objections were overruled, and said tax deed was read in evidence. Defendant, Martin, then called the county clerk, who produced three separate tax-sale certificates, filed in his office June 28, 1871. Said certificates, except as to description of property and amount of taxes, were alike. One was for "lot 8, in block 126," amount

of taxes, etc., \$4.75. Another was for "lot 11, in block 193," amount of taxes, etc., \$4.75. The third was as follows:

"\$13.55.

TREASURER'S OFFICE, BOURBON CO., KAN.,

"FORT SCOTT, June 26, 1871.

"This is to certify that Bourbon county did, on the eighth day of May, 1868, purchase from me, as county treasurer, lot 2, block 193, in the city of Fort Scott, Bourbon county, Kansas, for the sum of \$13.55, being the taxes, penalty, and charges on the above-described real property for the year 1867, the same having been duly advertised and sold according to law. The said Bourbon county, or assignee, will be entitled to a deed for said described real property, on and after the eighth day of May, 1871, if the same be not previously redeemed according to law. Witness my hand the day and year first above written.

C. A. MORRIS, County Treasurer."

On the back of which certificate was the following:

"71 "For and in consideration of the sum of \$24.24, I hereby assign the within certificate to V. McNally.

"Dated this twenty-eighth of June, 1871.

"C. FITCH, County Clerk."

Plaintiff objected to the introduction of said tax-sale certificates and indorsements thereon, because "(1) said certificates and each of them are irrelevant, incompetent, and immaterial; (2) said certificates and each of them on their face show that they were not issued according to law, in that they are not issued to V. McNally, the person who paid the money into the county treasury, and they do not set out on the face the amount paid into the treasury." These objections were overruled, and the certificates were read in evidence. Defendant then gave in evidence a deed of conveyance from McNally to herself of said "lot 2, in block 193," dated June 28, 1871, and duly recorded. The plaintiff, to impeach said tax deed, called the county clerk, who produced certain records, among them the assessment roll for the city of Fort Scott for 1867, (which showed that the three lots described in the tax deed were assessed and valued separately,—one of said lots being assessed to "G. R. Sweeney," as owner, and described and valued thus: "Lot 2, B. 193, \$800,") to which assessment roll was annexed a paper in the form of the affidavit required by section 26, c. 118, Laws 1866, which was signed by "J. A. T., Deputy Assessor," but was not sworn to. Another record was a printed copy of the treasurer's advertisement of the "Delinquent Tax List of Bourbon County for 1867," stating that the lots and lands therein described, if not sooner redeemed, would be sold on the first Tuesday of May, 1868, etc. Said list contained these descriptions: "1 1 b 126, 4.75;" "8 b 126, 4.74;" "1 1 b 193, t 6.95;" "1 2 b 193, t 13.55;" "lot 3 b 193, t 6.95;" "11 b 193, t 4.75." Another of said records was a printed

copy of the treasurer's advertisement of "List of lands for which title deeds will be given on and after May 5, 1871," on tax sale of 1868. In said list was the following:

Name.	Lot.	Block.	Amount.
Ft. Scott Town Co.....	8	126	\$ 8 46
J. R. Sweeney.....	2	193	23 86
P. F. Bartle.....	11	198	8 46

*72 *The plaintiff also gave in evidence the record of a warranty deed from Wade and wife to defendant, Martin, dated June 24, 1871. The district court found that Wade was indebted to plaintiff on his notes in the sum of \$400 and interest; that the mortgage was given by Wade and wife on said lot 2, block 193, to secure said notes April 13, 1871; that said lot was conveyed by tax deed, duly executed and acknowledged, to McNally; that said lot was subject to taxation for the year 1867, and was duly and separately assessed for that year; that the taxes were not paid, and said lot was duly and separately sold in 1868 for said unpaid taxes, and struck off to Bourbon county; that said lot was not redeemed from such sale; and that said McNally paid to the treasurer the proper amount therefor, and the treasurer gave to McNally a separate certificate of said sale, which was duly assigned to said McNally, and that said lot was duly conveyed by McNally to defendant, Martin. And, as conclusions of law, the court found that plaintiff was entitled to a personal judgment against Wade for \$491; that said mortgage was a valid lien on said lot 2, when executed; that said tax deed to McNally was and is valid, and the title conveyed thereby was and is paramount to the lien created by said mortgage; that said paramount title having passed to defendant, Martin, she owns said lot freed from any lien thereon by reason of said mortgage. Judgment accordingly.

McComas & McKeighan, for plaintiff in error.

The court should have sustained the objections of plaintiff to the tax deed. The answer of the defendant is no defense to the plaintiff's action. The tax deed is void upon its face, and is made part of the answer. Three lots in different blocks are described as having been sold *en masse* for the joint taxes charged to them. Such a deed is void. *Walker v. Moore*, 2 Dill. 256; *Journey v. Dickerson*, 21 Iowa, 320; *Boies v. Vincent*, 24 Iowa, 392; Gen. St. p. 1047, § 85.

The deed was not in conformity to law. The language of the *73 *deed is, "my official seal," instead of the seal of the county.

The county clerk has no official seal. Section 25, c. 25, Gen. St. 259. No seal was affixed to this deed, but merely the word "seal." A tax deed must follow the statute, or it will be void. *Martineau v.*

May, 18 Wis. 59; Morton v. Rutherford, Id. 321; Cutler v. Hurlbut, 29 Wis. 152.

It will be contended that section 115, p. 1057, Gen. St., authorizes the deed in question. This section merely authorizes an inclusion of different parcels of land in the same deed; but each parcel must have its separate history; must show that it was sold for its own taxes, which could alone authorize a deed at all.

The court should have sustained the plaintiff's objection to the tax certificates. The certificates were not issued as the law directs; they were not issued to McNally, nor did they state the amount paid into the treasury by the party purchasing. Tax Law, c. 107, § 91; Gen. St. 1048. They could not help the deed, and therefore they were immaterial. Each parcel of land must have been described by the assessor. The county clerk must have determined the sums to be levied upon each parcel, and so carried it out in the tax-roll, and each parcel must have been separately sold for its own taxes. Laws 1866, c. 118, p. 263, § 32, p. 278, § 76; Gen. St. 1047, §§ 84-86; Journey v. Dickerson, 21 Iowa, 320; Boies v. Vincent, 24 Iowa, 392; Hayden v. Foster, 13 Pick. 493. To help the tax deed in this respect, these certificates were introduced. They contain recitals that there was a certain amount of taxes due on each lot, but do not *contradict* the recitals of the deed that the lots were all sold together for the aggregate taxes chargeable against them. By the statute the deed must contain a history of the main facts. It must be good *by itself*. The certificates could not make an invalid deed valid; they may have shown that McNally was *entitled* to a good deed, but could not show that he had *received* one. The tax certificates did not extinguish the mortgage; they showed, if anything, a mere lien on the property.

There was no valid assessment of this property for the taxes *74 of 1867, nor any return of the assessment roll, nor any *verification as required by sections 26 and 54 of the tax law of 1866. There was a pretended assessment signed by one J. A. T., who describes himself as "deputy assessor;" but it is not sworn to, nor any evidence introduced that he did swear to it, nor any return on it. The oath written is subscribed, but not taken. The testimony shows that one E. J. was county assessor for the years 1866 and 1867. The office of deputy assessor was not elective; and it does not appear that the board of county commissioners had appointed a deputy. Comp. Laws, p. 432, §§ 121-123. How can it be contended that J. A. T. had any authority to make an assessment, when he was not appointed, and he had never qualified? The assessment book was evidence for plaintiff to show irregularities, but was not evidence for defendant to show an assessment without showing the appointment and qualifications of J. A. T. as deputy assessor. Austin v. Carpenter, 2 G. Greene, 133. It is a general principle affecting all tax proceedings that everything must be done which the law says shall be done. All facts necessary to confer jurisdiction must appear on the record.

Blackw. Tax Titles, 34, 39, 43, 44, 50, 55, 65, 68, 112. A tax sale on a void assessment passes no title. *Sibley v. Smith*, 2 Mich. 48; *Whitney v. Thomas*, 23 N. Y. 281; *Lessee v. Stockwell*, 9 Ohio, 9. There is no presumption that the oath was taken. *Skinner v. Brown*, 17 Ohio St. 33. The failure to take the oath was a substantial error. The land-owner has a right to a fair, impartial, and conscientious assessment, and the law compels the assessor to make an oath that he had so assessed, and a record to be kept of it. There was no such protection in this case, if an assessment could be made by a pretended deputy who had never been appointed, sworn, or given bond, and who did not take the oath prescribed by law. *McReynolds v. Longenberger*, 57 Pa. St. 13.

There are substantial irregularities in the proceedings of the treasurer. In delinquent list for 1867 the lots and blocks are not described as on the tax-roll, as required by section 66, c. 118, Laws 1866 (section 81 of the tax law of 1868, Gen. St. p. 1046.) In the tax-roll the words "lots" and "blocks" are used; in the treasurer's notice the letters "l" and "b" only are used, which have no meaning unless authorized by statute. Section 93 of the tax law of 1868 authorizes initials "to designate townships, ranges, and sections, and the numbers of lots and blocks." This language authorizes the numerical description of lots and blocks by initials, but not otherwise. The tax law (section 110) requires that the notice of the issuing of tax deeds should state the name of the person to whom the property was assessed. The name given was "J. R. Sweeney." It was assessed to "G. R. Sweeney." The notice did not state the amount necessary to redeem. The numerals used were not sufficient without the use of the dollar-mark. *Woods v. Freeman*, 1 Wall. 398; *Hurlbutt v. Butenop*, 27 Cal. 50; *Braly v. Seaman*, 30 Cal. 610; *People v. San Francisco Sav. Union*, 31 Cal. 132. The law says what the notice shall contain; the court cannot dispense with it on the ground that the owner must take notice of what his taxes are when his property was sold. The notice is for the benefit of all parties, and especially for subsequent purchasers, who are to be apprised by the notice of the time when the deed is to be made, and within which they can redeem and save their property.

It was contended in the court below that, inasmuch as section 110 of the tax law (Gen. St. p. 1057) provides that "no irregularities in the assessment or omission from the same, nor mere irregularities of any kind, shall invalidate the tax deed," that plaintiff's objections are not good. If the legislature meant that no irregularities should affect a tax deed, then this section is unconstitutional. The legislature of Missouri in 1864 passed a law making a tax deed "conclusive evidence that each and every thing required to be done had been complied with." The supreme court of that state decided this unconstitutional because it attempted to take away property "without due process of law." *Abbott v. Lindenbower*, 42 Mo. 162. Section 112 of the tax

law provides that the deed therein set forth shall be *prima facie* evidence of the regularity of the tax proceedings. This merely changed the rule of evidence, which it was competent for the legislature *76 to do; but if section 113 makes the deed good *no matter what the irregularities are, then it is void, because it makes the tax deed conclusive.

The plaintiff introduced a certain warranty deed from Wade and wife to defendant, Martin, dated the twenty-fourth of June, 1872. The deed from McNally was a quitclaim deed, and was dated one day later, the twenty-fifth of June. The purchase from Wade was the real purchase. Mrs. Martin acquired title subject to the tax deed and the plaintiff's mortgage. She has bought in the tax title claim for the benefit of the estate acquired from Wade, and has her action on the warranty deed against Wade for the amount paid, if the tax deed was good, or if the proceedings before made the taxes for 1867 a valid lien. The plaintiff's mortgage still remains.

W. C. Webb, for defendant in error.

The objection to the tax deed that it wanted a proper seal is not warranted by the record. The original deed was not produced; the record book from the register's office could not show the seal used, but only that a seal had been affixed; and as the county clerk has no seal of his own, but is the lawful custodian of the county seal, (section 43 of 25, Gen. St.,) with which he authenticates his official acts, (sections 43, 60,) the presumption is that he used the seal of "his office;" and his using the words "*my* official seal," (which were in the old form, *vide* Comp. Laws 1862, p. 879,) cannot override such presumption.

The objection to the validity of the assessment of the land is still more unsubstantial. It makes no difference whether J. A. T. was elected, or appointed, legally, or not; whether he gave an official bond, or not; whether he authenticated his assessment by affidavit, or in any other way, or not. The assessment roll or assessment book for the proper year was in the proper office, and was in due form. It was there as a public record, and was so held and regarded by its custodian, who produced it in court as a "record" belonging to his office; said *77 custodian being the officer appointed by law to hold and pre-serve the assessment books. Section 25, *Tax Law 1866; section 36, Tax Law 1868; chapter 123, Laws 1869; chapter 120, Laws 1870; section 43, c. 25, Gen. St. No other assessment book for that year was produced, nor was it suggested that this was not made as and for an assessment of the taxable property therein described for such year. Plaintiff produced and gave this assessment book in evidence. It was a "public record," and as such was competent as evidence, without regard to the man who made it, or his qualifications as an officer *de jure*. The record proved too much for plaintiff; it showed the lots described in the tax deed were in fact assessed, valued, and described separately.

The objection to the treasurer's lists, that the "description" is im-

perfect by reason of the use of the letters "l" and "b," instead of the words "lot" and "block," is not good. The advertisements show that the property advertised was situate in the city of Fort Scott. No one could fail to understand that "l" must stand for "lot," and "b" for "block," and nothing else; as "t" clearly stands for "tax." *Tax Law* 1868, § 93; *Blackw. Tax Titles*, (1st Ed.) p. 238; (2d Ed.) p. 203. *Hunt v. Smith*, 9 Kan. *188, *153. As the particular property intended to be designated was in fact designated with reasonable certainty, the description was sufficient. 2 Mo. 124; 18 Vt. 293; *Akins v. Hinman*, 2 Gilman, 444; *Blakeley v. Bestor*, 13 Ill. 714. The objection as to the "name of the owner," that in the assessment book it was "*G. R. Sweeney*," and in the advertisement that it was "*J. I. Sweeney*," is frivolous.

Nor is there anything in the point that Martin obtained a deed from Wade before she obtained title from McNally. The testimony was that both deeds were in fact *executed* on the same day, and that the purchase from Wade was made for the purpose of obtaining possession. But aside from the object or purpose of the purchase a deed acquired by her deed from Wade was the equity of redemption. Such purchase was subject to the mortgage lien held by Magill, and this mortgage Martin was under no legal nor moral obligation to pay. She could pay it and save the land if she chose. She *78 could omit to pay it at the peril of having her equity of redemption extinguished by the foreclosure of the mortgage. But her purchase and deed from Wade did not prevent her purchasing a paramount title which had grown up under tax proceedings (she being under no legal nor moral obligation to pay the taxes for which the land was sold;) nor did it affect or change the character of such tax title when said tax title was purchased by her. If in law such tax title was paramount, and extinguished the mortgage lien and the equity of redemption while held by McNally, it was equally good when acquired by Martin.

The principal question is, is the tax deed to McNally, under which Martin claims, valid? The only substantial objection urged in plaintiff's brief against such deed is that "*three lots*, in different blocks, and described (in the deed) as having been sold *en masse* for the joint taxes charged to them." The plaintiff denies the power of the court to go behind the tax deed and inquire into the actual fact as to the assessment and sale of said three lots, whether joint or separate, but contends that the tax deed "*must be good by itself*." Suppose this to be the correct rule, is this tax deed void on its face? The deed recites that the three lots (giving a full and separate description of each) were subject to taxation for the year 1867; that taxes on said lots for said year remained unpaid; that the county treasurer, on the eighth of May, 1868, at a sale begun and publicly held on the first Tuesday of May, 1868, exposed said lots to public sale, and sold them and that all this was done "*in substantial compliance with all the req*

visions of the statute in such case made and provided;" and said deed further recites that the purchaser paid on such sale "\$28.05, being the whole amount then due and unpaid on said property," (and again describes said three lots, giving a full and separate description of each.) Does this show a single sale, embracing the three lots? The deed says that "*all the requisitions of the law*" were "*substantially complied with.*" The treasurer must sell as he had advertised. Tax

Law, § 84. He must advertise, "describing such lands and town
 *79 lots as the same are described on the tax-roll." Section 81. "The assessor shall make "a correct and pertinent description of each *parcel* of real property," and insert the same in the assessment-roll, and attach a separate valuation to each *parcel*. Sections 32, 36. The county clerk shall determine the sums to be levied "upon each tract or lot of real property," and set the same down in a "separate column." Section 73. All these acts and proceedings are necessary to make the sale valid. The presumptions are that public officers perform their official duty. The law never presumes the contrary. Section 112 of the tax law provides that the tax deed "shall be *prima facie* evidence of the regularity of all proceedings from the valuation of the land by the assessor, inclusive, up to the execution of the deed." We have, then, *first*, the presumption of the law; *second*, the *prima facie* evidence shown by the execution and acknowledgment of the deed; and, *third*, the recital in the deed, that the three lots were separately assessed, described, valued, advertised, and sold substantially as the law required. Section 116 of the tax law expressly authorizes the county clerk, when required by the purchaser, to include in one and the same tax deed all the lots purchased by the same person at any one tax sale; and surely the omission of the county clerk to state in the deed the separate sums for which the several lots were respectively sold, and the setting forth of the aggregate amount of such several sums, stating that such aggregate is the "whole amount due and unpaid on *said property*" (describing the three lots separately) at the time of such sale, will not be construed or tortured by this court into a statement showing that said three lots had been sold together as one tract (or, in the language of counsel for plaintiff, had been "sold *en masse*") for the joint taxes charged to the three. To so hold is to determine that such omissions are equivalent to the statement of affirmative facts showing positive violations of the requirements of the tax law, rebutting not merely the presumption of the law that public officers perform their official duty, but the presumption to be drawn from the execution of the deed itself, and contradicting the plain and positive recital in the deed
 *80 that the sale "was "in substantial compliance with the law."

It seems to us that this deed is not void on its face, but valid. But suppose the true construction of the deed is as plaintiff claims, that it shows a sale of the three lots as one tract, and for one tax, can the court go behind the deed, and look at the assessment book,

the treasurer's notice of sale, and the treasurer's certificate of sale, to see what the facts were in each case? If the deed is void on its face, perhaps it could not be upheld or validated by the records showing the proceedings anterior to the deed to be valid. But the objection urged by plaintiff, if it be well taken, does not show the tax deed to be void but only voidable; and being voidable only, the supposed defect in the proceedings may be shown by the records not to exist in fact. It was competent, therefore, for defendant Martin to give in evidence the treasurer's certificates of sale; and as these certificates showed the separate and distinct sale of each lot, and the amount of taxes, etc., due and unpaid on each lot at the date of sale, they removed the objection made to the deed, and showed the deed to be valid. The tax certificates were properly issued showing that the lots had been struck off to the county, (section 91, Tax Law 1868) and they were duly assigned to McNally to whom the tax deed was issued.

BREWER, J. The only question in this case is as to the validity of the tax deed, and one of the objections to it is the same as that which was held fatal in the case of Norton v. Friend, decided at the present term of this court, (13 Kan. *532.) It recites a sale to the county not as a result of a failure to sell to an individual, but as the result of competitive biddings, in which the county entered as a voluntary bidder. The language of the deed is as follows: "And whereas, at the time and place aforesaid, Bourbon county having offered to pay the sum of \$23.05, being the whole amount of taxes, interests, and costs then due and remaining unpaid on said property, for the aforesaid lot, * * * which was the least quantity bid for, and *81 payment of said sum having been by it made to said treasurer, the said property was struck off to it at that price." The county is not a voluntary bidder at a tax sale. It enters into no competition with individuals. It pays no money to the treasurer. It simply becomes the involuntary purchaser of that which no individual will buy. The distinction between a purchase by an individual, and one by the county, and the reasons therefor, are clearly pointed out by Mr. Justice SAFFORD in the opinion in the case of Guittard Tp. v. Marshall Co., 4 Kan. *388. Hence a deed, which recites a purchase by the county under the same conditions as a purchase by an individual, recites an unauthorized and illegal purchase. A deed showing an illegal sale must be void. But it may be urged that this ruling conflicts with the decision in Hobson v. Dutton, 9 Kan. *477, where it is said that "the rule is clear that where the statute contains a form of any instrument, a compliance with that form is sufficient." The deed follows the form of the statute, and according to that rule must be held sufficient. The language of that opinion is general, and as far as the facts of that case are concerned states the law correctly. Yet we think here is found an exception. When the conditions

the sale are such that to follow the form is to recite an untruth and show an illegal sale, the form must be modified to suit the facts. To make a statement of an illegal and void sale evidence of a legal and valid sale is a contradiction not to be imputed to the legislative intent. The statute says the deed shall be in *substantial* compliance with the form. It thus contemplates minor modifications, and those modifications must be such as to make the deed recite the truth and comply with the conditions of valid action.

The judgment will be reversed, and the case remanded with instructions to proceed in accordance with the views herein expressed.

(All the justices concurring.)

*LEAVENWORTH, L. & G. R. Co. v. A. J. CLEMMANS,
Sheriff, etc., and another.

July Term, 1874.

1. Taxation: Railroad Property Deemed Personalty: Road Taxes.

In 1872 the county commissioners of Johnson county levied a road tax upon the taxable property of that county. Afterwards the county clerk determined the amount to be charged to the different persons, companies, and corporations having property in that county, and placed the amount to be charged against the L., L. & G. R. Co. upon the tax-roll of that county for that year. The railroad company did not pay the amount. In February, 1873, the county treasurer issued his warrant to the sheriff of said county for the collection of said tax, and the sheriff was about to proceed to collect the same when the railroad company commenced this action to enjoin the collection thereof, claiming that the tax could not be collected at that time, nor in that manner. *Held*, that under the tax laws in force in 1872 and in 1873 all railroad property used in operating the road, including the real estate, was treated as personal property; and that, as all road taxes on personal property for the year 1872 should have been collected at the time and in the manner that the road tax against the L., L. & G. R. Co. was attempted to be collected in this case, that the road tax against the L., L. & G. R. Co. was properly collectible at the time and in the manner it was attempted to be collected, and therefore that the railroad company cannot maintain said action.

2. Temporary Injunction: Effect of. In an action brought by the county commissioners of Johnson county against the county treasurer, the state treasurer, and certain railroad companies to whom county bonds had been issued, a temporary injunction was granted, restraining said county treasurer and state treasurer from paying any interest on said bonds. While said suit was still pending, and while said temporary injunction was still in force, the proper taxing officers of said county levied, and were proceeding to collect from the L., L. & G. R. Co. and others, a certain tax with which to pay interest on said county bonds. The L., L. & G. R. Co. then commenced this action to enjoin the collection of said

tax, claiming that the same was illegal and void because of said temporary injunction. *Held*, that the granting of said temporary injunction determined no person's rights; that the tax could properly be collected while it was still in force; and therefore that the railroad company cannot maintain said action.¹

***83 *Error from Johnson district court.**

The case is stated in the opinion.

S. O. Thacher, for plaintiff in error.

There can be no levy of road taxes until the first Monday in September of each year. The county clerk, on or before the first day of April of the following year, furnishes to the township trustee a list "all taxable property," as well as "the amount of road tax chargeable to each tract of land in their respective townships." By section 24 of the road law (chapter 89, Gen. St.) it would appear that the persons owing highway taxes have until the first day of August following to work out the tax, at the rate of two dollars per day, as provided in section 21 of said road law. It is apparent that the legislature allowed the taxes to be worked out at this high rate *per diem* as a favor to the tax-payer; but this privilege was entirely denied to plaintiff in error, and taxes for highway purposes were at once put into the tax-roll against it, never certified to the township trustees, but an enforcement sought of the same at least one year sooner than allowed by statute. No execution could issue against it for these taxes before 1874, if even then. The statute nowhere authorizes these taxes, if delinquent, to be put on the tax-roll of any year, and collected by execution or tax warrant issued by the county treasurer. Section 2 of the road law seems to have no reference to taxes on personal property.

But, in any view of the case, the plaintiff in error could not be deprived of the opportunity of working out its road taxes, as any other tax-payer. Neither could such taxes enter into a tax warrant.

***84 issued by the treasurer in February, 1873, for *the road taxes first levied in September, 1872.** Neither had the county clerk the power to enter the road taxes so levied at once on the assessment-roll of the county, and in the first instance payment of them be demanded by the county treasurer. No reason is shown or suggested why the same rule should not apply to the plaintiff in error in these matters as to any other tax-payer.

Another question arises as to its liability to pay interest on bonds whose validity was contested, and in suit in the name of the county commissioners, as plaintiffs, and the said Bruner, as county treasurer, and Hayes, as state treasurer, as defendants. The very tax Clements and Bruner were endeavoring to collect of this plaintiff in error was prohibited by injunction from being paid out by Bruner. On

¹ See *Stoddart v. Vanlaningham*, *ante*, *18, and cases in note.

what principle these officers seek to collect a fund from a party where such fund is declared to be improperly raised, is not apparent. In other words, while, by the strong power of a summary tax warrant, the treasurer is collecting from the plaintiff in error this interest on county bonds, he is lying under an injunction forbidding him from paying out this same fund. What right has he, or the county board, to collect this money from the plaintiff in error as long as there are pending suits enjoining its payment? This money, when paid into the treasury, is put there for a certain use. *Meier v. McCrillus*, 4 Kan. *250. The record discloses that the companies claiming this interest, the board of county commissioners, and the county treasurer, were all in court, adjudicating the right of the companies to demand interest on these bonds. Until it was settled that they had this right, the county treasurer had no power, while under the restraint of an injunction, to enforce the collection of such an enjoined revenue.

If the suits had been commenced by the county board before their levy, they would have had no power to make such a levy; but being commenced after, the whole levy for that object was necessarily affected thereby, the board acting for all the tax-payers of the county,

and in that matter standing as the representative of the tax-payers; and it was the right of each person to refuse to pay this enjoined tax. This court has recently held that equity will interfere in behalf of the county board to prevent county treasurers from paying interest on illegal county bonds. *Gulf R. Co. v. County of Miami*, 12 Kan. *230. The principle of this decision must be that in this manner the county represents all the tax-payers, else the case would be inconsistent with *Meier v. McCrillus*, *supra*. If the suits should terminate adverse to the county, then this tax remains an enforceable lien against the persons and property on which it is levied; for it is part of the revenue law that each tax is carried out separately on the tax-roll, and the treasurer, in such a case, could easily give a receipt for the unenjoined taxes. When the county board enjoined the payment of this tax it was as though each taxpayer had enjoined his individual part thereof. The bonds were issued, as the record shows, without authority of law, and hence a tax to meet the interest on them was simply void. This invalid nature of the bonds had been shown in the suits mentioned in the petition, so far that the payment of any interest on them was restrained. But, surely, the county cannot in one breath say that the interest claimed is for void bonds, and hence the county ought not to pay, and in the next assert the interest to be due and collectible from the tax-payers. If the interest is illegal, then it is so, not for one purpose only, but for all. If there is no interest due or owing on the bonds, then there should be none enforced from the tax-payers. The county cannot be permitted to collect funds for an illegal object, and then cover the same into its general funds. The right to tax and collect revenue is confided to the counties only in specified cases, and the power to use

this function is not to be enlarged by any construction whatever. The statutory power will be confined to a fair construction of the law creating it. Under our statutes no power is given to a county to collect funds for the payment of interest on bonds unauthorized by law. These propositions are fundamental. They stand upon authority and reason.

*86 The county asserting the illegality of these bonds, and instituting suit to set them aside, and having injunction to restrain its officers from paying out any funds on the interest due on the bonds, is precluded from turning around and alleging the validity of the bonds, and the legality of the tax sought to be collected in payment of the interest on them.

Frank R. Ogg, for defendant in error.

The questions presented by plaintiff's petition have been passed upon and adjudicated by this court in the case of *Gulf R. Co. v. Treasurer of Bourbon Co.*, 7 Kan. *210, and affirmed by the court in the case of the same *Railroad Co. v. Blake*, 9 Kan. *489. These cases are decisive of this. In this case there are no strong equitable grounds existing which would authorize the interference of a court of equity, and the court did not err in sustaining defendant's demurrer to plaintiff's petition. *Burnes v. Atchison*, 2 Kan. *454; *Roseberry v. Huff*, 27 Ind. 12.

VALENTINE, J. This was an action to enjoin the collection of two certain taxes. The defendant demurred to the plaintiff's petition on the ground that the petition did not state facts sufficient to constitute a cause of action. The court below sustained the demurrer. If either of said taxes should have been enjoined, then the demurrer should have been overruled, for in that case the petition would have stated facts sufficient to constitute a cause of action. One of the taxes was a road tax of \$162.62. The other was a tax of \$598.55 to pay interest on county bonds issued to railroad companies. The first it is admitted is legal, but it is claimed that the collection of the same at the time, and in the manner, it was attempted to be collected is illegal. The second of said taxes it is claimed is illegal and void. Both of said taxes were levied in 1872, for that year, and placed upon the tax-roll of that year. In February, 1873, the defendant Brumner, as treasurer of Johnson county, issued his tax warrant for their collection, and the defendant Clemmans, as sheriff of said county, was about to collect the same, when this suit was commenced to restrain both of said defendants from collecting said taxes.

*87 Was the attempted collection of said road tax illegal?

Section 72 of the tax law reads as follows: "The county commissioners shall meet on the first Monday in September in each year and shall estimate and determine the amount of money to be raised by tax for county purposes; also all other taxes which they may be required by law to levy." Gen. St. 1044.

Sections 21 to 24 of the road law (Gen. St. 905) read as follows:

"Sec. 21. The board of county commissioners of each county may, at the time prescribed by law for levying county taxes, levy a road tax of not more than three mills on the dollar on all taxable property in their respective counties, except the real estate in incorporated cities of over two thousand inhabitants; and said tax may be paid in labor, under the direction of the overseer of the district in which the property is situated, by any able-bodied man, at the rate of two dollars per day.

"Sec. 22, [as it originally was.] It shall be the duty of the county clerk, immediately after such tax has been levied, to furnish to each township trustee a list of the taxable *real estate, and persons charged with taxes on personal property, within their respective townships*, and the amount of road tax chargeable to each tract or person; said list to be furnished on or before the first day of *October* in each year."

"Sec. 22, [as amended.] It shall be the duty of the county clerk, after such tax has been levied, to furnish to each township trustee of the county a list of all the taxable property, and the amount of all road tax chargeable to each tract of land *within their respective townships*; said list to be furnished on or before the first day of April in each year." Laws 1872, p. 355, § 6.

"Sec. 23. The trustees of the several townships, after receiving the list mentioned in the preceding section, shall proceed to make out lists of all the taxable real estate within the various road-districts, and of persons charged with taxes on personal property, with the amount of road tax chargeable to each tract of land, and deliver the same to the overseer of such district on or before the fifteenth day of October in each year.

"Sec. 24. All road taxes remaining unpaid on the first day of August shall be returned to the township trustee. The township trustee shall, before the fifteenth day of August, return all such delinquent road taxes to the county clerk, who shall charge the same against the respective tracts of land on the county tax-roll of the current year."

The road tax we are now considering was levied, as provided by law, on the first Monday in September, 1872. It is claimed that under said section 22 of the road law, as amended, the list of the taxable property, and the amount of tax thereon, should have been furnished to the various township trustees on or before the first day of April, 1873; that under section 23 of the road law the township trustees should have furnished like lists to the various road overseers on or before October 15, 1873; that under section 24 of the road law the unpaid road taxes should be returned by the road overseers to the township trustees, and by the township trustees to the county clerks, and that all this should be done some time between the first and the fifteenth day of August, 1874; and that the county clerk should afterwards enter such delinquent road taxes on the tax-roll for the year

1874. And it is claimed that under these sections no road tax levied in 1872 could be put on any tax-roll of the county earlier than 1874. The plaintiff claims that under said sections it had the right to pay said road tax in labor, at the rate of two dollars per day for any able-bodied man, and that it had the right to do this at any time from October 15, 1873, till August 1, 1874. This claim seems very plausible, but, when examined closely, we hardly think it will be found to be sound. It may be that the company would have a right to pay the tax in labor; but, if so, we are inclined to think it would have to do so before the treasurer should issue his warrant for its collection, and that the treasurer might issue his warrant therefor any time after January 10, 1873. We shall now proceed to give our views upon this subject.

In 1872 and in 1873 all property, real and personal, belonging to a railroad company, and used in operating their road, was assessed as personal property. Laws 1871, p. 331, § 89. And the taxes levied upon such assessment were collected in the same manner as taxes levied upon personal property. Railroad property, although it may have been real estate, was not sold by the county treasurer on the first Tuesday of May, or at any other time, to pay the delinquent taxes, as other real estate was. Gen. St. 1046, §§ 80, 81. On the contrary, the county treasurer, on or before the tenth of January, issued his warrant to the sheriff to collect the same, and the taxes were collected in the same manner as other delinquent taxes upon personal property. Laws 1871, p. 334, § 11; Laws 1869, p. 339; Gen. St. 1059, § 123. Railroad property was in fact, under the tax law then governed by the same rules, and treated in the same manner, as personal property, although the larger portion of the same may have been real estate. As we have before seen, it was the duty of the county commissioners to levy the road tax, as well as almost all the other taxes. Gen. St. 1044, § 72; Id. 905, § 31. And, except where otherwise provided, all the taxes levied by the county commissioners under said section 72 of the tax law, were, by the county clerk, immediately placed upon the tax-roll of the county for immediate collection by the county treasurer. We have already given section 72 of the tax law, and we now call attention to section 73 of said law. It reads as follows:

"Sec. 73. The county clerk, immediately after the first Monday in September, shall proceed to determine the sums to be levied upon each tract or lot of real property, and upon the amount of personal property, in the name of each person, company, or corporation, which shall be assessed equally on all real and personal property subject to the same tax, and set down each tax in a separate column. He shall complete the same, and attach his certificate thereto, and deliver it to the county treasurer on or before the first day of November, and shall charge the treasurer with the amount of the respective taxes assessed on the tax-roll." Gen. St. 1044.

In 1872 and in 1878 there was no provision in any of the statutes authorizing the county clerk to do anything with the
 *90 *road tax levied by the county commissioners upon personal property, except to immediately place it upon the tax-roll of the county for immediate collection by the county treasurer as other taxes upon personal property are collected. There was no provision authorizing the county clerk to furnish the various township trustees of his county with the amount of road tax levied upon personal property, nor was there any provision authorizing him to furnish said trustees with the names of persons charged with road tax levied upon personal property. He simply furnished said trustees with "the amount of road tax chargeable to each tract of land within their respective townships." See section 22 of the road law, as amended; Laws 1872, p. 355, § 6. We have quoted said section 22 as it originally stood, and as amended, and have italicised those portions of each which differ from those of the other, or which are not found in the other. The differences, therefore, between the original section and the amended section will be obvious, and these differences will show clearly the intention of the legislature. Therefore, as all railroad property must, under said tax laws, be treated as personal property; and as the county clerk was not, under said laws, authorized to furnish to the various township trustees the various amounts of taxes levied upon personal property, or with the names of persons charged with road taxes levied upon personal property; and as said clerk was not authorized to do anything else with said road taxes except to place them upon the county tax-roll for immediate collection,—it would seem to follow, under said section 73, and other sections of the tax laws, that the county clerk must put all the road taxes levied upon railroad property, as well as those levied upon personal property in general, upon the county tax-roll, to be collected the same as other taxes levied upon personal property.

2. Was the tax levied to pay interest on county bonds issued to railroad companies invalid? It will be presumed that said tax was valid, unless the contrary has been shown by the plaintiff in its petition.

Have they shown the contrary? They allege that the county
 *91 treasurer and state treasurer have been enjoined, at the *suit of county commissioners, from paying any interest on said bonds. The grounds upon which the county commissioners obtained said injunction are as follows: The commissioners "set up, as a fact, that said bonds, and all of them, are void, and issued without authority of law, and that said interest so levied on said assessment roll of said county is wrongfully levied, and is of right not the property or moneys of said companies to which said bonds were issued." The plaintiff in the present suit does not say that said bonds are void; it merely says that the county commissioners say so in their suit. And the plaintiff in the present suit does not say that the county commissioners' suit has ever been terminated. We should

judge from the allegation in the plaintiff's petition that the injunction granted to the county commissioners, to restrain the county treasurer and state treasurer from paying any interest on said bonds, was merely a temporary injunction,—an injunction *pendente lite*, to stop the money in the hands of the county and state treasurers until it could be determined to whom the money belonged. Such an injunction determines no person's rights. Such an injunction will not prevent the county treasurer and the sheriff from collecting taxes to pay interest on said bonds. But even if said county commissioners' suit has been terminated, and said injunction were a perpetual injunction still it might not prevent the treasurer and sheriff from collecting said taxes. The county treasurer, state treasurer, and the railroad companies to whom said bonds were issued, were parties defendant in the said commissioners' suit. Now, suppose the railroad companies had parted with all the interest they had in said bonds before said suit was commenced, are the real owners of the bonds, who were not parties to the suit, to suffer because these merely nominal parties—the county treasurer, state treasurer, and railroad companies—may have allowed (possibly with their consent) judgment for a perpetual injunction to be rendered against them? There is no allegation in

the plaintiff's petition that the railroad companies owned said bonds when said suits were commenced. There is no allegation in fact that the county commissioners alleged that said railroad companies owned said bonds when their suit was commenced. Possibly the county treasurer, the state treasurer, and the railroad companies were all very willing that injunctions should be granted restraining the officers from paying said interest; for, possibly, the interests of all of them were on that side. They may all have been large tax-payers in Johnson county without having any interest in the bonds. We decide this case, however, upon the belief that said injunction was only a temporary injunction.

The judgment of the court below is affirmed.
(All the justices concurring.)

DANIEL C. YOUNG and others v. F. LEDRICK and others.

July Term, 1874.

1. Execution: Proceedings in Aid of: Powers and Jurisdiction of Probate Judge. The provisions of the Civil Code entitled "Proceedings in Aid of Execution" are constitutional and valid so far as the question is concerned of conferring power on the probate judge to act thereunder.¹

¹ See Board of Ed. v. Scoville, 18 Kan. *17; White S. M. Co. v. Walt, 24 Kan. 136; Ludes v. Hood, 29 Kan. 49.

2. **Probate Judge: Judicial Powers.** A probate judge may receive judicial powers other than those granted by the constitution to the probate court.¹
3. **Courts: District Courts and District Judges.** While it may be that no provision can be made for more than one judge of a district court, and while it may be that no legislation can be upheld which excludes such single judge from a supervisory control of all the proceedings of that court, yet, within these limits, it is competent for the legislature to provide that other persons may exercise some judicial functions in cases pending therein.

Error from Morris district court.

Young and two others as partners obtained as judgment against
 *93 Ledrick & Simcock, the defendants in error, at the *April term, 1872, of the district court of Morris county, and afterwards instituted proceedings in aid of execution before the probate judge of Morris county, under sections 482-504 of the Civil Code. After full examination said probate judge made an order appointing F. P. Nichols receiver, (who thereupon duly qualified,) and directing F. Ledrick and G. W. Munkers to deliver to such receiver certain notes and accounts found in their hands and found to be the property of Ledrick & Simcock. Thereafter Ledrick & Simcock filed their petition in error, with a transcript of the proceedings had before the probate judge, in the district court for said Morris county, asking a reversal of the order of the probate judge, and, also, at the same time, filed an undertaking to stay further proceedings on such order. Afterwards, and at the October term, 1873, of said district court, the order of the probate judge was reversed by said district court upon the ground that so much of the act of the legislature as attempted or purported to confer upon the probate judge authority or jurisdiction to entertain proceedings in aid of execution was unconstitutional and void.

R. M. Ruggles and Sharp & McDonald, for plaintiffs in error.

The only question presented in this case, as we think, and certainly the only question argued in the district court, is, Are the provisions of that part of article 20 of the Code entitled "Proceedings in aid of Execution" constitutional and valid in so far as they attempt or purport to confer upon the probate judge of a county power, authority, or jurisdiction to issue the process, entertain such proceedings, make the orders, and punish their disobedience? When courts are called upon to declare a solemn act of the legislature unconstitutional, and therefore void, the unconstitutionality of such act must clearly appear, (*County of Leavenworth v. Miller*, 7 Kan. *498, *499;) or, as this court in an early case has expressed it, "that no statute should be declared unconstitutional unless its infringement of the superior law is clear *beyond substantial doubt." Kansas v.
 *94 Robinson, 1 Kan. *27. We think that not only can it not be made "to clearly appear" that the provisions in question violate the

¹ See *In re Johnson*, 12 Kan. *103; *State v. Majors*, 16 Kan. 444.

constitution of the state, but that direct authority for their enactment can be deduced from the constitution itself.

It was claimed in the court below that the jurisdiction of the probate court, as created by the constitution, was confined to probate matters, and such others as are therein mentioned. The following is the provision of the constitution: "There shall be a probate court in each county, which shall be a court of record, and have such probate jurisdiction, and care of estates of deceased persons, minors, and persons of unsound minds, as may be prescribed by law, and shall have jurisdiction in cases of *habeas corpus*. * * * Const. Kan. art. 3, § 8. No negative or prohibitory words are here used; and as we understand the rule as adopted by this court, it will not, in the absence of prohibitory words, construe the enumeration of some things in regard to which jurisdiction is to be exercised as a limitation of the power of the legislature to confer jurisdiction in other matters. In *re Johnson*, 12 Kan. *102; *Henderson v. Kennedy*, 9 Kan. *166; *Judd v. Driver*, 1 Kan. *455; *Anthony v. Halderman*, 7 Kan. *65; *Norton v. Graham*, Id. *166. In the last case the report of the case does not show that this point was decided, but the court will remember it was so orally decided at the hearing, it being alleged in the answer therein that the defendant held the office of county treasurer of Coffey county by virtue of having received the greatest number of legal votes therefor, as well as by virtue of the judgment of a court for a trial of contested elections, and the defendant tendered evidence in support of said first allegation, which being objected to by the plaintiff on the ground that the legislature having conferred the jurisdiction upon the court constituted for the trial of contest elections, it must be presumed that such jurisdiction was exclusive; whereupon this court overruled the objection and permitted the evidence, saying in *95 substance that the legislature "had not in the election law, (chapter 36, Gen. St. 424, § 87,) in terms, declared the jurisdiction exclusive, and that this court would not so hold; and further remarking that even if the legislature had so declared it would be doubtful whether the provision would be a valid one, in view of the provision of the constitution giving to this court original jurisdiction in *quo warranto*."

There is another provision of the constitution which we think clearly gives to the legislature the power to enact the sections, the validity of which is herein drawn in question. That provision is as follows: "The judicial power of the state shall be vested in a supreme court, district courts, probate courts, justices of the peace, and such other courts, inferior to the supreme court, as may be provided by law." Art. 3, § 1. Here is express constitutional authority to the legislature to create whatsoever courts may be deemed necessary or proper, provided only that they shall be inferior to the supreme court. "Whenever the legislature confers upon any board or officer powers which are unquestionably judicial in their nature, and when they also invest such board or officer with all the instruments and paraphernalia of a

court, they undoubtedly create a court, although they may not in terms say so." "And it is not necessary that the legislature, in order to create a court, or to confer judicial power, should first in terms create a court." *Prell v. McDonald*, 7 Kan. *447; *Malone v. Murphy*, 2 Kan. *250; *State v. Young*, 3 Kan. *445. That the power conferred upon the probate judge by the sections of the Code under consideration is judicial in its nature, seems to us to be beyond all question. He is to hear the evidence, and then weigh it, and then determine its effect. He hears, and then decides,—adjudges. The legislature has in many cases passed acts conferring powers upon probate judges, or probate courts. In *re Johnson*, 12 Kan. *104. And in every case in which the power of the legislature to confer on probate courts, or probate judges, powers other than those enumerated in the constitution, has been questioned, and has been before this court, such power has been by the court upheld. Of course, we do not for a moment claim that the mere passing of an act, or a series of acts, upon a given question, makes such act or acts constitutional and valid, but that the law-making power has done so is an argument of persuasive weight in determining its validity, and affords some presumptions in favor of its not being an infringement of the fundamental law. *County of Leavenworth v. Miller*, 7 Kan. *498; *Malone v. Murphy*, 2 Kan. *261; *State v. Sheldon*, Id. *322; *State v. Young*, 3 Kan. *445; *Steele v. Martin*, 6 Kan. *436; *Anthony v. Halderman*, 7 Kan. *64; *Norton v. Graham*, Id. *166; *Prell v. McDonald*, Id. *446; *Kirkpatrick v. State*, 5 Kan. *676.

As to nature and character of "proceedings in aid of execution," see case of *Hayner v. James*, 17 N. Y. 316.

McClure & Humphrey, for defendants in error.

The constitution defines what powers and jurisdiction may be conferred by law on the probate court, and the probate judge. Section 8 of article 3 of that instrument prescribes the subject-matters over which the probate court shall have and exercise jurisdiction. This section, enumerating the subjects over which the court shall have jurisdiction, limits it to the matters named, and no other or different powers are authorized to be conferred on the probate court. *Kent v. Mahaffy*, 2 Ohio St. 498. These powers in these supplementary proceedings are not given to the court, but to the probate judge, and judge of the district court. Civil Code, §§ 482-504. Can the probate judge take this grant of power? Section 16 of the judicial article provides that "the several justices and judges of the courts of record in this state shall have such jurisdiction at chambers as may be provided by law." The only grant authorized by this section is of power to transact business at chambers. We think it may be stated as a general rule, that when, by the constitution, provision is made whereby the legislature may confer on the judges of certain courts jurisdiction at chambers, the jurisdiction thus authorized to be conferred extends only to such matters as properly pertain

to, though of a less important character than, the general business of the court. It would indeed be anomalous if it were permitted to grant to the judge of a court a class of powers and character of jurisdiction such as the court when in session could not take. Unless the constitution should specifically define the functions which a judge might exercise at chambers, and but a general grant of chamber powers is given, the grant must be understood as restricting the powers to such business at chambers as arises in causes or proceedings pending in the proper court of the officer whose chamber powers are invoked. Hence, jurisdiction at chambers extends only to the making of such rules and orders, during the vacation, which it is proper then to make, in matters connected with actions or suits pending in the court of which the judge making such rules and orders is the judge. *Pittsburg, Ft. W. & C. Ry. Co. v. Hurd* 17 Ohio St. 144.

Proceedings in aid of execution are not proceedings in or connected with an action, but proceedings after judgment, and are held to be in no sense identical with ordinary chambers business, but are of a special and higher nature,—a substitute for an action in chancery. *Cushman v. Johnson*, 13 How. Pr. 495. If it had been intended by the framers of the constitution to authorize a grant of such powers to the judge of the probate court as are comprehended in these proceedings supplemental to execution, such authority would undoubtedly have been expressly given. These powers are not conferred on the probate court, and it would not have been competent for the legislature to so have conferred them. In addition to the specific jurisdiction vested in the probate court, the legislature may give the probate judge jurisdiction at chambers. Proceedings in aid of execution are no part of, nor comprehended under, what is properly understood and defined as chamber business, or jurisdiction. Hence, there is no warrant or authority either in section 8 or section 16 of the judicial article to confer this class of powers on the probate judge.

It is contended by plaintiffs in error that the first section of article 3 of the constitution contains a sufficient warrant for a grant of power to the probate judge to entertain proceedings in aid of execution. This section simply declares in what courts the judicial power of the state shall be vested, viz., in the supreme court, district courts, probate courts, justices of the peace, and such other courts, inferior to the supreme court, as may be provided by law. The legislature by this section is authorized to establish other courts, inferior to the supreme court, besides those especially provided for in the constitution, and apportion to such newly-created courts such jurisdiction as may be convenient and proper. The only power granted to the legislature in this section is a power to create additional courts. There is no power here, either granted or to be inferred, to clothe any court created by the constitution with any specific powers or jurisdiction,—much less is there any grant of power

to confer on any judge of such a court specific powers and jurisdiction. Hence, the powers in question being of a special character, intrusted to the judge and not to the court, the granting of which not involving the establishment of a new court, there is no warrant in this section to justify the exercise of these powers by the probate judge.

The plaintiffs in error, citing section 8 of article 8 of the constitution, say: "No negative or prohibitory words are here used, and this court will not, in the absence of prohibitory words, construe the enumeration of some things in regard to which jurisdiction is to be exercised as a limitation of the power of the legislature to confer jurisdiction in other matters." We fail to perceive that the court has decided as above stated. In the cases cited to support this statement, we understand the court to say substantially that the rule as above set forth, which substantially embodies this maxim, *expressio unius, exclusio alterius*, does not apply. In these cases the court simply affirms that in the absence of a constitutional inhibition the legislature may confer on two distinct courts concurrent jurisdiction, which is almost equivalent to saying that two similar things may co-exist.

It seems to be contended by plaintiffs, that in seeking to invest the probate judge with the powers in question, the legislature has in fact, though not in terms, created by such act a court. The right of the legislature to create additional courts is not questioned. But

*99 in granting these powers to the *probate judge, the legislature has not created another court; it has not authorized any act to be done, in these supplementary proceedings, by any court. The powers are given solely to the judge, to be exercised by the probate and district judges respectively, in their capacity of, and by virtue of, their official character as probate and district judge. No court can entertain these proceedings, or make the orders necessary to make them effectual. The authority is personal, and vested in the judge before whom the proceeding is commenced; and further, the authority being statutory, the provisions of the statute must be strictly observed. *Biting v. Vanderburgh*, 17 How. Pr. 80; *Weber v. Hobbie*, 13 How. Pr. 382. It seems to be claimed that the acts creating the criminal court of Leavenworth county, and the courts for the trial of contested elections, and designating the probate judge as the judge of those courts, are analogous to the case at bar. We think a clear distinction exists. In the one case the probate judge is designated as the person or officer to exercise the functions of another court, and while performing the duties thus devolving on him he acts as the judge of that court, and not as judge of the probate court. In other words, while the probate judge was exercising the functions of the criminal court of Leavenworth county, or the contested election court, it was not the probate court that was in session, but the respective courts named. When, however, the probate judge is called on to act in these execution proceedings he acts as probate judge, or as judge of the probate court.

BREWER, J. The only question in this case is, Are the provisions of the statute entitled, "Proceedings in Aid of Execution," and found on pages 724 to 728 of the General Statutes of the state of Kansas, constitutional and valid in so far as they attempt or purport to confer upon the probate judge power, authority or jurisdiction to issue the process, entertain such proceedings, make the orders and

*100 punish their disobedience, as is provided for in the sections *of the statutes found on the pages above mentioned? Can a probate judge be invested with judicial functions as to cases pending in the district court? This really separates itself into two questions: Can a probate judge receive other judicial powers than those granted by the constitution to the probate court? and can judicial functions, as to cases pending in the district court, be granted to any person other than the duly-elected judge thereof? The first question is no longer an open one in this court, but has been already answered in the affirmative. In *re Johnson*, 12 Kan. *102, and cases cited in opinion. The second question must also be answered in the affirmative. The jurisdiction of the district court is not defined by the constitution. It is left to the legislature to prescribe its limits, and the manner of its exercise. While it may be that, under section 5 of article 3 of the constitution, it is impossible for the legislature to provide for more than one judge of a district court, and while it may be that no legislation could be upheld which excluded such single judge from a supervisory control of all the proceedings of that court, yet, within this limit, we think it competent for the legislature to provide that other persons may exercise some judicial functions in cases pending therein. Thus, the legislature has authorized the trial of certain cases before referees. No question has been, none can well be, made, as to the validity of such legislation. Yet here is an officer other than the judge who is exercising judicial functions in cases in that court. So, also, at common law the sheriff exercised judicial functions. The sheriff's jury, to assess damages, was an every-day occurrence. And in proceedings before such jury the sheriff acted as a *quasi* judge. In our own proceedings under the occupying-claimant act may be found something of the same nature. To require of the judge the performance of all these duties, because judicial in their nature, would so burden him as to work a great hinderance to the dispatch of business, and the trial of cases. Now, these proceedings in aid of execution are of this same subordinate nature. It has

*101 been claimed that they were a substitute for *and equivalent to the old creditors' bill. While in many respects they resemble, yet they are far from being exactly similar. See opinion of DANIO, J., in the case of *Hayner v. James*, 17 N. Y. 316. They are based upon a judgment already obtained. They are proceedings to aid in its collection,—proceedings resulting from the inability of the sheriff to accomplish such collection by means of ordinary execution. They are simply means to reach all the property of the debtor, and apply

the same to payment of a debt whose existence has been already judicially determined. It needs but a little reflection to perceive that, no matter how wide may be the scope of these proceedings, they are of a subordinate nature. Judicial functions in such matters may, it seems to us, be granted by the legislature to officers other than the regularly elected judge, subject, of course, to his supervisory control. This determines the case, and the judgment of the district court must be reversed, and the case remanded for further proceedings.

(All the justices concurring.)

RICHARD W. BUDD and others v. CHARLES F. KRAMER.

July Term, 1874.

1. **Errors: Immaterial.** Only errors which affect substantial rights can be considered in this court. [State v. O'Laughlin, 29 Kan. 24.]
2. **Pleadings: Omission to Attach Copy of Note.** When a petition on a promissory note sets out the note in full, and makes it a part thereof, an omission to attach a copy is not such an error as will authorize a reversal of the judgment.¹
3. **Pleading: Setting out Instruments: Effect.** Where a pleading alleges that a party executed an instrument, and sets out the instrument in full, it is equivalent to alleging that he made all the covenants and promises contained in such instrument, and assumed all the liabilities created thereby.²
4. **Court: Name or Style of.** The "name of the court" is fully given in a petition entitled "State of Kansas, Leavenworth County, District Court, 1st Judicial District."

*102 *Error from Leavenworth district court.

The case is stated in the opinion.

Green & Foster, for plaintiffs in error.

Howsley & Singleton, for defendant in error.

BREWER, J. Charles F. Kramer brought an action in the district court of Leavenworth county on a note, and to foreclose a mortgage given to secure the payment of the same. He made Richard W. Budd, Nancy E. Budd, David W. Eaves, Elisha Diefendorf, and James B. Wilson, defendants. The caption and style or name of the court were set forth thus: "*State of Kansas, County of Leavenworth, Dis-*

¹ Where an instrument in writing for the payment of money is sued on, and a copy of such instrument is attached to the petition and made a part thereof, such copy should be considered as a part of the petition when construing the allegations thereof. *State v. School-district*, 8 Pac. Rep. 208.

² See *Winkfield v. Brinkman*, 21 Kan. 684; *Wyandotte v. Zeitz*, Id. 656; *Hamrick v. Board of Education*, 28 Kan. 889; *State v. School-district*, 8 Pac. Rep. 211.

strict Court 1st Judicial District, ss." The following is a copy of said petition:

[Caption and Title.] "The plaintiff says on the twenty-eighth of February, 1873, defendants Richard W. Budd and Nancy E. Budd executed and delivered to him their promissory note, a copy of which and the indorsements thereon, is hereto attached, marked 'A,' and made part hereof. All the interest due thereon to the twenty-eighth of August, 1873, has been paid. There is now due on said promissory note \$440, and interest thereon from the said twenty-eighth of August to the present time, at the rate of twelve per cent. per annum, which the defendants refuse to pay, though often requested. At the time said defendants Richard W. Budd and Nancy E. Budd executed and delivered the aforesaid promissory note, and to secure the payment of the sum of money therein mentioned, according to the tenor of said note, they executed to plaintiff their mortgage deed, which was by him delivered to and received for record, on the twenty-eighth of February, 1873, at 2 o'clock p. m., by M. C. Mast, register of deeds of the county of Leavenworth aforesaid, and by said register of deeds duly recorded in liber 37 of Mortgages, at pages 489, 490, and *103 491, a copy *of which mortgage deed, with the indorsements of said register of deeds thereon, is hereto attached, marked 'B,' and made part hereof. The mortgage deed has become absolute. The defendants Eaves, Diefendorf, and Wilson each claim to own an interest in the real property described in said mortgage deed, the exact nature of which is unknown to the plaintiff, further than that the same is inferior to the rights of the plaintiff. Wherefore the plaintiff asks judgment against defendants Richard W. Budd and Nancy E. Budd for \$440, and interest thereon at the rate of twelve per cent. from the twenty-eighth of August, 1873, until paid, and for the sum of \$50 attorney fees, as stipulated in said deed, and that the mortgage be foreclosed, and the land therein described sold, as provided by law, and that defendants Eaves, Diefendorf, and Wilson be required to set up and make known their interest in the real property aforesaid, and the same be adjudged inferior to the claim of the plaintiff, and for such other and further relief as the plaintiff may be entitled to.

"HOWSLEY & SINGLETON, Attys. for Plaintiff."

Then follow copies of the note and mortgage as stated above. To this petition the plaintiffs in error, Budd and Budd, demurred, on the ground that the petition did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the court rendered judgment and decree of foreclosure and sale; to all of which plaintiffs in error excepted. We see no error in this ruling, at least none that under section 140 of the Code will avail the plaintiffs in error. That section declares that "the court, in every stage of action,

must disregard any error or defect in the pleadings and proceedings which does not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect." Section 118 of the Code requires, in an action on a note, that a copy be "attached to and filed with the pleading;" while section 123 authorizes a party in such an action "to give a copy of the instrument, with all credits and the indorsements thereon, and to state that there is due to him on such instrument a specified sum which he claims, with interest." Upon this counsel contends—*First*, "that section

123 is not complied with by merely attaching a copy of *104 the instrument to the pleading, as required by *section 118, and that the copy required by section 123 must be incorporated in, and thus made a part of the pleading, which is not done;" and, *second*, "that the petition, after referring to the copy of the note attached to and filed with it, wholly fails to state, in accordance with section 123, that there is *due* to the *plaintiff* on the note, from the *adverse party*, a specified sum, which he claims, with interest." We do not understand the petition as do counsel. We think section 123 was complied with. The note was not simply attached to the pleading, as an exhibit; it was made part of and incorporated into it. It was as much a part of the petition as though it had been copied into the body of the instrument. The place in which it is put is nothing. The pleader in very words makes it a part of his petition. It may be technically correct to hold that if it be a part of the petition it is not "attached to and filed with" it, and that therefore section 118 has not been complied with; but certainly no "substantial rights" of the plaintiff in error are affected thereby. The petition does not, in the language of the statute, allege that there is so much due the plaintiff from the defendants. But it does allege that there is due on the note so much, and the note shows that the defendants are the makers, and owe whatever is due thereon, and that the plaintiff is the payee, and entitled to receive whatever is due. This is abundant. The mortgage also is, as the note, made a part of the petition; and when it is alleged that the defendants executed a certain instrument, which is set out in full, it is equivalent to alleging that they made all the covenants and promises contained in such instrument, and assumed all the liabilities created thereby. The mortgage being to secure the note, when the latter became due the former could be foreclosed. The name of the court, it is claimed, is not properly given. We think it amply sufficient.

The judgment will be affirmed.

(All the justices concurring.)

*105 *STATE OF KANSAS v. CARY FOLWELL and another.

July Term, 1874.

1. **Evidence: Criminal Case: Admissibility: Effect of.** Testimony is admissible that tends directly to prove the defendants guilty of the crime charged, although it may also tend to prove a distinct felony, and thus prejudice the accused.¹
2. ———: **Opinions of Witnesses.** It is a general rule that witnesses (not experts) are not allowed to give their opinions to a jury, but there are many exceptions; and where, as in this case, the witness knew and had examined the wagon of the defendant, observed the peculiarities of its running gear, and had followed certain wagon tracks, had measured them, and had noted many minute circumstances tending strongly to show that the tracks were made by defendant's wagon, it was not error for the court to refuse to rule out a statement of the witness, a part of which was that in the opinion of the witness defendant's wagon made the tracks.²
3. ———: **Declarations of Defendant: Insufficient Record.** Where the record does not show that the bill of exceptions contains all the evidence, this court cannot say, in the absence of any showing, that there was not evidence produced to the court that declarations made by the accused while in custody were voluntarily made.³

Appeal from Bourbon district court.

Information, charging defendants with grand larceny in having stolen a "black horse, the property of J. P. McN., of the value of seventy-five dollars." Plea, not guilty. Trial at the December term, 1873; C. O. F., judge *pro tem.*, presiding. Verdict, guilty, and defendant Folwell was sentenced to imprisonment in the state prison for three years, and defendant White for seven years. Defendants appeal.

A. H. Wilkinson and W. J. Bawden, for appellants.

The court permitted evidence to be submitted to the jury, over the objection and exception of appellants, tending to show the commission of previous larcenies by them, damaging to the character of the appellants; they not having offered their character in evidence, and

¹ While evidence of the commission of one crime is incompetent on the trial of a party for another and distinct offense, merely for the purpose of inducing the jury to believe that defendant is guilty of the latter because he committed the former, yet evidence which tends directly to show the defendant guilty of the crime charged, is not rendered incompetent because it also tends to prove him guilty of another and entirely different offense. *State v. Adams*, 20 Kan. 311.

² In an action to recover damages resulting from an assault and battery, the plaintiff, although not an expert, is permitted to testify concerning her bodily health before and after the assault. *Townsdin v. Nutt*, 19 Kan. 282. See, also, *State v. Stackhouse*, 24 Kan. 445.

³ Declarations as evidence, see *Smith v. Smith*, 5 Kan. 25, and note; confessions, see note to *McClain v. Com.*, 1 Atl. Rep. 48; dying declarations, see *State v. Medicott*, 9 Kan. 176; *Railing v. Com.*, 1 Atl. Rep. 819, and note.

the presumption of law being that their character was good. In criminal charges the prisoner's character cannot be put in issue by the *state unless he opens the door by giving testimony to it.

It is not a conclusion of law that from his silence the jury are to believe he is a man of bad character. *State v. O'Neal*, 7 Ired. 251; *People v. Bodine*, 1 Denio, 282; *People v. White*, 24 Wend. 520; *Baker v. State*, 4 Ark. 56. Upon a trial of an indictment or information for larceny, evidence of the commission of a separate and distinct larceny from that charged is inadmissible. *Barton v. State*, 18 Ohio, 221; *Walker v. Com.*, 1 Leigh, 574; *Albriecht v. State*, 6 Wis. 74; *State v. Danbert*, 42 Mo. 242; *Com. v. Wilson*, 2 Cush. 590; *Kinchelow v. State*, 5 Humph. 9.

The evidence offered by the state must be confined to the issue. An inspection of the record of this case shows that this plain and unquestioned rule was repeatedly violated by the prosecution during the trial of this cause. The court permitted evidence to be given by the prosecution to the jury of matters entirely foreign to the issues joined, and highly prejudicial to the rights of the plaintiffs in error, over their objections and exceptions. As sustaining this view, see *State v. Wisdom*, 8 Port. 511; *Broek v. State*, 26 Ala. 104; *Cole v. Com.*, 5 Grat. 696; *Farrer v. State*, 2 Ohio St. 54; *State v. Renton*, 15 N. H. 169; *Ogletree v. State*, 28 Ala. 693; *State v. Gordon*, 8 Iowa, 410; *Lewis v. State*, 4 Kan. *296; *Whart. Crim. Law*, § 647; *Smith v. State*, 10 Ind. 106.

There was no evidence of the *corpus delicti*. The absence of such evidence was fatal to the state. We submit that a close inspection of the record, which contains the entire evidence in the case, fails to show any evidence whatever of the commission of the felony charged in the information herein by *any person*. For aught that appears by the evidence introduced by the state, the appellants are in the anomalous position of having been convicted of a crime which never was committed. The evidence presents no showing whatever of the possession by the appellants, or either of them, at any time, of the property alleged to have been feloniously taken. 1 Bish. Crim. Proc. §§ 500, 501, and note 2; *People v. Badgley*, 16 Wend. 53; *People v. Porter*, 2 Park. Crim. R. 14; *People v. Hennessey*, 15 Wend. 153; *Burrill*, Cir. Ev. 678; *Bergen v. People*, 17 Ill. 426; 1 Greenl. Ev. § 247; *State v. Schryver*, 42 N. Y. 1.

The court erred in permitting the interrogatories of the juror *107 Allen to the witness Randall. No inherent right exists *in a juror to question witnesses, and nothing is waived on the part of defendants in a criminal cause. Our position is that the court had no discretionary power to allow the innovation of permitting a juror to ask the interrogatories in question, nor any others. They referred to matters tending to prove the commission of other and previous larcenies than the alleged offense for which appellants were being tried, and were for that reason incompetent and illegal. The rights of a

defendant charged with crime should always be guarded most jealously by courts. No privilege or protection accorded to a defendant can be infringed upon, neither can they be waived by him; and when the supreme court, in view of this principle, has held it to be fatal error after conviction, for the judge, before rendering sentence, to omit asking the defendant "if he has any legal cause to show why the sentence of the law should not be passed upon him," holding this to be one of the inalienable rights of a defendant charged with crime, we claim that by a parity of reasoning the error set forth in this paragraph must still more forcibly commend itself to the reviewing court. The answering of the questions operated gravely to the prejudice of appellants, and had a direct effect to prevent that "fair and impartial trial" which was the right of the appellants, guaranteed them by the constitution of the state, and of which they could not be deprived.

Another error, to which we specially call attention, is the repeated admission by the court below, over the objections and exceptions of appellants, of the opinions of witnesses. The principle that witnesses cannot testify as to their opinions, except when testifying as experts is too well known and universally admitted to require argument; and a scrutiny of the evidence will clearly establish the fact that this well recognized principle of law was repeatedly ignored on the trial of this cause in the court below.

Declarations of the accused made while in custody are presumed to be involuntary, and, as such, are not admissible, unless it first be clearly shown that they were voluntary. The court below
 *108 erred in admitting the declarations of appellants to be given in evidence; said declarations being made while they were in custody, and it not being shown that they were voluntary.

KINGMAN, C. J. The appellants were charged with grand larceny committed in Bourbon county on the eighteenth of September, 1873, and tried and convicted of the offense. They claim that certain errors occurred on the trial. The first is that there was no proof of the *corpus delicti*, and therefore a new trial should have been granted. There can be no doubt as to the law; but a careful scrutiny of the record has satisfied us that the proof on this point is satisfactory. The owner of the horse placed him in the stable of a neighbor with whom he was staying that night, and near the door deposited his saddle and blanket. In the morning the horse was gone, and the owner has never seen him since. If it be said that the horse might have escaped, the answer is that the saddle and blanket were also gone; and almost every fact that was in evidence tended to prove that the horse was stolen. It was in evidence that the accused, on the day and night after the horse was taken, went northward with the team and wagon of Folwell, one of the accused; that there were three horse tracks northward twenty miles, while Folwell drove but two; that a couple of men with a span of horses and a wagon, with a led horse,

were seen stopping 150 yards from the road the accused traveled; that the team, wagon, and horses corresponded with that of the accused, and so did the led horse with the horse alleged to be stolen. A similar team, wagon, harness, with a led horse of the same color and size of the one missing, passed through Osage the afternoon of the nineteenth of September; and many other minute facts, all tended to show that the missing horse was stolen. Taken altogether, the testimony is so convincing that we do not see any ground on which the claim of the appellants on this point can rest.

*109 The other errors alleged are the admission of improper *evidence. The first is the admission of evidence tending to prove another larceny. The facts are substantially as follows: The state was trying to prove the whereabouts of the accused on the nineteenth of September, to connect them with the loss of the missing horse. The evidence had tended to show that they had gone north as far at least as Prescott, twenty miles, and that on the way up the tracks showed three horses, and on the return two horses. Every fact that in any way tended to show that the wagon of the accused made those tracks, and that the defendants were with the wagon, was important and relevant. The witness had already testified that he had examined the wagon of defendants, and described it, pointing out peculiarities of its running, and had measured the track near where he lived, and that the "double-trees on defendant's wagon, as he saw it on September 20th, were the property of witness." He was then allowed to testify that he left this property in the road five and one-half miles north of Fort Scott, on the Barnesville road, and next saw it the next day on defendant's wagon at Fort Scott. It is true, that this evidence tended to prove a distinct felony, and it will readily be seen that it was likely to injure the defendants; but the testimony was essential to show the guilt of defendants on the charge then being tried, and it would be a singular rule of law that a person accused of a grave crime could compel the exclusion of important and relevant testimony merely by committing two felonies at the same time, or so nearly and intimately connected that the one could not be proven without also proving the other. The testimony was competent, not for the purpose of proving another felony, but as tending to show the guilt of the accused in this case. The authorities are not conflicting on this point. Whart. Crim. Law, § 649.

This testimony, relevant and proper in itself, was elicited by two questions propounded by a juror; and this asking questions by a juror is alleged as error by the counsel for appellants, who have apparently overlooked the fact that it was done by their own consent, as shown by the record.

*110 *It is insisted that witnesses were allowed to give their opinions without having shown themselves competent; and two instances are pointed out. In the testimony of Randall, it was on cross-examination by defendants that the testimony was brought out, and

no exception taken in any way thereto. In Avery's testimony the witness stated that in his opinion the defendant Folwell's wagon made the track that was followed. This testimony the defendants move to have struck out, which the court refused to do. It is very evident that the testimony could have had little or no weight with the jury. Still it may possibly have had enough to make it necessary to examine the question raised. It is true, as a general rule, that witnesses are not allowed to give their opinions to a jury, but there are exceptions. In many cases they are the best evidence of which the nature of the case will admit,—cases where nothing more exact than an opinion can be obtained. Duration, distance, dimension, velocity, etc., are often to be proved only by the opinion of witnesses, depending, as they do, on many minute circumstances which cannot fully be detailed by witnesses. See note in case of *Poole v. Richardson*, 3 Mass. 330. Questions of science, skill, or judgment are also of this description. And where, as in this case, the witness knew the wagon of Folwell, the peculiarity of its construction, and that one wheel was dished,—the whole wagon making a much narrower track than common, and the dished wheel making, besides, a very irregular track,—and where he also testifies that he has followed the track for miles, noticing its peculiarities, and measuring its width, we do not think it was error to permit his opinion to go to the jury, who, having knowledge of its groundwork, can judge of its value. The question was not one of science, nor was the witness an expert. After giving the facts he gives only the conclusion he deduced from them; and as it was the same that the jury must have drawn from the same facts, we cannot say there was error therein. 1 Whart. Crim. Law § 45.

*111 Another alleged error is that the court admitted the declarations of appellants to be given in evidence; said declaration being made while they were in custody, and it not being first shown that they were voluntary. It is not necessary to examine the law on this question, for the facts are not such as to demand it. The record does not state that all the evidence is in the bill of exceptions; and as the testimony to show that the declarations were voluntarily made is for the judge only, to enable him to determine whether the declaration was a voluntary one, we cannot say that such testimony was not given.

It is alleged that the evidence was not confined to the issue, and that the rule requiring it to be so limited was repeatedly violated; but no specific instance is pointed out, and we think none exists.

Upon a careful consideration of the whole case, we perceive no error that would justify us in reversing the judgment.

(All the justices concurring.)

STATE OF KANSAS v. SYLVESTER O. Y. GURNEE.

July Term, 1874.

1. **Accessories: None in Misdemeanors.** In misdemeanors there are no accessories, but all persons concerned therein, if guilty at all, are principals.
2. **Evidence: Declarations, when Res Gestæ.** Declarations made by a person in possession of land, as to the extent of his possession, are admissible as part of the *res gestæ*.¹
3. —: **Copy of Paper: Secondary Evidence, in Criminal Trials.** Where a paper is made out in duplicate, and it is shown that one of the originals is lost, and the other is in the rightful possession of a person on trial for an offense, there is sufficient foundation laid for the introduction of a copy of the paper, as there is no power in the court to compel the accused to produce the paper as evidence against himself.²
4. —: **Competency.** It is not error to refuse to admit testimony¹¹² tending to show that a witness had notice of a contract *when no such contract is shown to have had an existence, and where, as in this case, the witness to whom the knowledge is sought to be brought home is not the party to be affected by the testimony.
5. —. **Competent evidence tending to prove any material fact in a case is admissible, although it may not be conclusive or competent to prove another fact in issue.**
6. **Instructions: Pointing Out Error in Supreme Court.** Where a general assertion is made in the brief that a large number of instructions given are erroneous, and no particular error is pointed out, and no single one of the instructions is indicated as erroneous, this court will not scrutinize them with great care, but will presume that if there was material error in any one of them it would be suggested.
7. **Trespass: Malicious: Growing Crops: Title not Material.** On a charge of malicious trespass, in cutting and carrying off a crop of growing wheat, under section 107 of the crimes and punishment act, it is not necessary to aver or prove that the owner of the wheat was the owner in fee of the land on which the wheat was growing.³
8. **Arbitration and Award: Award should be Signed by Arbitrators.** If an award in writing is not signed by the arbitrators, it is not binding on the parties; but if they accept the award, and arrange their possession of land in accordance therewith, it is not error for the court to re-

¹What declarations admissible as part of the *res gestæ*, see *Stark v. Cummings*, 5 Kan. 55, and note.

²Secondary evidence, when competent, etc., see note to *Johnson v. Mathews*, 5 Kan. 60.

³On a charge of malicious trespass in severing from a freehold growing corn, under section 107 of the crimes act, the complaint must set forth that the owner of the growing corn had either constructive or actual possessory right in the land on which the corn was growing. *State v. Haney*, 32 Kan. 428; S. C. 4 Pac. Rep. 881.

fuse an instruction as to the insufficiency of the award, which instruction contains no limitations of the rule arising from the acceptance of the award.

Appeal from Johnson district court.

Gurnee was charged on the oath of George H. Newton, before a justice of the peace, with maliciously and unlawfully entering upon the land or "claim" on the Black-Bob reservation, alleged to be owned by said Newton, on the sixteenth of June, 1874, and then and there cutting down and carrying away about fifteen acres of wheat growing on said "claim." Gurnee was convicted before the justice, and appealed therefrom to the district court. Trial was had in district court at the August term, 1874. The record discloses the following facts: In 1868 one C. J. Cleveland settled on a quarter section of land on Black-Bob reservation. He had a log-cabin and some ground under fence and in cultivation. In 1870, at his request, his son-in-law, defendant Gurnee, came out to take the "claim," and Cleveland gave it up and put Gurnee in possession. Gurnee fenced it.

*113 and *built a house on the north eighty acres, and moved the Cleveland log-cabin near his new house, and used it for a stable. Cleveland made his home then with Gurnee. In May, 1871, Cleveland became dissatisfied, and went to Newton's, (complaining witness.) In same month Cleveland and Gurnee agreed in writing to arbitrate matters between them. The following is the submission signed by them, to-wit:

"OXFORD, JOHNSON Co., May 13, 1871.

"We, the undersigned, mutually agree to abide by and conform to the decision of the men we have chosen, and to whom we refer the matter of difference existing between us in reference to the claim known as the N. E. $\frac{1}{4}$ of sec. 4, T. 14, range 25, in Johnson county, Kansas, on what is known as the 'Black-Bob Reserve.' We further agree that this instrument, and one exactly corresponding, or either of them, (one of which we shall each possess,) shall be evidence in court, and that the decision [of the arbitrators] shall be attached to each."

The "decision" of the arbitrators chosen by said parties, was in writing, signed by the arbitrators, and "attached" to said submission. So much thereof as is material is as follows: "(1) Said Gurnee is to purchase said quarter section, to-wit, the N. E. $\frac{1}{4}$ of sec. 4, in T. 14, R. 25, in Oxford township, in Johnson county, state of Kansas, of the government. He is then to give a warranty deed to the south half of said quarter to said Cleveland. * * * (5) Said Gurnee is to pay said Cleveland \$25, in lawful money, within five months. Said Cleveland is to have immediate possession of said 80 acres as it now is."

Cleveland went away to Missouri, and returned to Gurnee's in the spring of 1872. Gurnee continuously exercised acts of ownership

over the whole quarter section, which was inclosed in common with five other quarter sections,—no division fences. Gurnee claimed that in February, 1872, he and Cleveland had made a verbal contract to annul and set aside the award, and Cleveland was to take, in lieu of the eighty acres designated in the award, twenty acres out of said south eighty; that he (Gurnee) was to break twelve or fifteen acres of said twenty acres, and to erect a box-house on that twenty

*114 *acres, and that he (Gurnee) was to have the residue of the quarter section, and that Cleveland, at his death, was to deed all his interest in said twenty acres to Gurnee, and that Cleveland made such deed in May, 1874, and before the wheat was cut. The state disputed this claim of defendant, and evidence was offered tending to show that Cleveland at all times claimed the whole of said south eighty, and witnesses (over defendant's exceptions) testified to declarations made by Cleveland regarding his possession, and prior to March, 1873. In March, 1873, Cleveland sued Gurnee on an account. A. G. Newton went Cleveland's security for costs; and, to indemnify himself, took a quitclaim deed from Cleveland to said south eighty, which deed was left with one Kellogg as an escrow. In April, 1873, Cleveland (being still in possession of said south eighty) and said A. G. Newton leased to George H. Newton, the prosecuting witness, all the ground he could break, to raise crops on, on said south eighty acres, for two years. Said George H. Newton broke fifteen or sixteen acres, and sowed wheat thereon. Gurnee notified and warned Newton that he still owned that "claim," telling him if he broke ground there he should have no pay for it, and if he sowed he should not reap or harvest there. Gurnee also, in May, 1873, commenced an action of forcible entry and detainer against Cleveland, to recover a portion of said south eighty, and was defeated. When the wheat was about mature, Gurnee procured the necessary men and teams and cut the wheat, and hauled and stacked it near his residence on the north half of the quarter section. Kellogg delivered the deed to A. G. Newton on the ninth of April, 1874. Cleveland died in June, 1874. Of thirty-two instructions asked by defendant, the following were refused.

"(4) If the jury believe from the evidence that the land on which the wheat was cut was not the land of the prosecuting witness, Geo. H. Newton, the jury must find for defendant."

*115 *(6) If the jury believe from the evidence that the land on which the wheat was sown, together with the residue of the quarter section, was inclosed, in common with several other tracts of land, at the time the prosecuting witness entered upon it, and broke the ground, and sowed the wheat, and that then, and on the eighteenth of March, 1873, the defendant was residing on said quarter section of land, and claiming to be the owner thereof, and continually exercised acts of ownership over said quarter section, (less the twenty acres claimed to have been ceded by defendant to one Cleve-

land,) by cutting grass thereon, hauling hay from the land, clearing the land, selling the grass from a portion of the quarter section, and cultivating other parts of the quarter section, and erecting and maintaining fences inclosing the whole quarter section, you are instructed that in contemplation of law the defendant was in actual possession of said quarter section of land; and the prosecuting witness, and those under whom he claims, were bound to take notice of the defendant's rights in and to said land, whether such rights were legal or equitable."

"(14) The defendant is not estopped in this cause from showing that said C. J. Cleveland conveyed nothing by his quitclaim deed to A. G. Newton, and that said Newton took nothing thereby."

"(18) If the jury believe from the evidence that Samuel Bright was one of the arbitrators, and that said Bright did not sign the award, then said award is invalid, and the defendant is not bound by anything therein contained.

"(19) An arbitrator cannot delegate his power to another person to sign the award for him in the absence of such arbitrator.

"(20) If the jury find from the evidence that Samuel Bright was an arbitrator between C. J. Cleveland and defendant Gurnee, and that the signature of said Bright was placed to the award by Sherman Kellogg, one of the arbitrators, in the absence of the other arbitrators, then said award is invalid, and the defendant is not bound thereby although you may further find that Bright authorized Kellogg to sign his name to the award.

"(21) You are instructed that the rightful owner of land may enter on the possession of an intruder or wrong-doer, in the absence of such wrong-doer, if no breach of the peace is committed in so doing."

"(28) If the jury find from the evidence that said Cleveland delivered over the said 'claim' or quarter section of *land to his son-in-law, defendant Gurnee, and intended the same as a gift to said Gurnee, and that said Gurnee accepted said gift, and took possession thereof, and made lasting and valuable improvements thereon, and if they further find that said Cleveland, on the twenty-first of May, 1874, with a view of carrying out his original desire that said Gurnee should have said 'claim' or quarter section of land, executed and delivered to said Gurnee a deed of said land, then you are instructed that said deed, in contemplation of law, relates back to the date of the original gift or intention, and the execution of the deed in such case is no part of the contract; it is only the evidence of it."

"(32) If you find from the evidence that George H. Newton, or those under whom he claims, has no title to the land in dispute, and that defendant was a possessor of said land before said Geo. H. Newton, then you are instructed that said George H. Newton and A. G. Newton are estopped from attacking the validity of Gurnee's deed."

The jury returned a verdict of guilty, and defendant was sentenced to pay a fine of fifty dollars, and the costs of the prosecution.

Devenney & Green, for appellant.

There is not a *scintilla* of proof that the appellant, Gurnee, cut the wheat, or assisted the cutting thereof; or that he was even seen on or near the wheat ground during the cutting or hauling away. None of the witnesses swear that Gurnee was there, and one of state witnesses swears Gurnee was not there. He having no hand in the cutting or carrying away of the grain, or any part of it, then surely his conviction and sentence were in violation of the evidence and law, and his motion for a new trial ought to have been sustained. In all crimes under the degree of felony, there are no accessories either *before* or *after* the fact. 2 Bl. Comm. 34; 1 Hale, P. C. 613.

The district court permitted the prosecuting witness to detail
 *117 statements of his lessor's grantor, (Cleveland,) made *prior to the delivery of the deed to A. G. Newton, and before the lease to himself, as to the extent of Cleveland's interest in the land upon which the wheat grew. This was error, and affected the substantial rights of Gurnee. *Wilson v. Patrick*, 34 Iowa, 362; *Morrill v. Titcomb*, 8 Allen, 100. We insist that statements of Cleveland made in his own favor were inadmissible to strengthen the claim of Cleveland, or that of his grantee, or of his lessee. *Backus v. Clark*, 1 Kan. *309; *Stark v. Cummings*, 5 Kan. *85; *State v. Montgomery*, 8 Kan. *351; *Kansas Pac. Ry. Co. v. Pointer*, 9 Kan. *621; *McPeake v. Hutchinson*, 5 Serg. & R. 295; *Watson v. Bissell*, 27 Mo. 220; *Taylor v. Lusk*, 9 Iowa, 445; *Gibney v. Marchay*, 34 N. Y. 301; *Hollister v. Young*, 42 Vt. 403; *Swindell v. Warden*, 7 Jones, 575.

The court admitted in evidence a copy of a written submission and award between Cleveland and Gurnee. In this there was error. There was no sufficient foundation laid for its admission. There had been no search for the original, and no effort to obtain either of the originals; they having been signed in duplicate. *Perkins v. Ermel*, 2 Kan. *325; *Shaw v. Mason*, 10 Kan. *188. The signatures to the original—either the submission or award—had not been proven to be genuine. This was essential in order for it to be admissible. The copy offered only showed that Samuel Bright's name was on the paper *copied*, and not that the original was genuine. The genuineness of the original being first established, its contents might be proved by a duly-verified copy. But if there was no true original, the copy was worthless. *Corse v. Sanford*, 14 Iowa, 236; *Wilcoxson v. Burton*, 27 Cal. 238; *Chipman v. Emeric*, 5 Cal. 239. If the submission and award were offered to prove title, then they were not admissible for such purpose. *Stigers v. Stigers*, 5 Kan. *652.

The court erred in not permitting the accused to prove that the prosecuting witness and his father, at the time they acquired their supposed interest in the "claim" or land, had notice of the fact that the submission and award of May 13, 1871, had been done away with by a verbal contract between Gurnee and Cleveland in February or March, 1872, and that the "claim" belonged to Gurnee. No mat-

ter how Newton knew it, whether by common report in the neighborhood or otherwise, the evidence was competent. *Benoist v. Darby*, 12 Mo. 196, 206; *Trelawney v. Colman*, 2 Starkie, 191; *Williams v. London Assur. Co.*, 1 Maule & S. 325; *Brander v. Ferriday*, 16 La. 296.

*118 The court also erred in admitting in evidence the papers *and docket entry of the justice of the peace in the case of *Gurnee v. Cleveland and Eicelman*. It seems that Gurnee brought suit of unlawful detainer against Cleveland and Eicelman to recover possession of certain portions of the quarter section fenced and occupied by Gurnee in May, 1873. After Gurnee, in that action, put in his evidence and rested, the defendants filed a demurrer to the evidence, and the justice sustained it, and "dismissed the action at the costs of plaintiff." The papers and docket entry were admitted and read to the jury over the objections of Gurnee. It was incompetent, irrelevant, and immaterial because the action was not between the same parties. *Benz v. Hines*, 3 Kan. *390. The suit was in May, 1873, which was after Cleveland had conveyed to A. G. Newton, and had leased to George H. Newton, the prosecuting witness, (March 18, 1873,) and after the arbitration and award had been set aside and annulled (in February, 1872) by Cleveland and Gurnee, whereby Gurnee became possessed of the whole quarter section. These proceedings were no evidence that Gurnee had no possessory rights there at the time George H. Newton entered forcibly, and sowed grain, in July or August, 1873, even if the proceedings were admissible for any other reason. The right of possession in August, 1873, is a very different thing from right of possession in February or March of same year. *Jackson v. Randall*, 11 Johns. 405; *Fitzpatrick v. Gebhart*, 7 Kan. *44; *Allen v. Corben*, 10 Kan. *73.

The court erred in giving for the state the first, second, third, fourth, fifth, sixth, seventh, eighth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, nineteenth, twentieth instructions.

The court erred in refusing the defendant, Gurnee, the fourth, sixth, eleventh, fourteenth instructions, and in refusing the eighteenth, nineteenth, twentieth instructions. Those instructions are predicated upon a theory of the defense logically deducible from at least a portion of the testimony. The award not having been signed by Samuel Bright, it is a void award. *Daniels v. Ripley*, 10 Mich. 237; *Green v. Miller*, 6 Johns. 40; *McInroy v. Benedict*, 11 Johns. 402; *Jeffersonville R. Co. v. Mounts*, 7 Ind. 669. The arbitration between Cleveland and Gurnee is a common-law arbitration;

*119 and, when there is *no express power to a majority to make an award, they must all join.

The court erred in refusing the twenty-first instruction asked by defendant, (*Woodward v. Chicago & N. W. Ry. Co.*, 23 Wis. 405; *Dean v. Comstock*, 32 Ill. 179; *Hooser v. Hays*, 10 B. Mon. 72; *Culver v. Smart*, 1 Ind. 65; 1 Hil. Torts, 490, note a;) and in refusing to give

the twenty-eighth instruction asked by defendant, (*Hughes v. Lindsey*, 31 Iowa, 332; *Jackson v. Bull*, 1 Johns. Cas. 81;) also, in refusing the thirty-second instruction asked by defendant, (*Brown v. Pinkham*, 18 Pick. 172.)

We submit that it was necessary for the state to prove in this case that Newton was the owner of the land,—the owner in fee. *People v. Carpenger*, 5 Parker, Crim. R. 230; 1 Hil. Torts, c. 18, §§ 12, 18; *Parmlee v. Leonard*, 9 Iowa, 132; *Parker v. Parker*, 17 Pick. 236; *Doyle v. Teas*, 4 Scam. 236; *Edwards v. Hill*, 11 Ill. 23; *Jarrot v. Vaughn*, 2 Gilman, 132; *St. Mary's College v. Crowl*, 10 Kan. *447; *Doherty v. Thayer*, 31 Cal. 140. The person owning the *fee* must be named in the information or complaint, and proved as laid. *State v. McConkey*, 20 Iowa, 574; *Read v. State*, 1 Ind. 511; *Coffin v. State*, 7 Ind. 157.

KINGMAN, C. J. This was a prosecution for maliciously cutting down and carrying away a lot of growing wheat. It was originally tried before a justice of the peace, where a conviction was had. On appeal to the district court it was again tried, with the same result. From that court the appellant brings the case to this court, alleging many errors, which will be noticed in their order.

1. It is said that there is no proof that appellant assisted in cutting the wheat, or in carrying it away, or that he was on the wheat field at all, and therefore the verdict is not sustained by the evidence. It is true that no witness testifies that appellant was on the ground; but it is in evidence that the twenty-two men and three teams that did the work were employed by appellant for that purpose, and that the wheat was hauled to his farm and stacked there. Many other facts are detailed in the evidence, going to show that, if any offense was committed, it was done by the procurement of the appellant solely. If the offense were felony, these facts would have rendered him liable as accessory before the fact, if not *as principal; but in a misdemeanor, where there are no accessories, but "all persons concerned therein, if guilty at all, are principals," he may on such evidence be found guilty as principal if the necessary facts are established. 4 Bl. Comm. 34; Crim. Code, § 115; Gen. St. 839.

2. Two witnesses were allowed to state what one C. J. Cleveland said while in possession of the land as to the extent of his possession. Whatever diversity of opinion existed at one time on this question, it seems now well settled that declarations of this character by one in possession are admissible as part of the *res gestæ*. 1 Greenl. Ev. § 109. The authorities on this point are collated in note 81, p. 153, 1 Phil. Ev. (Cow. & H. notes.)

3. A copy of a submission and award was admitted in evidence. It is claimed that this copy was improperly admitted, because there had been no sufficient foundation laid by using proper means to obtain

the original, and because the signatures to the original had not been proven genuine. This evidence was important. The submission was between the appellant and Cleveland. The award showed that the possession of the south half of a certain quarter section of land was rightfully in Cleveland, and it was on this half that the wheat was grown. The man that broke the ground, and sowed the wheat, belonged under Cleveland. Before offering the copy in evidence the state had shown that when the award was made it was in writing; that the submission and award had been made out in duplicate, and one given to each of the parties; that the copy was a true copy of the original given to Gurnee; that the witness did not know where the originals were; that Cleveland was dead, and had told witness that he had lost his copy, and the copy offered in evidence was taken at the instance of Cleveland. The county attorney also testified that he did not have the originals, nor had he any means of obtaining them. We think this was sufficient foundation for the introduction of the copy. One of the originals was lost, its owner dead. The other was in the

*121 possession of appellant, and there was no power in the state to compel its production as evidence against himself. The second objection rests in a misapprehension of the facts. The witness who presented the copy testified that he was one of the arbitrators that the award was made in writing, and that the paper offered was a true copy of the award so made. We think that was sufficient. The controversy as to whether one Bright signed the award or not arose afterwards. The state made a sufficient *prima facie* showing of its genuineness to authorize its admission.

4. The fourth error is the refusal of the court to allow a witness A. G. Newton, to testify as to whether, at the time he took a deed for the land, he had notice of the fact that the submission and award had been set aside, and a new contract had been entered into by which Cleveland was to have a life lease for only twenty acres of the south half quarter section, with a dwelling-house on it, and that Gurnee was to have the rest of the quarter section. At the time this question was asked, no attempt had been made to prove that such a contract had ever been made, nor was any suggestion made that such proof would be offered. Under such circumstances the court was justified in refusing to permit an answer. This evidence was inadmissible on another ground. George H. Newton claimed to own the wheat as the lessee of Cleveland. To prove that his father, A. G. Newton, had notice of Gurnee's claim was inadmissible in this suit. It is true that A. G. Newton had told his son that when his title was perfected he would deed him the land; but this gave George H. Newton no rights, and in no way threw any light on the questions at issue.

5. It is insisted that the court erred in admitting in evidence the papers and docket entries of a justice of the peace in a case for an unlawful detainer, wherein the appellant was plaintiff, and Cleveland and another were defendants. This evidence tended directly to show

that a certain time (which was subsequent to the time when it is claimed the award was set aside and a new contract made) Cleveland, by Gurnee's admission, was in possession of the south *122 half of the quarter *section, and that Cleveland claimed that that possession was lawful. The evidence being admissible for one purpose, and nothing appearing that it was used for any other purpose, it is useless to discuss the other questions raised by appellants.

6. The court, at the instance of the counsel for the state, gave certain instructions, numbered from one to twenty. Eighteen of these we are told are wrong, but no error is pointed out or suggested. It was the duty of counsel to point out errors, if any existed; and the failure to do so may be relied on as sufficient assurance that there are none. They seem correct. Some of them enunciate principles as old as the common law. Under the circumstances we do not feel called upon to pass upon them.

7. The counsel for appellant asked thirty-two instructions. Twenty-two of them were given. We have examined those refused, and think they were properly refused, and will indicate the reasons briefly.

The fourth instruction was to the effect that, if the land on which the wheat was cut was not the land of Newton, (the man who sowed the wheat,) the verdict must be for the defendant. The counsel for appellant insist that the person owning the fee must be named in the information, and the fact proved as laid. This point is made in the motion for arrest of judgment, but may as well be considered here as elsewhere. The information charges the land to belong to George H. Newton, and the testimony abundantly shows that he held under a lease from Cleveland, and that appellant also claims under Cleveland by a verbal contract made with him. The offense charged is one plainly under section 107 of the crimes and punishment act, (page 338, Gen. St.) It is also an offense under section 1 of chapter 113, p. 1095. Under the first of these sections we do not think it necessary that it should be proven that the party injured is the owner of the land in fee. It would be as much an offense for the landlord, who owns the fee, to enter upon his tenant's possession, and sever therefrom and carry away the growing crops, as it would be for a stranger. The *123 language of the section does not require such a construction.

It is the injury to the "property of another" that is the offense, not injury to the land alone. In this case the fee was not in Newton. The appellant says that the fee was in the United States, and that is probably true. If so, no one had any but possessory rights, except the government. This possessory right was shown to be in Newton, under Cleveland. Unless the language requires it, we should be reluctant to hold that such possessory rights could be invaded by the strong hand, and no remedy but an action of trespass against persons who in most cases are not responsible. The decision in the case of *State v. McConkey*, 20 Iowa, 575, seems to be in opposition to this

view; but the reasoning of that case is right, and not in conflict with this opinion. As to ownership, the court charged that, to authorize conviction, the state must prove beyond a reasonable doubt that the grain cut was standing on land not belonging to defendant; that defendant had no right or interest in the grain so alleged to have been cut and carried away; a peaceable possession of the land on the part of the prosecuting witness at the time of plowing the land, and sowing the grain; a lawful right to that possession as against defendant, and a possession of the land on the part of the prosecuting witness at the time the wheat was cut.

The sixth instruction professed to state what was evidence of possession, and in the main correctly, but failed to include those qualifying facts necessary to make it applicable to the evidences, and was therefore properly refused.

The eleventh instruction was refused. It is an absurdity. It is as follows: "(11) That if either of two theories should be adopted by the jury from all the evidence, one of such theories consistent with the innocence of the defendant, and the other consistent with his guilt, then I charge you that you may adopt the theory which is consistent with the innocence of the defendant." If the jury adopted a theory consistent with the innocence of defendant, they were bound to acquit, and this instruction authorized them, if from the evidence they

adopted a theory of the guilt of defendant, they might acquit. *124 The *fourteenth instruction could have been no guide to the jury. It was a guide for the court, and one which the record shows the court was governed by.

8. The eighteenth, nineteenth, and twentieth instructions were in reference to the arbitration, and, as abstract propositions of law, are probably correct. If testimony for defendant was believed, and one of the arbitrators did not sign it, we think it was not a binding award. But the award was accepted by both parties, and acted on by both. It did not show title, except as against Gurnee, even if genuine. But whether valid or void, the proof shows that both parties acted on it, and that it became in either event evidence of the extent of the possession of the parties. As asked, the instructions would have misled the jury because they did not contain any allusion to the effect arising from the acceptance of the award by the parties, and an arrangement for the possession of the land in accordance therewith.

The twenty-first instruction is not applicable to the case. The defendant had not shown himself the rightful owner of the land; and for the court to have assumed the fact, as asked in the instruction, would have been a grave error. It is not intended to say that the instruction is or is not correct law.

We think the twenty-eighth is correct law; but if, between the making of the verbal contract and the execution of the deed in pursuance thereof, Newton acquired his rights, then Newton would not be affected by a verbal contract of that kind, of which he had no

knowledge, and the instruction needed this modification to make it applicable to the case. As it was asked, it ought to have been reversed.

The thirty-second instruction is not law, and was properly refused. The judgment is affirmed.

All the justices concurring.)

35 *D. W. HOUSTON and others v. M. W. DELAHAY.

July Term, 1874.

Reading: Joinder of Causes: Demurrer. A. entered into a written contract to do certain work. A., B., and C. entered into an undertaking conditioned for the faithful performance by A. of such contract. A. defaulted in the contract. A petition was filed alleging, in separate counts, the making of the contract, and different breaches thereof, and showing damages exceeding the amount of the undertaking. It also alleged, in another count, which referred to and made all the other counts part of it, the execution of the undertaking, and closed with a prayer for judgment for the amount of the undertaking. A demurrer was filed by B. and C. on account of improper joinder of causes of action, which was overruled. *Held*, no error, or, at least, none of which B. and C. could avail themselves in this court.¹

Error from Leavenworth district court.

Action, brought by Delahay, as plaintiff, against J. P. Taggart, D. Houston, and J. I. Larimer. Houston and Larimer demurred the petition. The district court, at the May term, 1874, overruled the demurrer, and from this decision H. and L. appeal, and bring the case here on error.

F. P. Fitzwilliam, for plaintiffs in error.

Two causes of action have been improperly joined in the petition. Section 39 of the Code provides that "persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and indorsers and guarantors, may, or any of them, be included in the same action, at the option of the plaintiff." The obligation of Taggart is primary and absolute, and that of the other defendants secondary and conditional. The covenant of the principal, and the covenant of the guarantor, are not the same obligation or instrument." Neither of the "instruments" set up in the petition is a bill or promissory note. They are both specialties. Nor are they one and the "same instrument or obligation." They are different instruments, and each expresses an obligation different from the other. At common law the holder of a promissory note or bill of exchange could not unite

¹When several breaches of contract constitute but one cause of action, see *Unity of Barton v. Plumb*, 20 Kan. 147. See, also, *Andrews v. Alcorn*, 18 Kan. 51, and note.

in the same action the maker and indorser, or guarantor, drawer, and acceptor; nor when a covenant was entered into by two or more *severally*, and not jointly, a joint action against them could not be maintained. *Birkley v. Presgrave*, 1 East, 226. So, also, at common law, when the contract was *joint and several*, the plaintiff must sue each separately, or all together. 1 Chit. Pl. 30; *Stratfield v. Halliday*, 3 Term R. 782. No case can be found which holds that at common law a joint action could be maintained against the *principal and guarantor* when the obligation was created by different instruments. Hence it has been held that section 39 of our Code does not authorize the joinder of a person liable as a mere guarantor with the principal, though the guaranty was executed on the same day, and on the same piece of paper. *De Ridder v. Schermerhorn*, 10 Barb. 63; *Le Roy v. Shaw*, 2 Duer, 626; *Wallis v. Carpenter*, 13 Allen, 1; *Griffin v. Grundy Co.*, 10 Iowa, 226; *Moore v. Platte Co.*, 8 Mo. 46; *Tibbits v. Percy*, 24 Barb. 39; *Phalen v. Dingee*, 4 E. D. Smith, 37. And it is now well settled that a *joint* action against a principal debtor and his guarantor, by a separate and independent instrument, will not lie. *Allen v. Fosgate*, 11 How. Pr. 218; *Warth v. Radde*, 11 How. Pr. 230; *Brewster v. Silence*, 8 N. Y. 207, 215; *Miller v. Bank*, 34 Miss. 412; *Sanders v. Clason*, 13 Minn. 379, (Gil. 352.)

Section 83 of the Code provides for uniting several causes of action in the same petition, where they all arise out of one of the following classes: "*First*, the same transaction or transactions, connected with the same subject of action; but the causes of action so united must all belong to one of these classes, and *must affect all the parties to the action*. According to the New York decisions, the courts have been disposed to restrict rather than extend the operations of the first clause of the section. Thus, it was held that "the transaction or transactions connected with the same subject of action" had reference to such causes of action as are *consistent with each other*, not such as are *contradictory*; and it was accordingly held that the plaintiff could not join in his complaint a claim to recover the possession

of real estate, and damages for withholding the same, with
 *127 claim for damages for obstructing *and injuring the plaintiff in the use of his property. *Smith v. Hallock*, 8 How. Pr. 7; *Hulce v. Thompson*, 9 How. Pr. 113; *Weed v. Clark*, 4 Sandf. 3; *Tibbits v. Percy*, 24 Barb. 39; *Phalen v. Dingee*, 4 E. D. Smith, 37; *Miller v. Gaston*, 2 Hill, 188; *Curtiss v. Seymour*, 1 Wend. 105. In *Le Roy v. Shaw*, 2 Duer, 626, it was held that the action was properly brought against the original debtor and his guarantor, and the rule under the Code was considered to be that "persons severally liable cannot be prosecuted together, unless they are severally liable as parties to a written contract or obligation on which the names of both appear as contracting parties."

The causes of action arising on the contract between Delahay and Taggart cannot be united in the petition with the cause of action

undertaking, because each cause does not affect all the parties to action; that is, they must all exist in the same right, in favor of plaintiff and against all the defendants. *Lexington, etc., R. Co. v. Goodman*, 15 How. Pr. 85; *Lexington, etc., R. Co. v. Goodman*, Barb. 469; *Leavitt v. Steenbergen*, 3 Barb. 157. Different rights of action, therefore, existing in favor of the plaintiff, but not existing against all the defendants, cannot be joined, though belonging to one of the several classes enumerated in the eighty-third section of the Code. *Bump v. Van Orsdale*, 11 Barb. 638; *Le Roy v. Shaw*, 2 Duer, 626; *Tompkins v. White*, 8 How. Pr. 520; *Pugsley v. Aiken*, Barb. 114.

The plaintiff has a right of action on either written contract; but if separate actions were commenced, could they be consolidated into one action?

W. English, for defendant in error.

The only error claimed to be in this record is that the petition improperly joins two causes of action—*First*, against Taggart, for breach of his contract; and, *second*, against Taggart, Houston, and Larimer, for breach of their undertaking. To sustain this view, plaintiff in error claims the undertaking is merely a guaranty, and not a general warranty for compliance with contract; and that the undertaking of Houston and Larimer was separate from that of Taggart, while in fact the obligation or undertaking was jointly executed by Houston, Larimer, and Taggart, and refers to Taggart's contract with Delahay, and made both the contract and specification part of the undertaking, thereby stipulating in the broadest terms possible that said Taggart should in all respects comply with said contract and specifications. Said undertaking is joint and several in its terms, and this suit is such an one as could, at common law, be brought and maintained as an action on the undertaking alone. The Civil Code, §§ 83, 39, clearly brings this case between the classes of cases contemplated by that law, since it is in regard to the same transaction, and affects all the parties to the action. *Sturges v. Burns*, 8 Ohio St. 216; *Nash*, Pl. c. 97. The cases which seem to be relied on by plaintiff in error, as sustaining his position as to the scope of the petition as a pleading, it seems to me, have no application to the case at bar, (2 Duer, 626;) for the court sustained a demurrer to the petition because it did not appear that the promise to pay the debt of another was in writing, as required by the statute of 1848; also because the liability of the two parties defendant was joint, while in this case all the defendants signed the same undertaking, and declare themselves jointly and severally liable thereon. It is not necessary that several causes of action should affect all the parties equally. It is sufficient if they affect all, though in unequal degrees. In *re Marsac*, 15 How. Pr. 383. In this case Larimer and Houston are sureties for Taggart on a joint undertaking, and therefore all are affected, and suit properly instituted.

BREWER, J. It appears from the petition filed in this case that J. P. Taggart contracted in writing with defendant in error to erect and complete certain buildings within a stipulated time; that said Taggart and plaintiffs in error entered into a written undertaking with defendant in error, obligating that said Taggart should fully perform all the terms and conditions of said contract. The condition

of such undertaking was as follows: "The condition of the *129 undertaking is such that whereas, *said J. P. Taggart has entered into a written contract with said Mark W. Delahay, dated the twelfth of May, 1873, but actually executed on the day of the date of this undertaking, for the erection of three dwelling-houses in said city of Leavenworth: Now, therefore, if the said J. P. Taggart shall fully perform all the terms and conditions of said contract, to be by him performed, and according to the plans and specifications attached to said contract, then this undertaking shall become null and void; otherwise the same shall be and remain in full force and effect," etc.

The petition sets out both the contract and the undertaking, alleging that Taggart failed to comply with his contract, and asks a judgment against all the signers of the undertaking for damages sustained by this failure. To this petition Houston and Larimer separately demurred—*First*, upon the ground that there is an improper joinder of causes of action, one being a cause of action to recover damages for breach of contract, and another being upon a written undertaking to answer for the default of Taggart; *second*, that the petition does not state facts sufficient to constitute a cause of action against Houston and Larimer. The demurrers were overruled, and this ruling presents the only question in the case.

The proposition of counsel is that the "obligation of Taggart is primary and absolute, and that of the other defendants secondary and conditional;" that they are created by separate instruments, that of Taggart by the contract, and that of the others by the undertaking; and that these separate causes of action do not affect all the parties. We are disposed to think this is not the correct view to be taken of this case. The pleader, it is true, in setting out the contract and the breach of it, sets out a cause of action against Taggart, as against Taggart alone,—a cause of action not limited in amount to the penalty of the undertaking, but extending to the full damages resulting from such breach. But this statement, it seems to us, is preliminary, and for the purpose of showing a default in the condition

of the undertaking. All signed the undertaking, and all therefore assumed the *130 obligations created by it. The condition of the undertaking is the performance by Taggart of his contract. Without default in this, no one is liable on the undertaking. With it, all are. This default was alleged in the petition, and it matters not that in alleging it a cause of action is shown against Taggart for breach of his separate contract. Indeed, it could not be other

e, for if Taggart defaulted in his contract, he was liable to an action for damages caused thereby. If he did not default, there was no liability on the undertaking. No liability could be shown on the undertaking without showing the default of Taggart, and the default of Taggart could not be shown without showing a cause of action against him. All that is claimed in the prayer of the petition is the amount due on the undertaking, while the damages alleged to have been sustained by the different breaches of the contract greatly exceed that amount. It is true that the pleader, in commencing the several statements of the different breaches, and of the execution of the undertaking, says: "and for a further cause of action," etc.; but we must have regard to the substance of the petition than to the mere form of statement. Suppose the demurrer had been sustained, under section 92 of the Code the court would have been compelled to permit the plaintiff to have filed a petition with one count, and showing a cause of action on the undertaking. To accomplish this, the only change necessary would have been to omit these preliminary words which introduce, instead of the several statements of the breaches, and of the execution of the undertaking. That this was not done cannot have wrought any injury to the substantial rights of the plaintiffs in error; so that, although the court might have, strictly speaking, erred in its construction of the pleading, the judgment would have to be affirmed. The judgment will be affirmed.
(All the justices concurring.)

*131

*JANUARY TERM, 1875.

JAMES I. HOLMES v. HENRY M. RILEY.

January Term, 1875.

1. **Bills and Notes: Proof of Execution: Burden of Proof.** Where in an action on a promissory note, the answer contains a sworn denial of its execution, it is error for the court to permit the note to be received in evidence, and read to the jury, without any proof of its execution, and it is error, also, to instruct the jury that the burden of proof is on the defendant to show that he did not execute it.¹
2. **Deposition: Competency of Evidence.** Where the question is as to the execution of a note, it is not error to admit the deposition of a witness who, without having the note before him, testifies, not to the genuineness of the signature, but to circumstances tending to show that the defendant did at the date of the note execute such note.

Error from Atchison district court.

Action by Riley against Holmes upon a certain promissory note. The petition set forth a copy of said note. Holmes filed his answer thereto, verified by affidavit, denying the execution of said note, and denying that Riley was the owner thereof, or that he ever purchased the same before maturity, or paid any value therefor. Reply, general denial. Trial at the November term, 1873. Riley offered in evidence said note, to the introduction of which Holmes objected, which objection was overruled, and said note was received and read to the jury. Holmes introduced evidence tending to show that he never executed said note. Riley then offered in evidence the deposition of C. Lowrey, which was admitted over the objection and exception of

Holmes. The court instructed the jury that the burden of proof was on the defendant. Verdict and judgment for the plaintiff.

Everest & Greenawalt, for plaintiff in error, contended that, upon the issues joined, the note did not prove itself, and that it was incumbent upon Riley, plaintiff below, to prove the allegations of the petition as to the execution of said note before the same could be introduced in evidence; and cited *Glazier v. Streamer*, 57 Ill. 91, and *Boston Relief & S. Co. v. Burnett*, 1 Allen, 410. Section 108 of the Civil Code has not changed the rule of the common law in any case where a party desiring to put the execution of a written instrument in issue verifies his denial by affidavit. In this case the burden of proof was upon the plaintiff. The court erred in admitting in evidence

¹ Defenses to notes—burden of proof, *French v. Gordon*, 10 Kan. 279, and note.

dence the deposition of Lowrey, (Palmer v. Manning, 4 Denio, 131; Shaver v. Ehle, 16 Johns. 201; Glazier v. Streamer, 57 Ill. 91; Consaul v. Lidell, 7 Mo. 128,) and in instructing the jury that the burden of proof was on the defendant.

Henry C. Solomon, for defendant in error, submitted that, admitting there was error in admitting the note in the first instance without proof of execution, still the weight of evidence supported the verdict. The testimony of Lowrey proved that the note was executed by Holmes. For defendant below to first state, under oath, that he never signed the note,—that the signature to said note was not made by him,—and then to attempt to show that if he did sign it there was no consideration, and that plaintiff was not a *bona fide* holder of the note, is an unreasonable defense. Plaintiff in error must either stand upon one defense or the other—that the note was not executed by him; or that there was no consideration, and that the plaintiff below was not the owner. If he stood upon the first, he waived the last-named defenses; if upon the last, he admitted the execution. Under these circumstances there was no error in the instructions.

BREWER, J. This was an action on a promissory note. The answer denied, under oath, the execution of the note. *Upon the trial the court permitted the plaintiff to read the note in evidence without any proof of its execution, and charged the jury that the *onus probandi* was on the defendant to show that he did not execute it. This was clearly wrong. The plaintiff alleged the execution of the note. By the sworn denial, that execution was put in issue, and on that issue the plaintiff had the affirmative.

We see no error in the admission of the deposition of H. H. Lowrey. The objections of counsel go rather to the effect and weight of the testimony than to its competency. The witness testifies, not to the genuineness of the signature to the paper offered in evidence, but to circumstances tending to show that the defendant did, in fact, at the time of the date of the note, execute such a note. This we think was perfectly competent.

The judgment, however, for the errors noticed, must be reversed, and case remanded for a new trial.

(All the justices concurring.)

STATE OF KANSAS *v.* W. D. JENNERSON.

January Term, 1875.

Errors: Must be Specified. Where it is alleged that the trial court erred in its rulings, it is the duty of the party complaining to indicate where the error consists, as well as the particular ruling of which he complains.

Appeal from Saline district court.

A criminal complaint was filed before a justice of the peace against the defendant, the body of which was as follows: "Dorothea Evarts, being duly sworn, according to law, deposes and says that on or about the twenty-seventh day of August, 1873, in the county of Saline aforesaid, one W. D. Jennerson willfully, maliciously, and unlawfully *134 fully attempted to sever and *remove from the freehold of the affiant a cross-piece and hook which were then thereto attached, and which said cross-piece and hook were then a part of the fixtures to a well, and the property of this affiant, contrary to the statute in such cases made and provided, and against the peace and dignity of the state of Kansas." The defendant was tried and convicted before the justice, and appealed to the district court, where another trial was had at the March term, 1874. Verdict of guilty and sentence that defendant pay a "fine of five dollars, and costs of prosecution, and stand committed until said fine and costs are paid." Defendant appeals.

J. G. Mohler, for appellant.

E. W. Hodgkinson, for the State.

BREWER, J. Appellant was convicted on a charge of attempting to maliciously sever and remove certain property from a freehold, and from such conviction appeals to this court. The only error alleged is thus stated in the brief of counsel for appellant: "The court below erred in overruling the motion in arrest of judgment. The complainant does not state facts constituting a public offense. Whart. Amer. Crim. Law, § 2012." What specific objection there exists to this complaint, and wherein it fails to disclose a public offense, we are not advised. The counsel refer to a section in Wharton's Criminal Law, but on turning to that section, we find that it treats of more than one subject. It treats of the manner of "describing the property," and the "value." Now, whether counsel intends to claim that the complaint is defective in not stating the value of the property attempted to be severed, or in not sufficiently describing the property, or the freehold, we are not informed; and we shall not attempt to consider the various questions which may suggest themselves to our minds, in the expectation by so doing of reaching the specific objection counsel intended to present.

The judgment will be affirmed.

(All the justices concurring.)

*STATE OF KANSAS v. CHARLES B. KELLERMAN.

January Term, 1875.

Instructions: Specific: Falsus in Uno, Falsus in Omnibus. Where an instruction is asked that if a particular witness, naming him, has willfully testified falsely, etc., the jury should disregard his entire testimony, it is not error for the court to refuse such instruction, and substitute one that if *any witness* has willfully testified falsely, etc.¹

Larceny: Elements of Crime. Where the court properly instructs the jury that in order to convict they must be satisfied, from the evidence, "that the defendant stole, took, and carried away" the property alleged to have been stolen, it is not error to refuse a specific instruction that "*taking* is a material part of larceny, and must be established by competent evidence."

Criminal Law: Testimony of an Accomplice. Where the principal witness for the state is an accomplice, it is not error to refuse an instruction that such accomplice "stands before the jury in the character of an impeached witness, and as such his testimony requires confirmation," when the jury have been instructed that "in determining the weight and credit to be given such testimony the jury should use great caution, and unless the testimony of the witness is corroborated by other evidence in some material point in issue, the defendant should be acquitted, as it would be unsafe to convict upon the sole and uncorroborated testimony of an accomplice."²

Evidence: Competent: Corroborative. Where the larceny charged was the larceny of a horse, and the owner testified that the horse was taken out of his pasture during the night-time; and the accomplice testified that an arrangement was made between the defendant and himself for stealing and selling a horse, and, in pursuance thereof, on the night that this horse was taken out of the pasture it was brought by defendant to witness, and by him taken to a neighboring town, and sold; and produced a writing admitted by defendant to have been written and signed by himself, certifying that the witness was "duly authorized to sell" this horse, described in the writing as "my horse:" *held*, that this writing was sufficient corroboratory testimony to sustain a verdict of guilty.

New Trial: Newly-Discovered Evidence. Where a motion for a new trial is made on the ground of newly-discovered evidence, it is, as a general rule, essential that the affidavits of the newly-discovered witnesses should be produced, or their absence accounted for; and it is also, as a general rule, true that the unsupported affidavit of the defendant or his counsel will not be sufficient.³

See *Shellabarger v. Nafus*, 15 Kan. 547, deciding that it is the province of the jury to determine the credibility of witnesses, and the weight of their testimony; and where any witness has testified willfully, corruptly, and falsely to any material fact, it is the province of the jury to determine how much, or whether the whole, of his testimony should be disregarded. No inflexible rule should be imposed between the witness and the jury, commanding the jury to take all, or exclude all, of his testimony. Same principle applied, *State v. Potter*, 16 Kan. 80; *Wheeler v. McMillan*, 18 Kan. 183. The credibility of a witness, knowingly testifying falsely as to one or more material facts, is entirely for the jury, *Schueck v. Edgar*, 24 Minn. 339.

¹Evidence of accomplice, *State v. McCarthey*, 17 Minn. 26, (Gil. 54.)

²See *Smith v. Williams*, 11 Kan. 88; *Boyd v. Sanford*, *post*, *280.

*136 *Appeal from Coffey district court.

The case is stated in the opinion.

W. A. Johnson and W. L. McConnell, for appellant.

A. M. F. Randolph, Atty. Gen., for the State.

BREWER, J. Appellant was convicted in the district court of Coffey county of the crime of grand larceny, and from this conviction brings his appeal to this court. The errors alleged are in reference to the instructions, and in overruling a motion for a new trial.

With reference to the first we have little difficulty. The rulings of the court were unquestionably correct. For instance, the appellant asked the court to instruct the jury that if one witness, naming him, testified willfully falsely, etc., they must disregard his entire testimony. Instead of this the court charged that if any witness testified willfully falsely, etc. The latter is the proper way. To single out a witness, and by name give such an instruction in reference to him, suggests a suspicion, if it does not imply a belief, on the part of the court of the witness' perjury.

Again, the court was asked to charge that "*taking* is a material part of larceny, and must be established by competent evidence." Instead of this the court charged that the jury must be satisfied that "defendant stole, took, and carried away," etc.; "and that if A. should feloniously take into his possession the property of B., and immediately deliver the same to C., this would be a sufficient tak-

*137 ing and carrying away to constitute the crime of larceny "in A. There was nothing to emphasize the question of "*taking*." The larceny charged was of a horse. It was turned by the owner into a pasture at night. Before morning, in pursuance of a previous arrangement, it was handed by the defendant to his accomplice, and by the latter taken immediately to Olathe, and sold. We see no error in this charge of the court.

The main witness for the state was an alleged accomplice. Upon this counsel for defendant asked these two instructions:

"The testimony of Allen Roberts is that of an accomplice, and must be corroborated by evidence tending to convict the defendant of the offense charged, or the jury must acquit the defendant.

"Allen Roberts stands before the jury and court in the character of an impeached witness. As such, his testimony requires confirmation."

These instructions were refused, and instead thereof the following was given:

"The jury are charged that the admission of accomplices [to testify] as witnesses for the state is permitted and justified by the necessities of the case, it often being impossible to bring the principal offender to justice without their testimony. But in determining the weight and credit to be given such testimony, the jury should use great caution; and unless the testimony of the witness Allen Roberts is

corroborated by other evidence in some material point in issue, the defendant should be acquitted, as it would be unsafe to convict upon the sole and uncorroborated testimony of an accomplice."

Under this instruction it is claimed by counsel that the witness might be corroborated as to the fact of the larceny, but in nothing tending to connect the defendant with it, and that, under such circumstances, it would be improper to convict. We do not think the jury were misled. The testimony of the witness Roberts did not go at all to the circumstances of the taking. He was not present at the time. The horse was brought to him by the defendant after it had been stolen. His testimony related to the disposition of the horse thereafter, and the connection of the defendant with the transaction. Corroborating testimony is that which supports the testimony already given, not that which proves an entirely different part of the case. So Allen Roberts, to have been corroborated, must have been sustained as to some of the facts as to which he testified. These are the principal questions made upon the instructions, and in them we see no error.

A motion for a new trial was overruled. Upon this, two questions are presented: (1) The verdict was not sustained by the evidence; and (2) there was newly-discovered evidence. We think the verdict was sustained. The owner of the horse testified to placing his horse in the pasture at night, and its disappearance before morning, and to finding it in a few days at Olathe. Roberts testified to an arrangement between Kellerman and himself for stealing a horse; that Kellerman, in pursuance thereof, on the night said horse was stolen, brought it to him, and he rode it to Olathe, and sold it; that he sold it for \$60, of which he received \$10, and was to receive the balance when he "sent up a title;" that he went back, and obtained from Kellerman his "title." This title was produced, and read as follows:

"I, C. B. Kellerman, a resident of Coffey county, Kansas, duly authorized Allen Roberts to sell my bay horse, which left here July 23, 1874, which he says he sold in Olathe, Saturday, July 25, 1874.

"C. B. KELLERMAN."

When testifying in his own behalf, Kellerman admitted the writing and signing of this paper. This, we think, was very strong corroboration of Roberts' testimony. True, he attempted to explain the writing, but the explanation was far from satisfactory.

We think also that the showing of newly-discovered evidence was insufficient. The only testimony offered was the affidavit of one of the counsel for the defendant that two of the witnesses on the former trial would testify to additional facts of which neither the defendant nor his counsel were aware before the retirement of the jury: Neither the affidavit of the defendant nor that of either witness is presented, nor any excuse shown for not producing them. It is laid down in 3 *Grab. & W. New Trials*, 1065, as essential. v.14K—8

tial that "the affidavits of the newly-discovered witnesses should be produced, or their absence accounted for." And again, on page 1067 that "the information must come directly from the newly-discovered witnesses, so that it may appear just what they know, and what they are ready to testify." To like effect are the authorities cited on the same and succeeding pages. See, also, *Manix v. Malony*, 7 Iowa 81; *Keough v. McNitt*, 6 Minn. 513, (Gil. 357.) While this rule may not be of absolute and universal application, and while cases may arise in which the showing of newly-discovered evidence is so full and satisfactory that a new trial ought to be granted, even without the production of the affidavits of the new witnesses, or any explanation of their absence, yet, for all ordinary cases, the rule is a good one, well supported by authority, and ought to be enforced. If a defendant could, by his own affidavit of newly-discovered testimony, secure a new trial, it would soon be found that verdicts of guilty rested on very slippery foundations. In this case it appears from the record that these witnesses were residents of the county; that they were present at the trial; and it does not appear that they had since absented themselves; nor is any intimation or excuse given why their affidavits were not produced. This, we think, fully justified the court in overruling the motion for a new trial; nor is the testimony itself of such conclusive a character that we should feel warranted in holding that the court erred in refusing a new trial on account of it. The owner of the horse has testified that he saw, at or about the place where his horse had evidently been taken out of the pasture, "the track of a very fine boot;" that a neighbor of his measured it, and produced before the court and jury the measure. Now, the affidavit states that such witness would testify that he had measured the tracks made by the accomplice and witness Allen Roberts since the commencement

of the trial, and that such tracks were identical in form, appearance, and *length with the tracks seen by himself and others "at the place above indicated; and also that another witness would testify that Roberts had on, during the trial, the same boots that he was wearing a day or two before the larceny." There is, however, on the other hand, nothing to show that there was anything peculiar about these tracks, except that they were the "tracks of a very fine boot,"—nothing to show that the boots of the defendant would not have made exactly the same track. And, indeed, when the measure of this track was produced on the trial, it seems hardly probable that counsel, so acute and skillful as the able gentlemen who conducted the defense, should not have compared it with the track made by the defendant, and, if there was any difference between them, have called the attention of the jury to such difference.

On the whole case, we think that the judgment must be affirmed.
(All the justices concurring.)

WILLIAM HAUG v. H. W. GILLETT.

January Term, 1875.

Dram-Shop Act: License to Sell Liquor: Sales by Agents. A liquor dealer must have a license from the city or county in which his store is kept. With such license he may send out agents and take orders in any part of the state for goods to be selected and forwarded from the stock kept in such store, and is not required to obtain a license from the authorities of each city or county in which contracts are made therefor by such agents.¹

Statutory Construction. A penal statute should be strictly construed.]

Error from Shawnee district court.

The case is stated in the opinion.

Hanback & Johnson, for plaintiff in error.

Stillings & Fenlon, for defendant in error.

41 ***BREWER, J.** This action was originally brought by defendant in error before a justice of the peace, to secure a money judgment against the plaintiff in error on an accepted draft and a promissory note. The plaintiff in error answered by admitting that he accepted the draft and made the note, but claimed that they were made without consideration, being for intoxicating liquors sold on credit; that the contracts under which the liquors were sold were made in the city of Topeka; and that the defendant in error (Gillett) had no license at that time from the city of Topeka to sell intoxicating liquors. Upon this issue the case went to trial, and the justice rendered judgment against Haug for the full amount of the note and draft. Haug then appealed to the district court of Shawnee county, and the case came on for trial at its June term, 1873, and was submitted to the court on the evidence and admissions of the parties made in open court, a jury having been waived by the respective parties; on consideration whereof the court found for the plaintiff, (Gillett,) and rendered judgment for him against the defendant, (Haug,) for the sum of \$292, to which Haug excepted, and was given thirty days to make a case for the supreme court, which time was afterwards extended by the court to October 11, 1873.

It appeared from the testimony that the defendant, Gillett, was a wholesale liquor dealer in the city of Leavenworth, and had a license from the mayor and council of that city to sell liquor in any quantity, except by the dram, but had none from the city of Topeka; that the orders for the liquors were given by Haug in his saloon, in the city of Topeka, to Gillett, or some agent of his; that the orders were taken at Gillett's store, in Leavenworth, the goods therefor selected from

¹See *Williams v. Feiniman*, *post*, *288; *McCarty v. Gordon*, 16 Kan. 85; *Snider v. Koehler*, 17 Kan. 492.

his stock, and shipped by rail to Haug, at Topeka, the latter paying the freight. Was there error in the ruling of the district court, and were the note and draft void, as given in consummation of a contract prohibited by statute?

The statute claimed to have been violated is section 3 of the *142 dram-shop act, which forbids the sale of liquors by "any person without taking out and having a license as grocer, dram-shop keeper, or tavern-keeper," etc.; and it is insisted that this sale was made in Topeka, where, it is conceded, Gillett had no license, and "that, under the laws of Kansas, any one having a license to sell intoxicating liquors can only sell them within the limits of the city or township granting him the license." The proposition involved in this case is substantially that a wholesale liquor dealer, having a stock of goods, and conducting business in a city from whose authorities he has received a license, cannot send out agents, and take orders for those goods, elsewhere than in such city, without first obtaining a license from the authorities of each city or county in which those orders are taken. The proposition is a broad one, and the language of the statute should be clear before such an intention is imputed to the legislature. The legislature may suppress the liquor traffic altogether, or it may impose such restrictions as it deems wise. It may restrict the sale to the county, the city, or even the building, and forbid the making of any contract therefor outside thereof; and it is the duty of this court simply to determine what restrictions it has imposed. Its enactments are, however, to be construed in the light of the general usages of society and business. The business of a wholesale dealer is carried on extensively, generally by agents,—traveling men, as they are called,—who visit the different towns, and solicit orders. To recognize and license such a business, and at the same time to cut off one of the ordinary methods of carrying it on, while it is within the power of the legislature, should also be within the clear meaning of the enactments.

Again, the statute is penal, and as such is to be strictly construed. Only those things are forbidden which are plainly within its terms. Counsel claim that a party licensed may sell only within the limits of the county or city granting the license. But where was the sale completed? The contract therefor was made in Topeka, but did any title pass before the goods were selected and separated from the whole stock? Clearly *not, and therefore the sale was not completed till then. The goods were selected and separated at Leavenworth, and there delivered to the carrier, to be by him forwarded to the purchaser. At Leavenworth, then, the sale was completed, and there Gillett had a license. *Bancher v. Warren*, 33 N. H. 183; *Boothby v. Plaisted*, 51 N. H. 436. Nor can this be deemed a "shift or device to evade the provisions of the act." Gillett had no license, and that at the place where his store was kept. By the first section of the act, before a license can be granted, a petition must be

presented by the citizens of the township or city "in which such dram-shop, tavern, or grocery is to be kept." This locates the place where the license must be had. Gillett kept no store in Topeka, had no stock of goods there, made no delivery of goods, and passed no title there. Clearly, therefore, there was no violation of the dram-shop act in this transaction, and the judgment of the district court must be affirmed.

(All the justices concurring.)

ANDREW AKIN v. LEWIS F. DAVIS and others.

January Term, 1875.

1. Injunction: Preliminary: When not Error to Refuse. Where, on an application for a preliminary injunction, the petition alleges that the plaintiff is and has been, for a series of years, the owner of a mill-dam; that, in a proper court, a decree had been entered in a suit brought by one of the defendants whose land was flowed by said dam; that to such suit plaintiff was not made a party, and had no notice, actual or constructive, thereof; that execution has been issued, and is in the hands of the other defendant, as sheriff of the county, who is about to enforce it; and where it appears from affidavits filed, and other testimony, that the person in possession, and having the actual charge and management of the mill and dam, were defendants, and served with process in the suit in which the decree was entered; that the same was fully litigated; that, as a matter of fact, the dam did flow said defendant's land, and^{*144} was a nuisance to him; that he^{*} was able to respond in damages for any injuries caused by the removal of the dam; and where it does not appear that any right to build said dam and flood lands had been obtained by consent or legal proceedings: held, that an order of the district judge refusing a preliminary injunction will not be reversed.
2. —. An injunction *in limine* is not a matter of strict right. It may sometimes be properly refused upon the same facts which would entitle the party of right to a perpetual injunction on final hearing.¹

Error from Wilson district court.

The case is stated in the opinion.

R. M. Ruggles, for plaintiff in error.

J. B. F. Cates, for defendants in error.

BREWER, J. This was an application for a temporary injunction, at the commencement of an action for an injunction, under section 239 of the Civil Code, to restrain defendants in error, pending the litigation, from tearing down and destroying a mill-dam across the Verdigris river, in Wilson county. The application was made upon the petition in the cause, duly verified, to the judge of

¹ See Stoddart v. Vanhanningham, ante, *18.

the district court at chambers. The defendants were notified, and appeared, and resisted the motion for the temporary injunction upon affidavits which are set out in the record. The judge denied the motion for an injunction, to which plaintiff excepted, and brings the cause to this court on error, as provided in section 542 of the Code. The petition sets forth, in substance, that on the first of February, 1871, plaintiff in error was, and ever since has been, the sole owner of the mill-dam in the petition described; and that on the thirty-first of January, 1872, the defendant in error, Lewis F. Davis, recovered a

judgment in the district court of Wilson county against H. C. *145 Akin, C. M. Akin, and C. M. Akin, as *administrator of the estate of C. G. Akin, deceased, in an action then pending wherein said Davis was plaintiff, and plaintiff in error, together with said H. C. Akin, C. M. Akin, and C. M. Akin, as administrator of the estate of C. G. Akin, deceased, were defendants, for the sum of five cents and costs; and that it was further decreed by said district court that said H. C. Akin, C. M. Akin, and C. M. Akin, as administrator of the estate of C. G. Akin, deceased, should, on or before the first day of March, 1872, remove so much of said mill-dam as might be necessary to prevent the water from flowing back in the channel of said Verdigris river by reason of said dam, upon the riffles situated on the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 16, township 28 south, of range 16, in said county of Wilson; and, in default of compliance with said decree by said last-named defendants, within said time, then that the sheriff of said county should execute the said order by removing so much of said dam as might be necessary to satisfy said decree. The petition further states that plaintiff in error never had any notice whatever, either actual or constructive, of said action; nor did plaintiff in error ever appear in said action; nor is he (the plaintiff in error) a party to said judgment. The petition further states that, at the instance and request of said Davis, (defendant in error,) a writ of execution has been issued by the clerk of said district court to defendant in error B. W. Ladd, sheriff of said Wilson county, upon said judgment; and that the said B. W. Ladd is now threatening and intending, at the instance and request of said Davis, to carry into effect said execution, and remove so much of said dam as may be necessary to comply with the requirements of said judgment; which, if he is allowed so to do, will be to the great and irreparable injury of the plaintiff; and in so doing the said B. W. Ladd will be acting without leave or license of plaintiff in error. A certified copy of the former proceedings and judgment is attached to the verified petition, and made a part of the same. At the argument of said motion for an injunction plaintiff in error asked leave of the said judge at chambers to amend his verified petition by inserting, in the proper place, the fol-

*146 *lowing: "That said mill-dam is worth ten thousand dollars, and would be totally ruined and rendered worthless if said defendants were suffered to execute the said order of said court, which

they are threatening to do,"—which said judge refused to allow, and plaintiff in error excepted.

The defendants showing cause why said preliminary injunction should not be granted, set forth in their affidavits, in substance, that at the time of the commencement of said original action referred to, and during the entire pendency of the same, and until after the final judgment, said plaintiff in error was not in charge of said mill-dam in said original petition described, nor had he the actual charge or control of the same, but was residing in another county, with his family, in the business of register of the land-office; that at the commencement, and during the entire pendency, of said action, C. M. Akin, and C. G. Akin in his life-time, carried on said mill, and had the charge and management of the same; that the dam in question was adjudged a nuisance in said former action, and ordered to be abated; that said dam, at the commencement of said former action, was kept and maintained as a nuisance by said defendants, and is now kept by plaintiff in error so as to flood the water back in the channel of the Verdigris, and thereby to flood the land of said Davis, lying on both sides of said river, above said dam, so as to raise the water five and one-half feet in excess of the natural flow; and that said Davis had a good ford on said river on his premises, which has been ruined; that said defendant Davis, and said sheriff of Wilson county, intend only to remove so much of said mill-dam as will prevent the waters from flooding back on said Davis' premises; and that said mill and dam are not worth over ten thousand dollars; and that said Davis is worth much more than that sum, beyond exemptions and liabilities, and is able, ready, and willing to respond in damages on any judgment said plaintiff in error may obtain against him by reason of any injury to said mill-dam; and that said Davis has given the said sheriff a bond of indemnity, etc.

*147 *We shall not attempt to decide at the present time whether the proceedings to abate the nuisance caused by the erection of the dam was so far a proceeding *in rem* as to conclude the owner, although not a party to the suit, for we think that upon other and more obvious grounds the ruling of the district judge must be affirmed. No right to maintain a dam is disclosed in the petition. It does not show that proceedings were ever had under the mill-dam act, or that consent was ever obtained of the parties whose lands were flooded. The plaintiff bases his right to restrain the defendants upon the fact that the dam exists, that he owns it, and that he has never been ordered to remove it. It does appear, from the whole case, that, in a proceeding between the owner of the lands flooded and the actual possessors and managers of the mill and dam, the dam was declared a nuisance, and the parties in charge ordered to abate it; that, as a matter of fact, it is a nuisance to one of the defendants; and that said defendant is able to respond to all damages which may be caused by the removal of the dam. Under these circumstances, we cannot

say that the judge, in the exercise of a sound discretion, erred in refusing an injunction.

Some full and clear showing might well be insisted on of a right to maintain the dam, even though it were conceded that the prior judgment was not conclusive. An injunction *in limine* is not a matter of strict right. It may sometimes be properly refused upon the same facts which would entitle the party of right to an injunction on final hearing. *Stoddart v. Vanlaningham, ante*, *18. It may be a hardship to have the dam removed, but if a party builds a dam without obtaining, by consent, or legal proceedings, the right to flow lands above the dam, he has only his own imprudence to blame for the result.

The order denying the temporary injunction will be affirmed.
(All the justices concurring.)

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*JOHN B. YOUNG v. PETER CLIPPINGER.

January Term, 1875.

1. **Conveyance: Quitclaim Deed.** A deed which recites that the grantors "have bargained, sold, and quitclaimed, and by these presents do bargain, sell, and quitclaim, all our right, title, interest, estate, claim, and demand, both in law and in equity, as well in possession as in expectation, with all and singular the hereditaments and appurtenances thereunto belonging; and we do also promise to defend the property against all claims, if any should come up, against said property,"—is only a quitclaim deed, and purports to convey only the existing interest and estate of the grantors.¹
2. ———: **Covenant.** The general covenant following the granting clause does not operate to enlarge the estate granted, but is itself limited to such estate.
3. **Pleading: Petition: Action on Covenants.** A petition which alleges the execution of such a deed, that the grantors did not have a fee-simple title, that a third party did have such title, and subsequently to the deed brought an action and recovered possession of the land, evicting the grantee, does not state facts sufficient to constitute a cause of action.

¹ An ordinary deed of quitclaim conveys no greater rights than the grantor actually has at the time of its execution; and a person who relies upon a mere quitclaim of the interest which a party may have in property does so at his peril and must look to it that there is an interest to convey. *Martin v. Brown*, 4 Minn. 282. (Gil. 201.) *Hope v. Stone*, 10 Minn. 141. (Gil. 114.) *Everest v. Ferris*, 16 Minn. 26. (Gil. 14.) *Gesner v. Burdell*, 18 Minn. 497. (Gil. 444.) *Marshall v. Robert*, 18 Minn. 405. (Gil. 365.) *Johnson v. Robinson*, 20 Minn. 189. (Gil. 169.)

One of two tenants in common conveyed his interest to the other by deed, which never was recorded. Subsequently they both joined in a mortgage of the land, and thereafter the one who had previously conveyed his interest gave a quitclaim deed which was recorded, of all his "right, title, and interest" to a third person, who had actual knowledge of the previous conveyance. *Held*, that the grantee in the last named deed acquired no rights thereunder. *Gesner v. Burdell*, 18 Minn. 497. (Gil. 444.) A grantee in a quitclaim deed is bound to inquire and ascertain at his peril as to outstanding equities; but if he convey with covenants of warranty his grantee need not, but will be presumed a *bona fide* purchaser without notice. *Winkler v. Miller*, 6 N. W. Rep. 698.

Error from Nemaha district court.

The case is stated in the opinion.

N. Price and S. Conwell, for plaintiff in error, contended that Clippinger's promise and agreement "to defend the property against all claims, if any should come up against said property," is an express covenant in relation to the *property*, and runs with the land as such, and a covenant for the future protection of the title, and cite 2 Blackstone, Cooley, Bl. 303, note 10; 1 Bouv. Law Dict. 402, 403; 2 Amer. Law Reg. 267, 744; Rawle, Cov. 318, 506; 1 Smith, Lead. Cas. 133; *Belts v. Kellogg*, 15 Ill. 137; *Barter v. Ryerss*, 13 Barb. 281.

Joseph Sharpe, for defendant, contended that the petition
 149 *did not state facts constituting a cause of action; that the deed of Clippinger was a mere quitclaim, conveying only a present interest, and that the supposed covenant was limited by the grant,—and referred to *In re Strong*, 20 Pick. 488; *Wade v. Howard*, 11 Pick. 296; *Blanchard v. Brooks*, 12 Pick 47; *Hurd v. Cushing*, 7 Pick. 169; *Wight v. Shaw*, 5 Cush. 56; *Inhab. of Princeton v. Adams*, 10 Cush. 132; *Sweet v. Brown*, 12 Metc. 175; *Kimball v. Temple*, 25 Cal. 452; *Lessee v. Loomis*, 11 Ohio St. 475; 3 Washb. Real Prop. 104, § 40.

BREWER, J. On the seventh of July, 1868, Peter Clippinger and wife executed a deed to Aaron W. Manchester of a tract of land. The material portion of the deed is as follows: Said grantors "have bargained, sold and quitclaimed, and by these presents do bargain, sell and quitclaim, unto the said Aaron W. Manchester, his heirs and assigns forever, all our right, title, interest, estate, claim and demand, both in law and in equity, as well in possession as in expectation, * * * with all and singular the hereditaments and appurtenances thereunto belonging, and we also do promise to defend the property against all claims, if any should come up against said property." On the twenty-fourth of May, 1870, Manchester and wife executed a warranty deed of said premises to plaintiff. Plaintiff, in January, 1874, filed his petition, setting out the execution of these deeds, and alleging that at the time of defendant's conveyance he was not seized of fee simple of said lands, and had not defended the same against the lawful claims of all persons, but that one Eli Finley was the owner, and that said Finley, in August, 1872, commenced an action against said plaintiff to recover the possession, and did in said action recover the possession, and that under said judgment plaintiff was, in September, 1873, evicted from said premises. A demurrer to said petition was sustained, and of this ruling plaintiff in error complains.

The deed from defendant is plainly a quitclaim. It does not
 150 purport to grant a fee-simple title. It uses the technical *term "quitclaim," and to make assurance doubly sure, it limits the grant to the "right, title, interest, estate, claim and demand" of the grantors. Such a deed conveys nothing but the interest of the grant-

ors, and after-acquired title does not inure to the benefit of the grantees. *Simpson v. Greeley*, 8 Kan. *586. Nor in this case do we think the covenant enlarges the grant. The reciprocal effects of covenants upon the grant, and of the grant upon the covenants, has been much discussed, and the conclusions are not all harmonious. It is said in 2 Smith, Lead. Cas. 636, that "the true rule would seem to be, that the instrument should be taken as a whole, and effect given to its meaning as derived from each and every part of it." Under this rule it is more reasonable to hold that the general terms of the covenant are limited to the restricted estate granted, than the reverse. The estate conveyed is specifically, doubly limited. It is restricted to the interest and estate of the grantors, for the phrase, "or in expectation," refers to interests existing but not vested, and does not include interests and titles wholly disconnected from the grantors. It can hardly be supposed that the grantors used such words of limitation without intending to restrict the extent of the grant, while the general terms of the covenant may properly be held as applicable only to the estate granted. In other words, the grantors convey a limited estate, and covenant to defend that estate. The authorities support this view. In *Blanchard v. Brooks*, 12 Pick. 47, *SHAW, C. J.*, says: "The grant in the deed is of all his right, title and interest in the land, and not of land itself, or any particular estate in the land. The warranty is of the premises, that is, of the estate granted, which was all his right, title and interest. It was equivalent to a warranty of the estate he then held or was seized of, and must be confined to estate vested." In *Comstock v. Smith*, 18 Pick. 116, *WILDE, J.*, uses this language: "The tenant in covenanting to warrant and defend the granted or released premises must be understood to refer to the estate or *151 title sold or released, and not to the land, *because he certainly did not intend to warrant any estate or title not intended to be conveyed." In *Sweet v. Brown*, 12 Metc. 175, it was decided that, where "A. conveyed to B. by deed all his right, title, and interest in and to certain real estate, described by metes and bounds, corners and distances, with the usual covenants of seizin and warranty, the covenants were limited to the estate and interest of A. in the granted premises, and were not general covenants extending to the whole parcel described in the deed." See, also, *Allen v. Holton*, 20 Pick. 458; *Wight v. Shaw*, 5 Cush. 56; *Miller v. Ewing*, 6 Cush. 34; *Gee v. Moore*, 14 Cal. 472; *Kimball v. Semple*, 25 Cal. 452; *Rawle, Cov.* 525-527, and notes. It follows from these considerations that the court did not err in sustaining the demurrer, and the judgment will be affirmed.

(All the justices concurring.)

GEORGE LOWNSBERRY v. J. W. RAKESTRAW.

January Term, 1875.

1. Case Made: When to be Filed. It is not essential to the validity of a case made that it be filed with the clerk immediately after it has been settled and signed by the judge. It is enough if it be so filed within a reasonable time. In a district composed of several counties two months and a half is not an unreasonable delay in so filing a case made. *Quere*, would an unreasonable delay in filing affect the validity of a case made?¹
2. Indian Lands: Treaty Rights, how Determined. Where the determination of any question involving discretion is committed to any officer or tribunal within the limits of the jurisdiction conferred, his or their decision is conclusive thereof, and can be attacked collaterally only for fraud.
3. —. So, when it was provided by treaty that the Osage "half-breeds, not to exceed twenty-five in number, who have improvements on the north half of the lands sold to the United States, shall have a
- *152 *patent, said half-breeds to be designated by the chiefs and head-men of the tribe," *held*, that the designation by such chiefs and head-men was conclusive as to the right of the party designated to receive a patent, and that, in a suit brought by the grantee of such patentee to recover possession of the land, no inquiry could be made into the question whether such patentee was a half-breed of the Osage tribe, or whether he had any improvements on the north half of the land sold to the United States. [Rathbone v. Sterling, 25 Kan. 447.]
4. —. Where it was also provided by treaty that such designated half-breeds should receive patents for eighty acres each, "to include, as far as practicable, their improvements, all of said lands to be selected by the parties, subject to the approval of the secretary of the interior," *held*, that a selection of an eighty-acre tract by one of the designated half-breeds, and the approval of that selection by the secretary of the interior, gave to such half-breed a vested interest in the land, and was conclusive as against all persons claiming title acquired subsequently to the selection, and that the holder of subsequently acquired title could not show, as a defense to an action brought by the grantee of such half-breed, that such half-breed never had any improvements on the land.
5. —. Where the land selected was incorrectly reported to the secretary of the interior, the mistake could be corrected, even though the patent had already issued and the correct selection submitted to his approval; but where the party making the selection is aware of the mistake, makes no objection thereto, or effort to have it corrected, and assents to its submission to the secretary for approval, *held*, that such action was virtually a selection of the tract reported to the secretary.

Error from Neosho district court.

Ejectment, brought by Lownsberry, to recover possession of lot No. 3, and the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 4, in township 29 south, of range 20 east, containing 80.42 acres, in Neosho county, which

¹A case made may be temporarily withdrawn from the files, on leave, to have the same attested by the clerk of the court. *Pierce v. Myers*, 28 Kan. 364; correction of case made, *Edwards v. Porter*, 28 Kan. 700.

plaintiff claimed to own in fee-simple. Rakestraw answered, claiming title to said lands in virtue of certain rights acquired under a settlement thereon made by him in January, 1866, and a purchase made under the joint resolution passed by congress April 10, 1869. The land in controversy is part of the Osage lands conveyed to the United States by the treaty of September 29, 1865, (January 21, 1867.)

Lownsberry claimed as grantee of one William Tinker, a member of the Osage *tribe of Indians. Rakestraw not only claimed title in himself, as above stated, but he contended that the land patented to Tinker was not the land which had been selected for him, and that for this reason the patent was void, and plaintiff's title therefore failed. Trial at the December term, 1872. Verdict and judgment for defendant.

C. F. Hutchings, for plaintiff in error.

Stillwell & Baylies, for defendant in error.

BREWER, J. As a preliminary question, counsel for defendant in error insist that there was such a defect in the proceedings to make a case as is fatal to its validity, and that, therefore, there is nothing before us for examination. The case was signed May 1, 1873, but was not filed with the papers in the case until July 18, 1873. This it is claimed is fatal. The law in force at the time, as claimed by counsel, reads thus: "The case and amendments shall be submitted to the judge, who shall settle and sign the same, and cause it to be attested by the clerk, and the seal of the court to be thereto attached. It shall then be filed with the papers in the case." Laws 1871, p. 274, § 1. We are inclined to think the law applicable to this case must be found in section 1 of chapter 85, Laws 1870, p. 168; but it is, so far as this question is concerned, wholly immaterial which statute governs; the only difference being that in the latter the word "thereupon" is used, instead of "then." We do not consider the objection well taken. The law does not make an immediate filing a condition of validity. The case of *Brown v. Rhodes*, 1 Kan. *339, is cited as authority, but the reasoning of the court in that case shows that it is inapplicable. The question there arose as to the validity of a bill of exceptions filed two years and three months after the adjournment of the trial term. The court held that "the records of a
*154 term of *court are made during the term, and under the direction of the court;" that a bill of exceptions must be filed to become a part of the record, and that, therefore, it must be filed during the term, to become a part of the record of that term.¹ But with a case made the rule is different. Express authority is given to extend the time for making it beyond the term, and there is no statutory

¹See, also, *State v. Bohan*, 19 Kan. 48; *State v. Schoenewald*, 26 Kan. 289; *Scott v. McKinstry*, 27 Kan. 168. An objection to the decision of a judge at chambers should be reduced to writing, and presented to the judge for his allowance at the conclusion of the hearing when the decision is made, unless application is made for additional time, which may be given, but never to exceed ten days. If no time

mit within which it must be completed. The judge may fix the time within which the case must be made, that within which it must be served, that within which amendments thereto must be suggested, and the notice that must be given of the time of its presentation for settlement. When so presented, it is his duty to settle, sign, and certify it, and then it shall be filed with the clerk. But "then" does not mean the same day, for the judge may be several days' journey away from the clerk's office. It does not mean at the same term, for the term may long since have adjourned. The most that can be claimed is that it means that the case must be filed within a reasonable time. We do not decide that even that is essential to its validity. It may be claimed with much force that the time of filing is an immaterial matter; that the signature of the judge is the essential thing; and that even an unreasonable delay in filing will not affect its validity. It will be time enough, however, to decide that question when it is fairly before us. It is enough for this case to hold that it is sufficient if the case be filed within a reasonable time after it has been settled and signed, and that two months and a half is not, in a district composed of several counties, *prima facie* an unreasonable delay. We are compelled, therefore, to examine into the questions presented in the record.

The material facts are as follows: On the twenty-ninth of September, 1865, the Osage Indians made a treaty with the United States, which was ratified and proclaimed January 21, 1867, (14 U. S. St. 87,) by which they conveyed certain lands to the government, "to be surveyed and sold under the direction of the secretary of the interior on the most advantageous terms for cash; * * * but no pre-emption or homestead settlement shall be recognized; and, after reimbursing the United States the cost of said survey and sale, * * * the remaining proceeds of sales shall be placed in the treasury of the United States to the credit of the civilization fund," etc. See first article of treaty. By the fourteenth article it is provided that "the half-breeds of the Osage tribe of Indians, not to exceed twenty-five in number, who have improvements on the north half of the land sold to the United States, shall have a patent issued to them in fee-simple, for eighty acres each, to include, as far as practicable, their improvements; said half-breeds to be designated by the chiefs and head-men of the tribe, * * * and all of said lands to be selected by the parties, subject to the approval of the secretary of the interior." On the tenth of April, 1869, congress passed the following joint resolution:

"Resolved by the senate and house of representatives of the United States of America in congress assembled, that any *bona fide* settler

asked or given at the conclusion of the hearing before such judge, the parties are concluded, and are not thereafter entitled to present for allowance, and have settled and signed, a bill of exceptions. State v. Burrows, 33 Kan. 14; S. C. 5 Pac. Rep. 449.

residing on any portion of the lands sold to the United States by virtue of the first and second articles of the treaty concluded between the United States and the Great and Little Osage tribe of Indians September 29, 1865, and proclaimed January 21, 1867, who is a citizen of the United States, or shall have declared his intention to become a citizen of the United States, shall be, and hereby is, entitled to purchase the same in quantity not exceeding 160 acres, at the price of \$1.25 per acre, within two years from the passage of this act, under such rules and regulations as may be prescribed by the secretary of the interior: provided, however, that both the odd and even numbered sections of said lands shall be subject to settlement and sale as above provided: and provided, further, that the sixteenth and thirty-sixth sections in each township of said lands shall be reserved for state school purposes in accordance with the provisions of the act of admission of the state of Kansas: provided, however, that nothing in this act shall be construed in any manner affecting any legal rights heretofore vested in any other party or parties."

In September, 1867, the twenty-five half-breeds were "designated by the chiefs and head-men," and the "lands selected by the parties," as provided in said fourteenth article. William *Tinker was designated as one of these half-breeds, made his selection, and thereafter a patent for the land in controversy was issued to him, of date June 10, 1870, which recites that it was issued under the fourteenth article, and shows the approval, on the fifteenth of June, 1869, by the secretary of the interior, of the selection. On September 30, 1870, Tinker and wife deeded to Lownsberry, and this was his chain of title. In January, 1866, Rakestraw moved upon the land, made improvements upon it, and afterwards, having all the personal qualifications requisite, obtained a duplicate receipt for it under the joint resolution of 1869, though this receipt was thereafter canceled by the officers of the land-office, as issued by mistake. It appears probable from the testimony that prior to Rakestraw's occupation, and prior to the treaty, there had been some improvements on the land, though whether owned by Tinker or not is doubtful, but that all had been removed or destroyed prior to those dates. It was claimed that the land selected by Tinker was not the land embraced in the patent, and that through some mistake or design a change had been made intermediate the selection and the patent.

Upon these facts the court charged the jury as follows: "Should you therefore find from the evidence that on the twenty-ninth day of September, 1865, (that being the date of said treaty,) the said William Tinker had no improvement, as hereinbefore defined, on the land in controversy, and that long prior to the issuing of said patent to William Tinker for the land in controversy the defendant Rakestraw had a lawful and *bona fide* settlement upon said land, as defendant has in his answer averred, the issuing of the patent to Tinker in itself would

not operate to divest defendant of any rights he may have acquired before the issuing of said patent by virtue of settlement and improvements."

The court also refused this instruction: "If the jury find from the evidence that the chiefs and head-men of the tribe, before the tenth day of April, 1869, designated William Tinker as one of the half-breeds of the Osage tribe of Indians who should have a patent for eighty acres of land under the provisions of the fourteenth article of the *treaty of September 29, 1865, and that the said Tinker selected the land in controversy before the tenth of April, 1869, and his selection was afterwards approved by the secretary of the interior, then the said Tinker had on the tenth of April, 1869, a vested right in the land in controversy, and the defendant could obtain no title to the same, as against Tinker or his grantees, by purchase under the joint resolution of congress approved April 10, 1869." The same rulings appear elsewhere in instructions given and refused.

In their brief, counsel say: "The fact that said Tinker was designated as one of the twenty-five of the Osage tribe of Indians entitled to patents is not questioned by defendant in error, as the case now stands; but the two vital points we rely on in opposition to his right to rightfully receive a patent for the land in controversy are (1) that he never had any improvements on said land; and (2) that he never selected said land as his head-right."

In these rulings we think the learned court erred. Prior to April 10, 1869, Rakestraw's possession and occupancy gave him no rights in the land. He was simply a naked trespasser, whose possession, no matter how long continued, could never ripen into a title. *Wood v. Missouri, K. & T. Ry. Co.*, 11 Kan. *323. It is therefore, so far as respects the acquiring by other parties of any title from the United States under the provisions of the treaty, as though the land were wholly unoccupied and vacant. While it is true that only such half-breed Osages as had improvements on the north half of the lands were to be entitled to patents, yet the treaty provided a tribunal for determining who should thus receive patents, and the determination of that tribunal is conclusive. Testimony is no more admissible to show that William Tinker was not an Osage half-breed, or that he had no improvements on the north half of the land, than it would be, after the final determination of this case, to show that the facts upon which the judgment was based did not exist. *U. S. v. Arredondo*, 6 Pet. 729. Counsel in their brief do not seem to contest this proposition, or at least do not rest their case upon any denial of it; nor did the court instruct the jury in direct opposition thereto, though
 *158 it refused *an instruction asserting it, and did charge the jury that Tinker must have possessed the qualifications named to be entitled to a patent. Such ruling would be very apt to convey a wrong impression to the jury. The treaty not only provided for

designating the individuals, but for the selection of their lands, giving to the individuals named the privilege of making this selection, subject only to the approval of the secretary of the interior; and while it contemplated that such selections should include their improvements, yet it did not make this absolutely imperative. It says, "as far as practicable." It thus contemplated the possibility of selections outside of improvements. Perhaps the selection of one half-breed would cover the improvements of another, as well as his own. Perhaps other selections authorized by the treaty might conflict. Perhaps there might be conflicting titles to the same improvements. Whatever may have been the reason, the fact is apparent that the treaty contemplated the possibility that some selections might not cover the party's improvements. Hence the mere fact that the selection did not include the party's improvements would not necessarily defeat the selection.

Again, it provided for a selection subject to the approval of the secretary of the interior. Such approval was conclusive as against any rights which did not exist at the time of the selection. The approval related back to the selection, and confirmed it. The title thus acquired was good as against any one who did not then have a better claim. The only parties who at the time had any interest or rights in this land were the Osage Indians, the government, and Tinker. No one else could question the validity of the selection. So that whether Tinker had any improvements on the land at the time he made his selection or not, is a matter into which Rakestraw, holding by a subsequently acquired title, cannot be permitted to inquire. This ruling compels a reversal of the judgment, and the remanding of the case for a new trial. It will also have the effect of excluding on such subsequent trial much of the evidence offered on this trial.

*159 *The question of an error between the selection and the patent, we have not as yet considered, but perhaps should notice before closing. It is claimed that the land actually selected was the E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 9, instead of the land in controversy. It is true that if Tinker selected one piece of land, and by mistake another was reported to the secretary of the interior for approval, the error could be corrected, even though the matter had gone so far as the issue of the patent, and the actual selection might still be submitted to the secretary for his approval; but it is equally true that, if Tinker, before the tenth of April, 1869, became aware of the fact that a mistake had been made in the tract of land reported as his selection, made no effort to correct the mistake, and assented to its being thus presented to the secretary for approval, it was virtually a selection by him of the tract reported, and the approval of the secretary confirmed the title in him as of date prior to any rights which Rakestraw could acquire by his occupancy. We do not care to pursue this inquiry further, for we cannot anticipate the testimony which may be offered on the next trial.

The judgment will be reversed, and the case remanded for a new trial.
(All the justices concurring.)

OTTAWA UNIVERSITY v. W. L. PARKINSON.

January Term, 1875.

Witness: Expert: Knowledge. Where a witness testifies to facts within his own knowledge, such testimony is not that of an expert.

—: **Value of Attorney's Services: Competency of Witness.** Where a witness who knows of the employment of an attorney in a cause, and knows the services rendered by such attorney, and states that he is by profession an attorney and counselor at law, is seventy years of age, and that he was engaged as one of the attorneys in the case in which such services were rendered, he has shown himself competent to testify as to the value of the services so rendered.¹

*3. —. In so testifying it is proper to take into consideration the amount in controversy, the legal questions involved, and general importance of the case.

—: **Attorneys at Law: Value of Services.** What an attorney receives in a case is no criterion of the value of the services of another attorney in the same case, in the absence of any showing that the services were similar, the skill equal, and the time spent the same.

Error from Franklin district court.

Action by Parkinson to recover for services rendered by C. B. Mason, an attorney, in a cause brought and prosecuted in the district court of Franklin county against the Ottawa University. Mason made out his bill for said services, charging \$1,000 therefor, and giving credits on account of same, \$51.50, leaving a balance of \$948.50, which he assigned to plaintiff, and for which this suit was brought. Trial at the March term, 1874, when plaintiff had a verdict and judgment for the amount claimed.

John W. Deford, for plaintiff in error.

W. L. Parkinson, defendant in error, for himself.

KINGMAN, C. J. This was an action to recover for professional services rendered by C. B. Mason for plaintiff in error, in a certain case, which had passed by assignment to the defendant in error. The answer was a general denial. The issues were tried by a jury, and resulted in a verdict for plaintiff. The reversal of the judgment entered upon this verdict is sought upon two grounds only.

The first is the admission in evidence of the deposition of Wilson

¹As to expert testimony, see *Tefft v. Wilcox*, 6 Kan. 33, and note.

Shannon, Esq. It is as follows: "My age is 70, and my residence is in the city of Lawrence, state of Kansas, and my profession is that of an attorney and counselor at law. I was engaged as one of the

attorneys in the case of James Wind *et al.* v. The Ottawa University *et al.*, in the district court in and for the county of Franklin, (case No. 804,) on the part of the plaintiff. C. B. Mason, A. W. Benson, H. P. Welsh, J. W. Deford, and S. O. Thacker appeared as attorneys for the Ottawa University. I am acquainted with the services rendered by C. B. Mason in said case, and taking into consideration the amount in controversy, and the legal questions involved, and the general importance of the case, and the labor performed, I should consider \$1,000 a fair and reasonable fee for the services of the said Mason. And further this deponent saith not."

The grounds on which this deposition was objected to are thus stated by plaintiff in error: "It was incompetent and immaterial because—*First*, said Shannon does not state that he was acquainted with the value of lawyers' professional services in Franklin county at the time the services referred to in said deposition were rendered; *second*, because, although the witness Shannon states that he is 'acquainted with the services rendered by C. B. Mason, in said case,' he does not specify what those services were,—it being controverted in the defendant's answer that said Mason rendered any services therein; *third*, because said Shannon states that he 'should consider \$1,000 a fair and reasonable fee for the services of the said Mason,' 'taking into consideration the amount in controversy, and the legal questions involved, and the general importance of the case, and the labor performed,' whereas the witness should only have taken into consideration the actual labor and services performed, and should have given his opinion thereupon as to the reasonable value of such labor and services at the time and place at which they were done and performed."

We think the objections are not well taken. It will be observed that the objections were to the deposition as a whole. Now, whether any services were rendered by Mason was one of the issues in the case, and, in so far as the deposition speaks of rendering the services in the case for which the action was brought, the same was clearly admissible, and is not touched by the objections offered thereto, even if they are sound. Where a part of a deposition is clearly competent and admissible, and the objection is made to it as an entirety, is the

court bound to separate the objectionable from the unobjectionable part, unaided by the suggestion of counsel as to the part that he desires stricken out? If so, then a grave duty is imposed upon the court; for, upon the presentation of a deposition, the party against whom it is to be read has but to object, and the court must read all of it, to strike out but a single paragraph. We need not decide this question here. We hardly think it needs deciding. The deposition was properly read, because the witness testifies d

ely to facts in his knowledge. He was in the case in which Mason's services were rendered, knew what those services were, and then testified what they were worth. We do not understand that he testified as an expert. His long practice as an attorney and counselor at law may be inferred from his age; and from such long practice of his profession he would be qualified to state the value of services rendered under his own eye, and necessarily subjected to his careful scrutiny from his position as opposing counsel. If there are any doubts about his conclusion, they will vanish when it is known that the record is silent as to what other evidence was received; and, for anything the record shows, there may have been abundant evidence given of the great experience and high standing in his profession of the venerable witness. It is claimed that the premises on which the witness based his estimate of the value of the services rendered are erroneous; that he had no right to consider "the amount in controversy, and the legal questions involved, and the general importance of the case," in making his judgment of the value of the services. But we think these were all proper and important elements in determining the value of the services. We know that an attorney is bound to fidelity to his client as much when the amount is one dollar as when it is a million. His obligation is not changed. But it is in the knowledge of every professional man that when great interests are confided to his care he is expected to use the utmost diligence in the preparation of the case. He is not expected to nor does he limit his services by the rule of ordinary care and skill that governs him in an ordinary case. So, in *Duncan v. Yancy's Ex'rs*, 1 McCord, 149, the court held that the great value of the property in contest, and the doubtful nature of the right to be tried, were proper and important elements in determining the value of the services.

The other error alleged is the striking out from the deposition of O. Thacher, Esq., this paragraph: "I settled for my services in that case with the Ottawa University, receiving \$100 in full satisfaction thereof. This was all I asked; and, while I think it was a moderate fee, it was a reasonable one." He had already stated that he had been engaged in the case with Mason and others from the beginning of the case to its termination, but he does not say that he knew what services were rendered by Mason, but thinks no steps were taken in the main cause without consulting him, though some hearings were had at chambers when he was not present. The paragraph was rightly stricken out. The value of Mason's services were in issue, not those of the witness. The excluded testimony did not show the opinion of the witness as to the value of Mason's services in the case. We might infer, perhaps that what was a fair value for one attorney's services in a case would be some criterion of the value of another attorney's in the same case; but that would depend much on the nature of the services rendered by each. If they were of equal ability and standing, one might be entitled to much the larger fee because of the

labor and care in preparing the case, in the search for and procuring evidence, and in manifold ways, well known to the profession; that what would be a reasonable fee for one would be wholly inadequate for the other. The paragraph stricken out would have likely misled the jury, on this account. It is proper to say that no part of the evidence is preserved in the record, save the two depositions referred to.

The judgment must be affirmed.

(All the justices concurring.)

*164 *OTTAWA UNIVERSITY v. H. P. WELSH and others.

January Term, 1875.

Attorneys at Law: Value of Services. The rule for determining the value of the services rendered by an attorney at law, stated in *Ottawa University v. Parkinson*, ante, *159, approved and followed.

Error from Franklin district court.

The action below was by H. P. Welsh and A. W. Benson, as partners, to recover for services rendered by them for plaintiff in error. The plaintiffs had judgment, at the March term, 1874, of the district court, for \$1,000 and costs.

John W. Deford, for plaintiff in error.

Welsh & Benson, defendants in error, for themselves.

KINGMAN, C. J. The only error alleged in this case is the same as the first considered in the case of *Ottawa University v. Parkinson*, just decided; and for the reasons therein given the judgment in this case is affirmed.

(All the justices concurring.)

JOSEPH KERMEYER v. HENRY NEWBY.

January Term, 1875.

Payment: Bank-Check. The mere taking of a bank-check for a debt is not a payment of the debt until cashed, nor is it an extinguishment of the contract for which it was given.¹

¹ Where a promissory note is executed for a pre-existing debt, it is wholly without the control and direction of the parties themselves, at the time the note is executed, whether it shall serve as the absolute payment and extinguishment of the original debt or not. *Shepard v. Allen*, 16 Kan. 182. The acceptance of a note by the creditor of one of several joint debtors does not have the effect to discharge

Error from Leavenworth district court.

The case is stated in the opinion.

165 *F. P. Fitzwilliam, for plaintiff in error.

Charles W. Helm, for defendant in error.

KINGMAN, C. J. This action was upon an account for \$319.92 for cattle sold and delivered by Newby to Kermeyer. The answer was a general denial, and payment, but on the trial it was admitted that the plaintiff, Newby, sold and delivered the cattle at the price stated in the petition. The case was tried by the court, who found generally for the plaintiff; thereby finding, in addition to the admitted facts, that payment had not been made. There were no special findings of fact, and no question of law raised for this court, except that the evidence does not sustain the judgment. The conditions upon which this court will reverse a judgment of the court below on this ground have been too often decided to need statement here. It is only necessary to examine the record to see if there was evidence tending to support the judgment of the court on the want of payment for the cattle. The testimony is in substance as follows: Kermeyer testifies positively that he paid for the cattle in money, and strengthens his testimony by that of witnesses who heard conversations between himself and Newby, in which Newby admitted payment either in money or check. On the other hand, Newby testifies that he had taken for the cattle a check on the German Savings Bank of Leavenworth, which he had lost, and introduces some other testimony tending to strengthen his own, and throw doubts on the testimony of the defendant as to the payment in money. In this testimony the plaintiff used these expressions: Having testified to the sale and delivery of cattle to defendant at different times, he said: "He [defendant] paid me sometimes with checks on the German Savings Bank of Leavenworth, and sometimes in cash. * * * He paid me the amount I claim in a check on the German Savings Bank, and did not pay me cash for this lot of cattle. * * * I received the check in payment of the lot of cattle, and must have lost it."

of other debtors, without an agreement to receive it in payment or satisfaction. *Edberry v. Soper*, 17 Kan. 369. See also, *McCoy v. Hazlett*, *post*, *430. Where a debtor hands to his creditor the check of a third party, payable to bearer, and undorsed, and such check is not received as payment of the debt, and on presentation is not paid, by reason of the suspension of the bank, and is promptly returned to the debtor, and by him to the drawer, who promises to pay the amount thereof to such debtor; and where, at the time of drawing the check, the drawer has no funds in the bank to meet it, and at the time of the suspension of the bank is still indebted to it in a large amount: *held*, that the debt was not discharged, and that the creditor could recover the same of his debtor, notwithstanding the fact that, while living within fifteen miles of the bank, he had retained the check twenty-six days before presentation, during twenty-five of which the bank was open, and also that the president of the bank testified that the check would have been paid presented before suspension. *Mordis v. Kennedy*, 23 Kan. 408. Acceptance of drafts as payment, see *Shaffer v. McKanna*, 24 Kan. 22. A check is not *prima facie* evidence of payment. A check drawn in favor of the debtor's agent is not *prima facie* evidence of payment, even if the creditor assents that the check shall be so drawn. *Mullins v. Brown*, 83 Kan. 312; 8 S. C. 4 Pac. Rep. 305.

On this evidence the plaintiff in error (defendant below) insists that he ought to have had judgment, as in law it makes no difference whether payment was made in cash or by check. It is unquestionably true in law, however it may be in fact, that, if *payment* be made, it matters not whether it be by check or money. The real question is, was *payment* made? The court must have found these facts, or could not have given judgment: *First*, that the cattle were sold and delivered by plaintiff to defendant at the price alleged; *second*, that there was no payment therefor. To reach this last conclusion it is certain that the court must have found that a check was given for the price of the cattle, and that the check was not payment for the cattle. Under all the evidence in the case, this court is not able to say that any of the facts found as above are erroneous, and the only question for this court is whether the taking of the check is a payment in law. There is no doubt that if, by agreement, it is taken as a payment, then the law makes it a payment, as much as if paid in cash; but there is no evidence of any such agreement, save the inference that may be drawn from the terms used by the plaintiff, quoted above, and the court must have held these expressions as but the loose use of words by the witness, who would hardly have admitted payment of a claim that he was seeking to establish. Take his whole testimony together, and we cannot say the court erred in that conclusion. Then the law question which we have to consider is simply whether taking a check is a payment.

On this subject, Parsons, in his work on Bills and Notes, (page 85), says: "It is undoubtedly payment as soon as it is cashed; but, generally at least, not until then." In a subsequent chapter (page 15 *et seq.*) the authorities on the presumptions of law as to payment by accepting negotiable paper for a debt are referred to, and from *167 them it will be seen that as a general rule, in this country "and in England, that the acceptance of such paper does not extinguish the original debt. The exceptions are carefully pointed out, and the facts and principles stated on which the exceptions are founded, but none of them are broad enough to include this case. One of the exceptions would be where a party had taken negotiable paper, and by his own laches a loss is incurred, then, upon proof of such loss by the debtor, the negotiable paper becomes, by the negligence of the holder, a satisfaction of the debt without a special agreement; but the burden of proving this loss is upon the debtor. In Massachusetts, Maine, and Vermont, it seems to have been long established that the taking of a note is the extinguishment of the debt. In Wisconsin (Mehlberg v. Fisher, 24 Wis. 607) it seems that the receiving of a check is *prima facie* evidence of the payment of the debt, and is absolute payment if the holder of the check, through his own negligence, fails to take proper steps to obtain payment. In all the other states, so far as examined, the rule of the common law prevails, that the giving of one simple executory contract for another does not extinguish

the latter. In this case, therefore, we but follow the rule of the common law, and the current of authorities, in holding that the simple making of the check was not a payment of the debt, nor an extinguishment of the contract for which it was given. The authorities to support this conclusion are referred to in note a, p. 153, Pars. Notes & Ills. The judgment must therefore be affirmed.

VALENTINE, J., concurs.

BREWER, J. I concur in the decision, but rest my judgment on slightly different grounds.

68 *ALEXANDER McLAUGHLIN v. DEWITT C. DAVIS.

January Term, 1875.

Recess: Petition for Wrongfully Suing Out Attachment. In a petition to recover damages for the wrongful issue of an attachment it is unnecessary to aver a want of probable cause for the suing out of the attachment, or a determination of the action in which the attachment was issued.¹

Error from Labette district court.

The case is stated in the opinion.

Ayres & Fox, for plaintiff in error, contended that the action below was for maliciously suing out an attachment, and that the petition should have averred want of probable cause for the suing out of the order, and the determination of the attachment suit; and they cited *Trake*, *Attachm.* 587; *Besson v. Southard*, 10 N. Y. 236; *McKown Hunter*, 30 N. Y. 625; *Marbourg v. Smith*, 11 Kan. *554.

F. A. Bettis, for defendant in error, contended that the action was for the mere wrongful suing out of the order of attachment; and that,

¹An action to recover damages for the wrongful issue of an attachment is not prematurely commenced when commenced after the dissolution of the attachment, and before the final determination of the action in which the attachment was issued. *Kerr v. Reece*, 27 Kan. 469. Where a motion is duly made to dissolve an attachment, on the two grounds alone that the allegations in the affidavit therefor are false, and that the case is not one in which an attachment may issue, and the judge, upon proper notice and the hearing of the affidavits, dissolves the attachment, held, in an action upon the attachment bond, that this decision is conclusive (unless reversed by proceedings in error) that the attachment was wrongfully obtained. *Hoge v. Norton*, 22 Kan. 374. An action may be maintained against a corporation to recover damages for wrongfully, maliciously, and without just or probable cause obtaining and levying an order of attachment upon personal property. *Western News Co. v. Wilmarth*, 33 Kan. 510; *S. C. 6 Pac. Rep.* 786. This case, on motion for rehearing, challenging the authority of *McLaughlin v. Davis*, 8 Pac. Rep. 104; motion overruled, as the question was not made when case first presented.

if there was no *actual* cause, then probable cause is no defense to action for actual damages. In cases cited by plaintiff in error, the order of attachment could be obtained upon allegation under oath of the *belief* of the affiant in the existence of the alleged cause of attachment. Hence probable cause would authorize such belief, and would have been a defense. But under the statutes of Kansas an allegation of a cause of attachment made upon *belief* is not sufficient. The positive existence of the cause or grounds upon which the writ may issue must be sworn to, and probable cause is no defense.

*169 *Brewer, J. Davis commenced an action against McLaughlin, and caused an attachment to be issued and levied on his goods. On motion, this attachment was dissolved, and thereupon McLaughlin commenced this action to recover damages for its wrongful issue and levy. A demurrer to this petition was overruled, and of this plaintiff in error complains. The petition is not on the attachment undertaking, but alleges the issue and levy of the attachment, its dissolution, that the statements in the affidavit were absolutely false, and that McLaughlin "wrongfully, willfully, maliciously, and with intent to injure," sued out the attachment. It is insisted that "the petition should have averred want of probable cause for the suing out of the order, and the determination of the attachment suit. Neither of these is necessary. A party is entitled to an attachment only when certain facts exist, not when there is probable cause to believe that they exist. Civil Code, § 190. If they do not exist, the attachment is wrongfully issued, and the party causing it to issue is liable for all the damages actually sustained. Nor is it necessary in such case, to set out or sue on the undertaking. If the surety on the undertaking is liable, *a fortiori* the principal is; and that, not for the reason of the undertaking, but of the act for which it was given. No need the determination of the attachment suit be averred. The attachment is but ancillary to the action in which it was issued. It stands or falls without affecting the progress or termination of the suit. A party may have a just cause of action, but no right to a wrongful attachment; nor can he justify a wrongful attachment by a valid action. Hence the claim for damages for a wrongful attachment does not depend upon and need not wait for the termination of the action. In this petition, it is true, there are allegations appropriate to an action for malicious attachment, and unnecessary in one for a merely wrongful attachment. But all these may be ignored as surplusage. There is not enough to make out the former action, but

*170 *ample for the latter. Of course, being simply an action for a wrongful attachment, only actual damages can be recovered, and the court will on the trial exclude from the jury all those other considerations which may properly be submitted in cases of malicious and willful wrong. The order will be affirmed.

(All the justices concurring.)

STATE OF KANSAS v. JOHN SULLIVAN.

January Term, 1875.

Supreme Court: Review of Trial upon Agreed Statement of Facts. In criminal as well as civil cases, where the facts are agreed, this court can determine what conclusions are to be drawn therefrom as readily and fully as the trial court.

Trespass: Opening Fence. Where a party is charged, under section 2 of chapter 113, Gen. St., with having voluntarily and unlawfully thrown down a fence other than that "leading into his own inclosure;" and where it is agreed that defendant and the prosecuting witness occupied, with inclosed fields, separate portions of the same tract, the right to purchase which from the government they were contesting; that defendant had built a house within the limits of his field, which he had been for months occupying as his home; that his west fence was along a county road, through which fence he was accustomed to pass to and from his house at a place where there was a "slip-rail gap," or a "loose rail;" and that the prosecuting witness had, a few days before the alleged offense, built around the inclosure of defendant an outer fence, which, along the county road, was but eighteen inches or two feet from defendant's fence: *held*, that the defendant had committed no offense, under the statute, in removing that portion of this outer fence in front of the "slip-gap" in his own fence, so as to permit his passage to and from the county road.¹

Appeal from Montgomery district court.

Sullivan was tried before a justice of the peace, and convicted for alleged violation of section 2 of chapter 113, Gen. St., "An act to prevent certain trespasses." He appealed to the district court, where another trial was had at the September *term, 1874; M. S., judge *pro tem.*, presiding. The facts were agreed to, and by the parties, and filed. The defendant was again convicted. *Turner & Ralstin* and *R. J. Hill*, for appellant.
A. B. Clark, Co. Atty., for the State.

BREWER, J. This case was tried by a judge *pro tem.*, and without jury, upon an agreed statement of facts. The charge was that defendant voluntarily and unlawfully threw down a fence other than that "that led into his own inclosure," and was brought under section 2 of the "act to prevent certain trespasses," Gen. St. 1096. Defendant was found guilty, and sentenced to pay a fine of five dollars, from which sentence he has appealed to this court. As this case was based upon an agreed statement of facts, and without the introduction of witnesses, it is presented to us very much as it was to the trial

See, also, *State v. Armell*, 8 Kan. 198, and note; *Wright v. Brown*, 5 Kan. 365, and note; joinder of actions under said chapter, *Felter v. Manville*, 23 Kan. 191; cutting timber by mistake, *Wagstaff v. Schippel*, 27 Kan. 450; purchase of void title, *Sullivan v. Davis*, 29 Kan. 28; vacant land, *Fitzpatrick v. Gebhart*, 7 Kan. 541; evidence of title, *Douglass v. Dickson*, 31 Kan. 810; S. C. 1 Pac. Rep. 541.

court. Those considerations, so often adverted to, which uphold the decision of the lower tribunal in doubtful cases, have no application here. We can act upon it in almost the same manner as though it were an original case in this court. *Kansas Pac. Ry. Co. v. Butler*, 7 Kan. *308. Do the facts as agreed upon show a violation of the statute by the defendant? It seems to us clearly not. The facts are substantially these: For months prior to the alleged misdemeanor, defendant and one Kennedy were occupying the same tract of land, and contesting the right to purchase it from the government. A trial in the local land-office had resulted in favor of Kennedy, but an appeal therefrom was still pending before the commissioner of the general land-office. Kennedy had a field fenced on the south side of the tract. On the north, defendant had built a house, and was occupying it. This house was about forty yards from a county road, which ran along the west line of the tract. Around *172 this house defendant had built a fence, the west line of which was on the county road, through which, at a place where was a "slip-rail gap," or "loose rail," he passed to and from his house. About a week or ten days before the commission of the alleged offense, Kennedy built a fence so as to entirely inclose defendant's house and field, the west fence of which along the county road was only eighteen inches to two feet from defendant's fence. In building this fence, he put a post opposite the center of the "slip-gap" above referred to, which he nailed some rails or slats. Defendant knocked off the slats and pulled up the post, and passed in and out with his team and wagon. Kennedy replaced the post and slats, and defendant a second time removed them, and this removal was the offense charged. In this there was no criminal offense. It did not come within the statute. The fence thrown down was between his house and the public road, placed across the very way he had been accustomed to pass in and out from his home. It was not, therefore, in the language of the statute, one "other than those that lead into his own inclosure." If this conviction be right, any man may have his homestead fenced in by an outer fence, and be thus debarred ingress and egress. Such is not the law. The contest between Kennedy and defendant cannot thus be carried on through the aid of the criminal law. With equal propriety might defendant surround Kennedy's field with an outer fence, and then ask to have him punished criminally if he broke down to get into his field.

The judgment will be reversed, and the case remanded, with instructions to discharge the defendant.

(All the justices concurring.)

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*STATE OF KANSAS v. THOMAS J. HOWARD.

January Term, 1875.

1. Self-Defense: Instructions. Where, in an action in which the charge is shooting with intent to kill, the question is one of self-defense, it is error to instruct the jury that if, as a matter of fact, the defendant was in no imminent danger, they must convict.
2. Self-Defense: Rule. The rule is that, if the defendant had reasonable grounds to apprehend that he was in imminent danger, he is justified in defending himself.¹

Appeal from Doniphan district court.

The case is stated in the opinion.

W. D. Webb and B. A. Seaver, for appellant.

We ask the attention of the court to the fifth instruction for the state. We do not think that the law is that a man cannot be justified in shooting another unless there is reasonable ground to believe there is a design to do great bodily harm, and that such design must be so apparent as to induce a belief of it *in the mind of a jury*, sitting in perfect quiet and security, surrounded by the officers of the law, at a far-distant time from the danger, and that such belief must unite with the *fact* that the danger was absolutely imminent. The instruction says, "and if the jury finds that the defendant was in no such imminent danger, they will convict." We claim the rule to be that, if he was in *apparent* danger, he had the right to shoot, and that all that the state can claim is that the jury may say whether there was *apparent* imminent danger. The *fact* itself of imminent danger is not the question. I may draw a revolver on a man, and threaten to shoot him, and, while holding it on him, he may shoot me. Now, if the *fact* of imminent danger is the question, if my revolver is not loaded, my enemy who shoots me under such circumstances becomes

*174 a murderer; while, if it is a question of *"apparent* imminent danger, he would be, as he should be, acquitted.

D. M. Johnston, for the State.

BREWER, J. Defendant was convicted in the district court of Doniphan county under an information charging an assault with intent to kill. There was no dispute but that Howard shot the prosecuting witness, but the claim was that such shooting was in self-defense. Upon this question, at the instance of the state, the court gave the following instruction: "The shooting by the prisoner at Collier would be justified, under our laws, only in case it was committed by the prisoner when there was reasonable ground to apprehend a design to do him great bodily harm, and that there was imminent danger of

¹See State v. Bohan, 19 Kan. 28; evidence, see State v. Scott, 24 Kan. 68. See the note to State v. Potter, 13 Kan. *414.

such design being accomplished; and the jury are the judges, and it is for the jury to say whether there were any reasonable grounds for such apprehension, and whether there was, at the moment that the shot was fired, imminent danger that some great bodily harm would have been done to prisoner; and, if the jury find that the defendant was in no such imminent danger, they will convict."

In the latter portion of this instruction the court erred. The jury are in substance told that the question is as to the actual existence of danger, and not as to the reasonable apprehension, of danger; that the reasonable apprehension refers to the design to injure, and not to the imminence of the danger. Under such an instruction, no matter how threatening the conduct of the party shot, no matter though it be as great as to create in any mind an irresistible conviction of imminent peril, yet, unless the imminent peril actually exists, the shooting is not in self-defense. Thus, if a party approaches with a drawn pistol and threatens to kill on the spot, it is not self-defense to kill such assailant unless his pistol be in fact loaded, and he thus actually able to carry out his threat. In other words, if the pistol of the assailant is loaded, it is self-defense; if not, it is murder. The law is not too

harsh. All that it exacts is that there shall be a reasonable apprehension of imminent danger, and of the reasonableness of this apprehension the jury are to be the judges. A party assailed is justified in acting upon the facts as they appear to him, and is not judged by the facts as they are. It is not to be wondered at that this error occurred; for such, at first view, seems to be the meaning of the statute,—the apparent import of the language used. But this language is not new in our statute. It will be found in the statutes of other states, and had received a settled construction elsewhere before it was introduced here. 2 Whart. Crim. Law, §§ 102, 1027, and notes; Shorter v. People, 2 N. Y. 197. Indeed, when the court gave the instruction asked by defendant,—and its attention was probably not drawn to the statute,—it stated the law correctly, and in accordance with the well-settled current of late authority. Yet, as we cannot say which instruction influenced the jury, and as it may be that the verdict rested on the erroneous one, we are compelled to reverse the judgment, and remand the case for a new trial. Horn v. State, 1 Kan. *73.

(All the justices concurring.)

WILLIAM M. AYRES and others v. RICHARD PROBASCO.

January Term, 1875.

1. **Evidence: Leading Questions: When Allowable.** Leading questions may sometimes be put to a party's own witness; and it is possible that in some cases a court may abuse its discretion by refusing to permit such questions to be asked.
2. **Principal and Agent: Knowledge of Agent.** Where a transaction is carried on and consummated by one person, acting as the agent for another person, whatever comes to the knowledge of the agent pending the transaction must be presumed to come to the knowledge of the principal.¹
3. **Usury: Construction of Statutes.** In an action on a promissory note given in 1871, while section 4 of the usury law of 1868 was in force, *176 (Gen. St. 526,) said section 4 governs with regard to the forfeiture of interest on usurious contracts, although a subsequent law upon that subject has been passed. *Jenness v. Cutler*, 12 Kan. *500; [*School-district v. State*, 15 Kan. *49.]²
4. **Mortgage: Execution of, in Blank.** Where husband and wife sign and acknowledge a blank mortgage, with the understanding and agreement that it shall afterwards be filled up so as to make it a mortgage on a certain piece of land owned by the wife, and occupied by herself and husband as their homestead, and so as to make it a mortgage to C. to secure the payment of \$1,000, and also give authority to a third person to so fill up the blank, and the mortgage is afterwards filled up in the presence and with the consent of the husband and said third person, but in the absence and without the knowledge of the wife, so as to make it a mortgage on said property, but so as to make it a mortgage to P. instead of C., and to secure the payment of \$1,100 instead of \$1,000, *held*, that said mortgage after it is so filled up is not the mortgage of the wife, and is void as to her.³
5. **Statute of Frauds: Authority to Agent to be in Writing.** Where a party signs and acknowledges a blank mortgage, another person acting as the agent of such party cannot afterwards in the absence of his principal fill up the blanks in said mortgage so as to make it the mortgage of his principal, and then deliver the same to the intended mortgagee, unless he is authorized so to do by his principal *in writing*.
6. **Estoppel: Void Mortgage.** Where a mortgage was executed in blank as above mentioned, in proposition 4, to secure a loan of money, and the husband received the money loaned and with it paid off a prior mortgage on the land attempted to be mortgaged by such second mortgage, and the mortgagee through his agent was fully cognizant at the time he parted with his money, and received the mortgage, of the manner in which the mortgage was executed, *held*, that the wife is not estopped from claiming that the mortgage is not her mortgage, and that it is void as to her.⁴

¹See the full note of cases to *Huff v. Farwell*, 25 N. W. Rep. 255.

²See full note on usury to *Clark v. Spencer*, *post*, *398.

³Deed executed in blank, assumed to be void, *Tucker v. Allen*, 16 Kan. 812. See *Chicago L. Co. v. Ashworth*, 26 Kan. 315. See the note to *Arguello v. Bours*, 8 Pac. Rep. 52.

⁴Deed procured by fraud, *McNeil v. Jordan*, 28 Kan. 7. Fraudulent conveyances, see notes to *State v. Wallace*, 24 N. W. Rep. 610; *Lewis v. Hopping*, 8 Pac. Rep. 75; *Knight v. Kidder*, 1 Atl. Rep. 143; *Zoeller v. Riley*, 2 N. E. Rep. 392.

7. **Homestead: Mortgage of Husband Alone, Void.** And the mortgage being void as to the wife, and being on property owned by her and occupied by herself and husband as a homestead, the mortgage is also void to both the husband and wife. *Morris v. Ward*, 5 Kan. *239; *Dollman Harris*, Id. *597.¹

ON REHEARING.

8. **Mortgage: Alteration: Delivery after: Void Mortgage.** Where an instrument or paper is executed or authorized to be executed to a particular person as mortgagee, and without any authority from and without the knowledge of the mortgagor the name of a wholly different party or person is inserted in such paper or instrument as mortgagee, a delivery of such paper or instrument to the person so named, or his agent by person to whom such paper or instrument had been intrusted, without the knowledge or consent of the party named as mortgagor, is not a delivery by such mortgagor, and is wholly void.
9. **Estoppel: Not Created by Involuntary Benefits.** A party who receives an involuntary benefit, (as, where a wife is benefited by the payment by her husband of a mortgage lien on the homestead, the title to which homestead is in the wife,) which benefit is so received without such party's knowledge or procurement, is not thereby estopped from denying the validity or legality of a pretended instrument or mortgage used by the party conferring the benefit as the instrument or mortgage of the party so involuntarily benefited, and as a security to obtain the money employed in conferring the benefit, but of the existence of which instrument such benefited party was wholly ignorant.²
10. ———. The case of *Knaggs v. Mastin*, 9 Kan. *532, cited, considered and distinguished.
11. **Mortgage: Title to Mortgaged Lands.** Where neither the pleading nor the mortgage given by husband and wife show in whom the title to the premises is, the presumption, in the absence of proof, is that the title is in both the mortgagors. But it is competent, to save or determine the rights of either party, to show by proof in whom the title in fact is, — whether the husband, the wife, or both.
12. **[Homestead: Lien on, in Equity: Void Instrument.** It would seem that, where one person advances money with the consent of the owner of a homestead to extinguish some existing lien upon such homestead, with the understanding of the parties that the person so advancing such money shall acquire a lien upon such homestead, such person will in equity acquire such lien to the extent of the money so advanced and so used to extinguish such first-mentioned lien, notwithstanding the instrument claimed to create or to evidence such lien in favor of the party so advancing the money may be void.³ Per VALENTINE, J.]
13. **[Statute of Frauds: Authority to Agent.** The fifth proposition above stated, regarding the authority of agents in certain cases, and the

¹See *Thimes v. Stumpff*, 33 Kan. 59; S. C. 5 Pac. Rep. 431.

²Estoppel, see full note to *Carithers v. Weaver*, 7 Kan. 72.

³The doctrine of subrogation will not be applied to relieve a party from the consequences of his own unlawful act. *Johnson v. Moore*, 33 Kan. 90; S. C. 5 Pac. Rep. 406. Where money is loaned upon the security of what is supposed to be a valid mortgage, but which in fact is a forged and void mortgage, and the money is so loaned for the purpose that a prior valid mortgage may be discharged, which is done, the mortgagee of the void mortgage may be subrogated to the rights of the prior mortgagee, there being no intervening liens or incumbrances. *Everston v. Central Bank*, 33 Kan. 352; S. C. 6 Pac. Rep. 605.

necessity for such authority to be in writing, is again considered by VAL-
 ENTINE, J.; and the case of Van Etta v. Evenson, 28 Wis. 33, com-
 mented on, and disapproved.]

Error from Doniphan district court.

Probasco brought suit to recover on two notes, of \$550 each, exe-
 cuted by Wm. M. Ayres to him, and to foreclose a mortgage given by
 Ayres and wife to secure said notes. Frank Sutter, as the
 *178 holder of a second mortgage, *was joined as a co-defendant.

Afterwards the court ordered W. L. Challiss made a defendant.
 Each defendant answered separately. Ayres and wife each pleaded
 that \$100 of the notes was usury, and denied the execution of the mort-
 gage, but specially admitted that they executed a "blank mortgage"
 for the purpose of procuring a loan of money from said Challiss for
 \$1,000. The blanks in this mortgage were afterwards, in the pres-
 ence of Ayres, but in his wife's absence and without her knowledge or
 consent, filled with Probasco's name, and the sum of \$1,100, and it
 then was delivered to Challiss as agent instead of as principal. Mrs.
 Ayres made her husband's answer a part of hers, and he the same
 with her answer, and both asked for affirmative relief, that said sup-
 posed mortgage be adjudged and decreed to be null and void, and that
 the record thereof be canceled. The mortgage does not, nor does
 either answer, show or aver in whom was the title to the mortgaged
 property. The district court at the September term, 1873, gave judg-
 ment in favor of Probasco for the recovery of the \$1,100 and interest,
 and for the foreclosure of the said mortgage, and also found in favor
 of Sutter for the amount claimed by him, and decreed a foreclosure
 of the mortgage held by him as a second lien on the premises, ad-
 judging the same to be subsequent to the lien of Probasco's mortgage.
 From such judgments and decrees Ayres and wife and Sutter appeal,
 and bring the case here on error.

Everest & Greenwood, A. Perry, and B. O'Driscoll, for plaintiffs in error.

The court erred in submitting to the jury the following questions,
 and receiving their answers thereto, to-wit: *Question No. 10.* "Did
 defendants Wm. M. Ayres and Melissa T. Ayres obtain and apply to
 their use and benefit the proceeds of such loan? (the loan from Pro-
 basco.)" *Answer.* "Yes." *Q. No. 17.* "Did Mrs. Ayres, after learning
 the facts of such loan, consent to the using the proceeds thereof for
 the benefit of herself and husband?" *A.* "Yes."

*179 *Question No. 10 was improper and prejudicial to the rights
 of Mrs. Ayres. If the question was submitted for the purpose
 of sustaining the execution of the mortgage on the ground of any
 equitable estoppel as against her, it should have been submitted as
 to her alone. There was no evidence upon which question No. 17
 could have been submitted, as there is no proof that Mrs. Ayres ever

knew the facts in reference to this transaction, or that any part the money passed into her hands, or that she ever used the same.

The jury found specifically that the name and place of residence Probasco were inserted in said mortgage on the sixth of December 1871, at the office of W. W. Guthrie, in the city of Atchison; and the court erred in refusing to submit to the jury for their answer to the following questions of fact, prepared and presented by defendant below, to-wit: *Question No. 32.* "Was the defendant Melissa T. Ayres present at the time the name of Richard Probasco was written in said mortgage, and did she have any knowledge thereof or consent thereto?" *Q. No. 34.* "Was the defendant Melissa Ayres the owner in her own right of the mortgaged premises mentioned and set forth in plaintiff's petition, at the time the said mortgage is claimed to have been signed, executed, and acknowledged by said Melissa?" *Q. No. 38.* "What is the value of said notes of L. O. McNamee transferred by defendant Wm. M. Ayres to plaintiff, or to defendant Challiss his agent?" *Q. No. 39.* "Did defendant W. L. Challiss, in making the loan of money to defendant William M. Ayres, in accepting and receiving the notes and mortgage set forth in plaintiff's petition, and in taking and receiving the notes of said McNamee and in the receiving the said deed from defendant Wm. M. Ayres, and in the whole transaction between the plaintiff and defendant Wm. M. Ayres, act as the agent and attorney of said plaintiff?" *Q. No. 41.* "What was the consideration paid for which the said two notes were executed which are sued upon in this action?" *Q. No. 42.* "Did the defendant Melissa T. Ayres ever execute or deliver to the plaintiff the mortgage mentioned and set forth in the plaintiff's petition?" **Q. No. 43.* "Was said mortgage ever in any manner by said Melissa delivered to the plaintiff?" These propositions or questions were proper, and specific answers thereto were necessary to enable the jury or the court to correctly determine the rights of Mrs. Ayres.

The court erred in refusing instruction No. 1 asked for by the defendants. The statutes in force at the time the alleged contract was made provided that any person contracting, by promissory note, etc., to receive a greater rate of interest than twelve per centum per annum, "shall forfeit *all* interest, and shall recover no more than the principal." Gen. St. c. 51, §§ 2, 4. The notes in question bear date December 1, 1871, and were signed December 6. The district court erroneously held that the contract in the case at bar was governed as to the usury question by chapter 134, Laws 1872, p. 285; that is, the court held that the law in force at the time of the commencement of the action should govern, and not the one at the time the contract was made.

It was also error to refuse the following instruction, asked by the defendants: "If the jury find from the evidence that, at the time the

defendant Melissa T. Ayres signed said mortgage mentioned and set forth in plaintiff's petition, said mortgage was in blank, and contained no name or person as mortgagee, and thereafter, and without the written authority, direction, or consent of the said Melissa, the defendant Challiss, or any other person, in the absence of the said Melissa, and without her knowledge, inserted the name of the plaintiff as mortgagee therein after the same had been signed and acknowledged by her, that the said mortgage is invalid and void as against the said Melissa T. Ayres."

Under the statutes of this state an agent could not insert the name of the mortgagee in the instrument, much less fill up the entire blank in the absence of Mrs. Ayres, unless he had *authority in writing* so to do. Statute of Frauds, Gen. St. c. 43, p. 505; Upton v. Archer, 41 Cal. 85; Story, Ag. § 49; Jackson v. Titus, 2 Johns. 430; Basford v. Pearson, 9 Allen, 387; Simms v. Hervey, 19 Iowa, 273; Smith v. New York Cent. R. Co., 24 N. Y. 230; Ingram v. Little, 14 Ga. 173; Doniphan v. Gill, 1 B. Mon. 199; Williams v. Crutcher, 5 How. (Miss.) 71; 4 Kent, 462; Arrington v. Burton, 19 Ala. 114;

Chase v. Palmer, 29 Ill. 306; Viser v. Rice, 33 Tex. 139; *181 Rhode v. Lonthain, *8 Blackf. 413; Dodge v. Hopkins, 14 Wis. 631; Preston v. Hull, 12 Amer. Law Reg. (N. S.) 699, and note 711; Preston v. Hull, 23 Grat. 600. But if we concede, for the purpose of the argument, that parol authority alone was sufficient, then, certainly, the court erred in refusing the following instruction asked by defendants below, to-wit: "If the jury find from the evidence that at the time defendant Melissa T. Ayres signed and acknowledged the said mortgage the same was in blank as to the name of mortgagee, or the amount or consideration thereof, and after the same had passed out of the possession or control of said Melissa, and in her absence, and without her consent or authority, the name of the plaintiff was inserted therein as the mortgagee, or the amount or consideration thereof was inserted therein, and delivered to the plaintiff or his agent in the absence of the said Melissa, then said mortgage is invalid and void as against her." This instruction is undoubted law, and to refuse it was obvious error. The mortgaged premises were the *homestead* of the parties. Hence it was also error to refuse the instruction asked for "that if the instrument, after it passed out of Mrs. Ayres' possession and control, and in her absence, and without her consent and authority, was filled up, then it constituted *no lien on the premises*."

This error affected the material rights of the defendants in the court below. The mortgage was not the act or deed of Mrs. Ayres, and hence there was no "joint consent" to the alienation. Morris v. Ward, 5 Kan. *239; Dollman v. Harris, Id. *597.

W. W. Guthrie, for defendant in error.

Can a mortgage, when executed in blank and placed in the hands of
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an agent on which to negotiate a loan, and thereon he fills it up with the line of his authority, and delivers it a perfect instrument in *bona fide* transaction, be sustained? We assert the affirmative. mortgage does not convey a *title*, but only creates a lien. Chicks Willetts, 2 Kan. *391; Kurtz v. Spowable, 6 Kan. *397; Brenner Bigelow, 8 Kan. *502; Lenox v. Reed, 12 Kan. *223. A mortgage is not an *alienation* in this state, but is commercial paper. *182 the *auxiliary of the note. Watterson v. Kirkwood, 8 Kan. *465. Hence the authorities regarding *alienations* are inapplicable in this case.

Instruments take effect upon delivery, and in the condition when delivered. Knaggs v. Mastin, 9 Kan. *550; Simms v. Hervey, 19 Iowa, 296; Basford v. Pearson, 9 Allen, 387; Upton v. Archer, 41 Cal. 87. In these cases it was held that parol authority was not sufficient within the statute of frauds *in the absence of the grantor*. Why not in his absence, when performed in strict accordance with his intention? But in this case Wm. M. Ayres was present, and no issue in the case warranted any finding that Melissa T. Ayres was the owner of the mortgaged premises, and all such evidence was received against our objection. In Chauncey v. Arnold, 24 N. Y. 383, and Drury v. Foster, 2 Wall. 33, parol authority is sustained. In Simms v. Hervey, 19 Iowa, 297, such authority is not denied; and even in case of deed, in Fletcher v. Mansur, 5 Ind. 269, it is held that the proof may be made *aliunde*. The case of Preston v. Hull, p. 699, vol. 12, Amer. Law Reg. is against us, but it fails from the volume of its own weight. A decision of a Virginia court at this day, made by three judges against three judges, will hardly be held to overturn the respectable authorities cited in the editor's note to that case, or to impair the reasoning of his conclusions. But in Devin v. Heimer, 2 Iowa, 299, the doctrine contended for by plaintiff in error is completely refuted, and the exception stated in Simms v. Hervey, *supra*, held applicable in a case where the grantee's name in a *deed* was filled in after the delivery to the grantee, and the deed held valid and complete. But the doctrine as applicable to a mortgage is directly affirmed in Van Etta v. Evenson, 28 Wis. 33. And all the authorities agree that where a party is *competent to ratify*, and does ratify, that the deed is valid, and such ratification may be proved by parol.

But if a *conveyance of title* by Mrs. Ayres was claimed, the law of estoppel would apply and defeat her defense, even in case of a homestead. Knaggs v. Mastin, *supra*; Conover v. Porter, 14 Ohio St. 454; Curtis v. Leavitt, 15 N. Y. 47. But here this very property was under *mortgage, and about to be sacrificed at sale on foreclosure, and the money raised on this loan was used to pay off such prior mortgage. Now, Ayres and his wife claim the right (or more properly the second mortgagee Sutter does) to say that Probasco has no lien, because when this mortgage was sent out on it

mission for their relief, it was not known from whom the relief was to come, and that, although the relief was afforded by Probasco, just as desired, was accepted and used by the Ayres, and the Symns mortgage thereby extinguished, that he shall lose his money in order that Ayres and wife may mortgage the place to Sutter.

On the question of usury. The notes were given in December, 1871, and payable in one and two years. The amount of *principal* specified in the notes was \$1,100, and the rate of *interest*, 12 per cent. In December, 1871, the law of 1868 (Gen. St. c. 58) was in force. On June 20, 1872, sections 2, 3, 4 were repealed without any saving clause, and a new rule of recovery established. Laws 1872, p. 284. It was claimed that only \$1,000 was in fact loaned, and that the extra \$100 was for compensation to Challiss for his services in raising the money. If so, there was no usury: *Beckwith v. Windsor Manuf'g Co.*, 14 Conn. 594; *Beadle v. Munson*, 30 Conn. 178; *Thurston v. Corwell*, 38 N. Y. 281. The repeal in June, 1872, was constitutional, and the law of 1872 governed, as held by the district court. *Cooley*, Const. Lim. 374; *Bank v. Allen*, 28 Conn. 101; *Andrews v. Russell*, 7 Blackf. 474; *Walpole v. Elliott*, 18 Ind. 258; *Curtis v. Leavitt*, 15 N. Y. 151.

VALENTINE, J. This was an action on two promissory notes and a mortgage. The notes were executed by William M. Ayres alone. The mortgage was executed (as it appears upon its face) by both Ayres and his wife, Melissa T. Ayres, and both the notes and the mortgage were executed to Richard Probasco. Probasco was the plaintiff in the court below, and Ayres and wife, Frank Sutter, and W. L. Challiss were the defendants. The defendant Ayres and wife set up as defenses to the action that the notes were usurious, *184 and the mortgage was void. The *transactions connected with the execution and delivery of said notes and mortgage were, so far as they are necessary to be stated, substantially as follows: Mrs. Ayres owned, and she and her husband occupied as a part of their homestead, the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 18, in township 4, of range 21 E., in Doniphan county, less ten acres out of the southwest corner of said land. Said land was mortgaged to one A. B. Symns, who was foreclosing his mortgage in the district court of Doniphan county, and the land was about to be sold to satisfy said Symns' mortgage. B. O'Driscoll was the attorney for Ayres and wife in said foreclosure suit. In order to save their land from being sacrificed, Ayres and wife concluded to try to borrow the money and pay off the mortgage. O'Driscoll acted as their agent in attempting to procure and negotiate the loan. He had an interview with W. L. Challiss, of Atchison, about the matter, and from what transpired they all expected to borrow the money of Challiss. They expected to borrow \$1,000, and to pay interest thereon at the rate of fifteen per

cent. per annum. O'Driscoll furnished an ordinary printed blank mortgage, and Ayres and wife signed and acknowledged the same before E. W. Stratton, a justice of the peace of Doniphan county. O'Driscoll and Ayres then took said blank mortgage to Atchison, and went to the office of said W. L. Challiss. Challiss, however, was not loaning money for himself, but was loaning money for Richard Probasco, of Maryland. He required a greater rate of interest than fifteen per cent. per annum. O'Driscoll and Ayres finally agreed to the terms proposed by Challiss, and Ayres executed his two promissory notes which read as follows:

"\$550.00.

ATCHISON, KAN., Dec. 1, 1871.

"One year after date I promise to pay to Richard Probasco, bearer, five hundred and fifty dollars, value received, payable at Exchange Bank, with interest at 12 per cent. per annum from date until paid, and payable semi-annually.

"WILLIAM M. AYRES."

The other note is precisely the same as the above, except that it is made payable in "two years after date," instead of in one year.

*185 The two notes together amounted to \$1,100. O'Driscoll and Challiss then filled up the said blank mortgage so as to make it correspond with said notes, and so as to make it a security for the payment of said notes, O'Driscoll doing the principal part of the writing. They filled up the blank for the description of the land with the same land that had prior to that time been mortgaged to Symms, and they made Probasco the mortgagee. The notes and the mortgage were then delivered to Challiss, as the agent of Probasco, and in consideration therefor Challiss paid Ayres \$1,000, and only \$1,000. Ayres, being present all the time, agreed to all that was done, and ratified and confirmed the same. He therefore has no right to raise any question of *mere irregularity* in the execution of said mortgage. But the question of the execution of said mortgage is one of power, and not a question of *mere irregularity*, as we shall presently see. After Ayres received said money from Challiss he paid off the mortgage to Symms therewith. The notes and the mortgage to Probasco are the instruments upon which the present suit is brought.

Ayres and wife now claim that said mortgage is void, and that said notes are tainted with usury, and these are the main questions in the case. It is true that a vast number of other questions are raised, but they are mainly technical and frivolous. For instance, the first question raised (both in this court and in the court below) is upon the ground that the court below allowed the plaintiff to ask O'Driscoll a leading question. Five such questions are raised in this court, and seven such questions were raised in the court below. In the deed, the defendants even objected to the plaintiff asking the defendants

Ayres a leading question, although it was asked in a legitimate cross-examination of said Ayres. We have already stated something of the connection which O'Driscoll had with the transactions out of which this cause of action arose. O'Driscoll was also the attorney for Ayres and wife in this case in the court below. He was called as a witness for the plaintiff below. He did not show himself to be a "fast witness"

for the plaintiff, but on the contrary plainly showed himself to
 *186 be obviously the *reverse. Yet notwithstanding all this, seven different questions that were put to him by the plaintiff were objected to by the defendants on the ground that they were "leading." Some of them *were* leading; but still there was scarcely the remotest possibility that the witness could be led, either from inclination on his part or from inadvertence, into testifying too favorably for the plaintiff. His evidence abundantly shows this. The court therefore did not err in permitting leading questions to be put to him. Indeed, it possibly would have been an abuse of judicial discretion if the court had refused to permit such questions to be asked.

We will now pass from the many immaterial and unsubstantial questions raised by the defendants below to the more material ones. The whole of the transactions out of which this cause of action arose, were carried on and consummated on the part of Probasco through his agent Challiss. Therefore, whatever came to the knowledge of Challiss, pending the negotiations for said loan, must be presumed to have come to the knowledge of Probasco. Notice to the agent is notice to the principal, in such a case, (*Greer v. Higgins*, 8 Kan. *519; 1 Pars. Cont. 74,) and delivery of the notes and mortgage to Challiss, was delivery to Probasco. Challiss was really standing in the place of Probasco in every particular.

Were said notes usurious? Certainly they were. Only \$1,000 was loaned, although the notes were given for \$1,100. And while under our statutes the highest rate of interest allowed to be contracted for is only twelve per cent. per annum on the amount of the debt or loan, yet in this case interest at the rate of twelve per cent. per annum was contracted for on an amount greater than the amount loaned. Twelve per cent. interest on \$1,100 is more than twelve per cent. interest on \$1,000. Twelve per cent. interest on \$1,100 is equal to thirteen and two-tenths per cent. interest on \$1,000. In 1871, when

these notes were executed, all interest was forfeited if the parties contracted for more than the highest *rate of interest allowed by law. Gen. St. 526, c. 51, § 4. And the laws in force when these notes were executed is the law that now governs, although a subsequent law (Laws 1872, p. 284) has been passed by the legislature. *Jenness v. Cutler*, 12 Kan. *500, *510-*512.

Is said mortgage void? We are reluctantly compelled to answer this question in the affirmative. Mrs. Ayres never executed said mortgage. She signed and acknowledged a paper, but this paper in

legal effect was nothing. It was just such a blank mortgage as may be purchased at almost any printing office for a few cents. At the time she signed and acknowledged the same she had never heard of Richard Probasco. She did not expect the mortgage to be so filled up as to make him the mortgagee. Nor did she expect to have it filled up so as to make it a security for the payment of any sum greater than \$1,000. She expected to have the mortgage filled up so as to make W. L. Challiss the mortgagee, and so as to secure the payment of just \$1,000. This it may be said she authorized to have done. But even this authority was given by her only by parol. She never authorized in writing any portion of said mortgage to be filled up. It was therefore not her mortgage, even when filled up. An estate in land is usually transferred by deed. An interest in land less than an estate may probably be transferred by a simple contract in writing. But no interest in land, if it is to continue for more than one year, whether it be an estate or less than an estate, can be transferred except in writing or by operation of law. Statute of Frauds, (Gen. St. p. 505, c. 43, § 5.) And if the transfer is to be made through an agent, the agent must be authorized in writing. *Id.* It is true, an owner of real estate may by parol authorize an agent to make a simple contract concerning such real estate which will bind the owner personally, (*Rottman v. Wasson*, 5 Kan. *552;) but in such a case no interest in the land is transferred from the owner to the agent, or

from the agent to the person with whom the agent contracts.

*188 No interest in the land passes *from the owner to any one and the person with whom the agent contracts gets no interest in the land. If the contract is broken by the owner, the remedy of the other party is an action against the owner personally, either for the specific performance of the contract, or for damages. There is a vast difference between authorizing an agent to transfer an interest in land, and authorizing him to make a contract which will have the effect to compel the owner of the land personally to transfer at some future time such interest. The agent cannot be authorized to do the first by parol, (see said section 5 of the Statute of Frauds,) but he may be authorized to do the second by parol. *Rottman v. Wasson*, *supra*. Now, a mortgage of real estate, although it may not be technically an estate in land, yet it certainly is an interest in land. It is in form a conveyance, and is in fact a lien that may be paramount to any subsequent conveyance, lien, or incumbrance. It is an incipient and conditional alienation of the estate that may eventually overturn and destroy the homestead interest of the mortgagor, and may wholly absorb and swallow up every other right or interest which he may have in the mortgaged premises. It is indefinite in its duration. It is co-existent and co-extensive with the debt which it is made to secure and nothing but the extinguishment of the debt will destroy it. In the present case one of the notes which the mortgage was made to

secure was to run *two years* before it became due. Therefore, as a mortgage of real estate creates an interest in the land of indefinite duration, even if Mrs. Ayres had authorized O'Driscoll or her husband *by parol* to fill up said blank mortgage, as it afterwards was filled up, the authority would have been void. Upon this proposition the authorities in the different states are conflicting; or at least, the law upon this subject is different in the different states, as shown by the decisions thereof. But the great preponderance of authority, both in this country and in England, lays down the doctrine as we have stated it. See the following authorities: Burns v. Lynde, 6 Allen, 305;

Preston v. Hull, 28 Grat. 600; People v. Organ, 27 Ill. 27; *189 Ingram v. *Little, 14 Ga. 173; Upton v. Archer, 41 Cal. 85; McMurtry v. Frank, 4 T. B. Mon. 39; Cummins v. Cassily, 5 B. Mon. 75; Williams v. Crutcher, 5 How. (Miss.) 71; Mosby v. State, 4 Sneed, 324; Graham v. Holt, 8 Ired. 300; Byers v. McClanahan, 6 Gill & J. 250; Blood v. Goodrich, 9 Wend. 68; 12 Wend. 525; Worrall v. Munn, 5 N. Y. 229, 239; Cross v. State Bank, 5 Ark. 25; Ayres v. Harness, 1 Ohio, 368; Perminter v. McDaniel, 1 Hill, (S. C.) 267.

Is Mrs. Ayres estopped from denying that said mortgage is her mortgage? We think not. This case is obviously dissimilar from the case of Knaggs v. Mastin, 9 Kan. *532, *548, *et seq.* It may be just as immoral for Ayres and wife to claim that their mortgage is void, as it was for Knaggs and wife to claim that their deed was void; but still there are distinctions between the two cases which render them very dissimilar from each other. The instrument in this case was not filled up as Mrs. Ayres had directed that it should be filled up, while the instrument in the other case was filled up just as Mrs. Knaggs had directed. And the mortgagee in this case, through his agent Challiss, was perfectly cognizant of all the facts connected with the execution of the mortgage at the time the mortgage was delivered to him, and at the time he parted with his money, while the grantee in the other case was wholly ignorant of all the irregularities in the execution of said deed at the time the deed was delivered to him, and at the time he parted with his money, and for a long time afterwards. Both Mrs. Ayres and Mrs. Knaggs enjoyed the benefit of the money, or a portion thereof, procured by means of their respective instruments, and in this respect only (so far as any foundation for equitable estoppel is concerned) are the two cases similar. But merely enjoying the benefit of money, procured irregularly and wrongfully, is not of itself a sufficient ground upon which to found an equitable estoppel, so as thereby to make what would otherwise be a void deed or *190 mortgage a valid instrument. A party invoking the aid of *estoppel must himself show that he has been vigilant and careful in the protection of his own rights and interests. Where a person negligently or knowingly puts it within the power of some other

person to swindle and defraud him, and he is thereby swindled and defrauded, he is generally allowed to suffer the consequences of his own negligence and folly. Neither the courts nor the law can undertake to protect men of sound mind from all the consequences of their own negligence and follies. The rule of estoppel *in pais* will be found stated in the case of *Clark v. Coolidge*, 8 Kan. *189, *196. Mr. Probasco ought to have said, through his agent Challiss, when O'Driscoll and Ayres desired to borrow said money from him, and offered to deliver said mortgage to him, "I know that mortgage is void, as a mortgage of Mrs. Ayres; I will therefore not receive it. You must furnish me a better mortgage if you want the money."

If said mortgage had been on the property of Ayres, and on any other property than the homestead of Ayres and wife, it would have been valid as to Ayres, although void as to his wife. But this mortgage was on the property of Mrs. Ayres, and on property occupied as the homestead of herself and husband. Is the mortgage therefore valid as to Ayres (the husband,) or is it absolutely void? We think it is absolutely void. Const. Kan. art. 15 § 9; *Morris v. Ward*, Kan. *239; *Dollman v. Harris*, Id. *597. A mortgage is a continuing alienation of the mortgaged premises. It is a lien thereon that may finally engulf and swallow up the whole estate. And such alienation can only be effected, and the lien created, by the joint consent of the husband and wife. Const. art. 15, § 9, and cases above cited. Now, as Mrs. Ayres did not give her consent to said mortgage, it is void as to her; and being void as to her, it must also necessarily be void as to her husband, there being no *joint consent* of the husband and wife. This virtually leaves Probasco without any security on his notes, so far as the case is now presented to us. It is

true that Challiss received from Ayres as collateral security two *191 other *notes, given by Lloyd McNamee to Ayres on the purchase by McNamee of another portion of the Ayres homestead, which notes were merely delivered to Challiss without indorsement. *McCrum v. Corby*, 11 Kan. *465, *470. And as Ayres and wife have never made a deed to McNamee for the premises, Ayres made a deed to Challiss therefor, in order to enable Challiss to make a deed to McNamee for the premises, and then to collect the McNamee notes. But as this deed was executed by Ayres alone, and for a portion of his homestead, it was also void. And as Ayres and wife now refuse to make a good deed to either Challiss or to McNamee, or to any one else on said sale to McNamee, said collateral security may not be worth very much. As McNamee was not made a party to this suit, and as there has not been any sufficient showing as to whether Ayres and wife could be compelled to make a good deed for said premises to McNamee, we cannot tell whether Challiss and Probasco may have said premises sold to satisfy the McNamee notes and the proceeds thereof applied in payment or part payment of the notes given by

Ayres to Probasco. *Stevens v. Chadwick*, 10 Kan. *406. The only judgment that could be rendered in this case in favor of Probasco, as the case is now presented to us, would be a personal judgment against William M. Ayres for the amount of the first note, without interest. Perhaps however, upon a second trial, with the pleadings amended, and other evidence introduced, and other findings made, other and additional relief may be granted to the plaintiff Probasco.

The judgment of the court below will be reversed, and cause remanded for a new trial.

KINGMAN, C. J., concurring.

BREWSTER, J. I concur in all the propositions of the syllabus except No. 5, and also in the reversal of the judgment; but it seems to me, that the principles of the case of *Swift v. Kraemer*, 13 Cal. 526, are applicable here, and should control the future disposition of this case.

THE CASE ON REHEARING.

The foregoing opinion was filed January 19, 1875. A motion
*192 *was made by defendant in error, Probasco, for a rehearing.

Said motion was heard and submitted at said term. Said motion was argued orally by *W. W. Guthrie*, on the part of Probasco, defendant in error.

The following opinion was filed June 29, 1875:

VALENTINE, J. The defendant in error moves the court for a rehearing in this case. And in his brief and oral argument urges many reasons why he thinks a rehearing should be granted. Among his reasons are these, that the court has mistaken the facts of the case; the court has mistaken the law; the decision was by a divided court; the principal question in the case had been settled otherwise, in the case of *Knaggs v. Mastin*, 9 Kan. *532; Mrs. Ayres by her subsequent acts has ratified the mortgage sued on, and is now estopped from claiming that it is not her mortgage, or that it is void, etc. We shall consider the principal reasons he offers for a rehearing, as we pass along. That Mrs. Ayres executed nothing but an ordinary "blank mortgage," there is not the slightest room for controversy. All the evidence upon the subject, and the findings of the jury, incontrovertibly show it. On December 5, 1871, O'Driscoll procured an ordinary blank mortgage and handed it to E. W. Stratton, the justice of the peace before whom the acknowledgment was taken. Said justice then took this blank mortgage to the farm of Ayres and wife, and then and there took their signatures and acknowledgment, and then returned the blank, with merely said signatures, and the acknowledg-

ment filled up, to O'Driscoll, at his office in Doniphan, Doniphan county. Mrs. Ayres never saw the instrument afterwards. On the next day, December 6th, Ayres and O'Driscoll went to Atchison, Atchison county, when and where the transactions out of which this action arose were finally consummated. They took with them said blank mortgage. The facts so far are incontrovertible.

*193 *We shall now quote from the evidence what some of the principal witnesses say with regard to the transactions at Atchison. W. L. Challiss among other things testifies as follows: "When I first saw the mortgage, the name 'Richard Probasco' was not in it. W. Guthrie was present. He was acting as my attorney. '\$1,100' was not in it. O'Driscoll wrote this. The name of Richard Probasco was written in it afterwards. Mrs. Ayres was not present. I don't know that Mrs. Ayres knew that \$1,100 was written in it. A mortgage was filled up over the acknowledgment except 'Richard Probasco of the state of Maryland,' 'eleven hundred dollars,' and 'eleven hundred dollars, payable in one and two years with interest at the rate of 1 per cent. per annum, semi-annually payable.' I think the word 'his' in the eighth line is in Mr. Guthrie's handwriting. Also the word 'two' in the twenty-first line of the mortgage. Also the letter 'y' in the twenty-third line; and the letter 'y' and the word 'his' in the twenty-fourth line, are in Mr. Guthrie's handwriting, and perhaps some other letters and words. The words, 'of the county of Atchison and state of Kansas,' were not stricken out of it when I first saw it. They were stricken out afterwards, I think, by myself. Mrs. Ayres was not present. I had no authority from her to change this mortgage."
* * * Richard Probasco lives in Maryland. I was acting as his agent. Guthrie wrote the words, 'Richard Probasco of the state of Maryland,' in the office on the sixth of December, 1871, after negotiations for the loan were effected, and papers filled up and executed. 'Richard Probasco of the state of Maryland,' was written in by Guthrie, and the words 'of the county of Atchison, and state of Kansas' were erased by me. I first saw O'Driscoll and Ayres on the sixth of December about this matter, after dinner about 2 o'clock, when the matter was all arranged. The money was paid in my office in Atchison. After negotiations had been concluded, I took the mortgage to Guthrie to be examined. He inserted the words, 'Richard Probasco of the state of Maryland,' and made some other slight alterations. He returned the mortgage back to O'Driscoll, and he delivered it back to me after the money was paid, along with the notes."

O'Driscoll testifies: "The mortgage was not after it was filled up ever sent back to Mrs. Ayres. When I delivered it to Challiss

*194 it was *"certainly in blank except the acknowledgment, and perhaps the date and the signatures."* [This has reference probably to the first delivery of the mortgage to Challiss. What follows has reference to the last and final delivery:] "The name of Richard

Probasco was not in it when I delivered it to Challiss. The amount was put in after I made the formal delivery. It was not passed back to me after the name of Probasco was inserted in it. It never came back to me. Challiss took the mortgage with the full knowledge that the grantee's name was not in it. I never directed Guthrie to write the name in the mortgage, nor was it done in my presence. * * * I never had the mortgage in my hand after the '\$1,100' was inserted. I am not sure the '\$1,100' was put in after Challiss went to dinner, but I am sure Probasco's name was not in it while Challiss was gone to dinner. Challiss asked to take the mortgage and have it examined by his attorney. After dinner he produced the mortgage, and laid it on the table with the quitclaim deed. When the notes were drawn up and the papers signed, I delivered the mortgage *not filled up as now.*"

William M. Ayres testifies: "It [the mortgage] has never been in my hands nor under my control since it was taken from my house by Stratton. This mortgage was never under my control after acknowledgment by Stratton. Don't know who filled up the mortgage. Don't think I ever saw it after acknowledgment."

From the circumstances of the case we would think that Ayres must have at least seen the outside of the mortgage after the acknowledgment was taken; that he must have been informed as to what it contained after it was filled up, and that he must have assented to it. The evidence however is conclusive that *Mrs. Ayres* never saw the mortgage after her acknowledgment was taken at her house by Stratton, the justice. Mr. Guthrie did not testify in the case. There is no pretense that Mrs. Ayres ever in writing authorized any person to fill up said blank mortgage. There is no pretense that she ever in any way authorized any person except O'Driscoll to fill it up. The evidence is positive that she did not authorize her husband to do so. And the only authority that O'Driscoll got is shown merely by inference and implication.

*195 *Mrs. Ayres testifies: "I never gave O'Driscoll any authority to fill up this mortgage over my name; never had any talk with him or Challiss."

The evidence, however, would seem to show that Mrs. Ayres understood that said blank mortgage was to be so filled up as to make it a mortgage to William L. Challiss on her property to secure a loan from Challiss for \$1,000, with interest at the rate of 15 per cent. per annum; that O'Driscoll was to negotiate and secure the loan, and that she signed and acknowledged said blank mortgage with that understanding. This was probably sufficient for the jury to find, as they did, that O'Driscoll had authority from her to fill up said blank mortgage as she understood it was to be filled up. But the jury also found that O'Driscoll did not negotiate the loan. This finding, however, is as we think against the evidence. But whatever authority Mrs. Ayres may have given, she never either in writ-

ing or by parol or otherwise gave any authority to O'Driscoll or any one else to fill up said blank mortgage as it was finally filled up by O'Driscoll, Challiss, and Guthrie. These persons filled up the blanks so as to make the instrument a mortgage to a different person from what Mrs. Ayres intended it should be, to make it secure a greater amount of money than she intended, and so as to make the money actually received draw a greater rate of interest than she intended. (The interest on \$1,000 for one and two years at 12 per cent. per annum with \$100 added as a bonus is more than the interest on \$1,000 at 15 per cent. per annum.) And it was even dated back five days before she signed and acknowledged the same, for what reason is not fully disclosed. The notes which the mortgage purports to secure were not in existence when this instrument was signed and acknowledged. Nor were they in existence until December 6th. Yet they, as well as the mortgage, were dated back to December 1st. But the persons who filled the blanks in said mortgage, not only filled the blanks, but they also erased portions of what *196 the instrument actually contained when it was signed and acknowledged. For this they had no authority from Mrs. Ayres. They actually altered a portion of the instrument without any authority whatever from Mrs. Ayres. The evidence of Challiss above quoted shows this. The delivery of the mortgage was also unauthorized. Mrs. Ayres never consented that Probasco should be her mortgagee. She never consented that the mortgage should be delivered to him. And therefore, as the delivery to him was unauthorized by her, the delivery was wholly void as to her. There is no evidence showing that Mrs. Ayres ever knew, until she was so informed by the commencement of this suit, that said instrument was in fact filled up in a different manner from what she expected it would be filled up when she signed and acknowledged the same, or that it was in fact delivered to a different person as mortgagee from the one she expected it to be delivered to when she signed and acknowledged it. There is no evidence showing that she ever had the possession or control of any of the money procured by virtue of said mortgage, but on the contrary the reverse is shown. There is no evidence showing that her husband took home even the smallest portion of said money, or that he even had it to take home when he left Atchison, or that she ever saw any portion of the same; but on the contrary, the evidence tends to show that he expended nearly all of it in Atchison before he left, and that she never saw any portion of the same. A large portion of said money was however probably expended in paying off a judgment which was probably a lien on the land covered by said mortgage, and to that extent Mrs. Ayres received the benefit of said money. But this benefit she received involuntarily. The benefit was conferred upon her before she knew that the loan was finally consummated, or that the money was procured. The money was paid to discharge said judgment before her husband left Atchison.

Under these circumstances it can hardly be said that Mrs. Ayres ratified said mortgage after it was finally filled up, or that she is now *197 estopped from denying that the same is her mort*gage. She could hardly ratify a thing that she did not know existed, and can hardly be estopped by acts which she never performed, and upon which the other party never acted. As we have before stated, there is no evidence showing that Mrs. Ayres ever beforehand authorized said mortgage to be filled up, as it was in fact filled up, or ever afterwards knew that the same was so filled up, or ever knew that it was delivered to Probasco as the mortgagee, or ever performed an act which could be construed into a ratification of the instrument; and Probasco through his agent had full knowledge that the mortgage was executed merely in blank, and in the manner in which it was executed. As to estoppel, see Big. Estop. 480; 5 U. S. Dig. (1st Series) 446 *et seq.*, and cases there cited.

There is such an obvious distinction between this case and the case of Knaggs v. Mastin, 9 Kan. *532, that we do not think it is necessary for us to point out the distinctions further than we have already done in the original opinion in this case. See opinion in the Knaggs Case, 9 Kan. *548. But even if there were no distinction between the two cases, still, as the mortgage in this case was executed December 6, 1871, and the case of Knaggs v. Mastin was not decided till June 4, 1872, we hardly suppose that Probasco or his agent was very badly misled by that decision when said mortgage was executed. We have no doubt, however, of the correctness of that decision.

It is claimed that Mrs. Ayres cannot show title in herself to the mortgaged premises. The mortgage purports to be a joint mortgage on the part of Ayres and his wife. It does not purport to show that the title to the premises is in one any more than in the other; and the pleadings do not show in whom the title is. They merely show that the land is in the possession of both and their family, and is occupied and claimed by both as their homestead. Now, a rule in such a case that would exclude Mrs. Ayres from showing title *198 in herself would also exclude *Ayres from showing title in himself, and therefore virtually exclude both from showing title.

But it in fact makes no difference in whom the title is, so that it is in one or the other, or in both. A mortgage of the homestead, without the joint consent of the husband and wife is void, without regard to whether one, or the other, or both, holds the title. Const. art. 15, § 9; Morris v. Ward, 5 Kan. *239; Dollman v. Harris, 5 Kan. *597.

We suppose that, from the pleadings and mortgage, the title would be presumed to be in both jointly, but the evidence showed that it was in Mrs. Ayres.

The judgment of the court below was reversed in this court by a unanimous court. Whether the court would agree upon all the questions that may eventually be raised in the case is not now known. For myself, however, I would say that I am inclined to think that

whenever a person advances money with the consent of the owner of a homestead to extinguish some lien upon the homestead, with the understanding of the parties that the person so advancing the money shall acquire a lien upon the homestead, such person will in equity acquire such lien to the extent of the money so advanced and so used to extinguish such first-mentioned lien, notwithstanding the instrument intended by the parties to create the lien, in favor of the party advancing the money, or to be evidence of such lien, may be void. The prior liens on the Ayres homestead that were extinguished with the money obtained from Probasco are so indefinitely shown by the record and proceedings in this case that we cannot now render any judgment with regard to them. They are in fact so indefinitely and obscurely shown that it would hardly be proper for us to even intimate any opinion concerning them. What we have said in this, and in the original opinion, with regard to them is founded merely upon inferences drawn from vague portions of the record; and while the facts, as we have stated them, are probably not more favorable to Probasco than the facts really are, yet we have stated them more favorably to him than the record would really warrant. From what we

*199 have already stated it *follows that a rehearing in this case cannot be granted; and the judgment as heretofore rendered in this court must remain as it is.

A final judgment cannot be ordered to be rendered upon the findings of the jury as they now stand, because neither party is entirely satisfied with the findings. Some of the findings are without evidence, and some of them are against the evidence; and many exceptions were taken during the trial. The ends of justice could probably be better subserved by a new trial upon the merits, with an opportunity of getting all the facts more properly before the court. We have examined all the authorities cited by counsel for Probasco, and not one of them is in conflict with the decision as rendered in this case. It is possible that some of them are in conflict with the fifth proposition stated in the syllabus. But even if that proposition is not good law, still this case must be decided just as it has been decided. It was not really necessary in this case that we should have decided said fifth proposition of the syllabus, and hence what is said therein, and the corresponding portion of the original opinion, may be treated merely as *dictum*. But as the great weight of authority both in England and in this country, and our own statutes, (Gen. St. 505, § 5,) are in favor of that proposition, it will not be very safe for any one to act as though it was not the law. The strongest decision in favor of Probasco cited by counsel is the case of *Van Etta v. Evenson*, 28 Wis. 33. The Wisconsin court, however, seems to have had but very few of the numerous authorities upon the question before them, although they seem to suppose they had all of them; and they labored under the erroneous belief that the weight of authority was with their decision. And from the briefs of counsel, and the opinion of the

court, in that case, it would seem that they have no such statute in Wisconsin upon the subject as we have in this state, as no such statute was referred to by either court or counsel. We suppose, however, that they have the statute, and that they merely overlooked it.¹ But whether that decision is right or wrong, it does not decide this case.

Motion overruled.

(All the justices concurring.)

NOTE OF HON. W. C. WEBB, State Reporter.

Upon the filing of the foregoing opinion denying a rehearing, and the remanding the case to the Doniphan district court, Probasco, at the March term, 1875, of said district court, dismissed his action to foreclose said mortgage, so far as he could. The defendants (Ayres and wife) insisted that the action should be retained as to the affirmative relief claimed by them in their answers, (to-wit, that said pretended mortgage should be adjudged to be void, and be surrendered up to be canceled, and that the record thereof be satisfied.) The action thereupon proceeded to trial, and judgment upon the issue joined by the defendants' answers and plaintiff's reply, and the district court rendered judgment in favor of Ayres and wife, setting aside and canceling the mortgage of Probasco.

Upon dismissing his action in the Doniphan district court, as above stated, Probasco commenced an action in the circuit court of the United States for the district of Kansas to foreclose his said mortgage. Ayres and wife answered, setting up two defenses—*First*, that the mortgage was void, as to which they stated the facts regarding the execution and delivery of said mortgage in blank; and for a *second* defense the defendants pleaded the judgment of the Doniphan district court, decreeing said mortgage to be null and void, in bar of the action, and set out a transcript of the record in the case of Probasco v. Ayres and others in said Doniphan district court. At the November term, 1875, of the United States circuit court, Judge DILLON, circuit judge, decided that the judgment of the Doniphan district court, even if erroneous, could not be reviewed by him, and that as the final judgment of a court of competent jurisdiction it was a bar to the action brought by Probasco in the circuit court to foreclose said mortgage.

¹NOTE OF HON. W. C. WEBB, STATE REPORTER.

The following is the section of the Kansas Statute of Frauds, referred to by the court:

"Sec. 5. No leases, estates, or interests, of, in, or out of lands, exceeding one year in duration, shall at any time hereafter be assigned or granted, unless it be by deed or note in *writing*, signed by the party so assigning or granting the same, or their agents thereunto lawfully authorized by *writing*, or by act and operation of law." Gen. St. 1868, p. 505.

The following is the corresponding section of the Wisconsin Statute of Frauds, to-wit:

"Sec. 6. No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in *writing*, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by *writing*." Rev. St. Wis. 1858, p. 613; 2 Tayl. St. p. 1254.

Under this section the supreme court of Wisconsin held in *Smith v. Clarke*, 7 Wis. 551, 554, that an assignment of a school-land certificate in *blank*, was void. In *Vliet v. Camp*, 13 Wis. 198, it was held that a warrant of attorney to confess judgment upon a note, which described the note as to makers, date, amount, and rate of interest, and name of

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*ABRAHAM NEWELL v. JESSE NEWELL.

January Term, 1875.

1. **Amendments: Amending Petition: Changing the Action.** When a plaintiff files his petition setting up that he is in possession of certain real estate, that he holds the equitable title thereto, that the defendant holds the legal title thereto, but that he holds it in trust for the plaintiff, and asks to have the defendant compelled to convey the legal title to himself, the court does not err by allowing him to amend his petition so as to make it an ordinary petition in an action to quiet title to the same land and against the same defendant.¹
2. **Trust: Legal Title Acquired by Fraud.** Where the defendant, by false and fraudulent representations, obtained a deed of conveyance from the plaintiff, but never paid anything for the property conveyed, and the plaintiff afterwards placed the defendant in as good a condition as he was before the conveyance, and in the same condition, it is not error for the court to hold, when asked to do so by the plaintiff, that the defendant holds the legal title to the property conveyed in trust for the plaintiff, and to render judgment in favor of the plaintiff for the title to said property.
3. **Conveyances: Consideration.** The consideration of any deed may be inquired into, not for the purpose of invalidating the deed, but for the purpose of ascertaining rights founded upon the particular consideration and upon other extrinsic circumstances.²

attorney, but which warrant, when executed, was in blank as to the payee named in the note, but was properly filled by the attorney named before confessing the judgment was valid, and the judgment rightly confessed. The case as reported shows that the note itself, containing the names of the payees, was written on the same sheet of paper as the warrant of attorney. The point was not raised, that the authority of the attorney to fill the blank was not in writing. It was claimed on the one side that filling the blank was a material alteration of a written instrument, and on the other that it was an immaterial alteration. In *Van Etta v. Evenson*, 28 Wis. 33, (cited in the text by counsel for the defendant in error, and referred to in the opinion,) the facts are these: One Hegg had negotiated with an agent for a loan of money for himself, but did not know the name of the principal. He made his note which was signed by himself and by his stepfather, Evenson, complete in all respects except as to the name of the payee, which was left blank. A mortgage to secure said note was made by Evenson and wife, complete in all respects except as to the name of the mortgagee, which was left blank. The mortgage was delivered to Hegg to be used by him as security for the money to be obtained on said note. He took the note and mortgage to the agent, where he learned the principal's name, (Van Etta,) which he then and there inserted as payee and mortgagee. Evenson afterwards claimed that the mortgage was void. The court said, (28 Wis. 33) "The only question of law in the case is as to the authority of Hegg thus to fill the blanks," and that while it did not appear that Evenson "directly or expressly authorized Hegg to insert the name of the plaintiff or of any particular person," yet "his authority to do so, if it existed, is to be implied from the facts and circumstances of the execution and delivery of the papers," from which such "intention" of Evenson clearly manifested;" and following the case of *Villet v. Camp*, *supra*, the court held that "the subsequent insertion of the name of the payee and mortgagee by Hegg was a valid execution of an implied authority that the same should be so inserted by him." In the case in this court (*Ayres v. Probasco*) the "mortgage" was in blank as to the land itself, the amount loaned, the rate of interest, date of the note, and day of payment, as well as to the name of the mortgagee, when signed by Ayres and wife.

¹See *Foote v. Sprague*, 18 Kan. *155, and note.

²See the cases in the notes to the following cases: *Tatge v. Tatge*, 25 N. W. Rep. 598; *Harris v. Harris*, 8 Pac. Rep. 9; *Merwitz v. Floring*, 3 N. E. Rep. 5. As to fraudulent representations, see note to *Mills v. Collins*, 25 N. W. Rep. 118; as to fraudulent and voluntary conveyances, see the references to *Ayres v. Probasco*, *ante*, *175, note 2.

³Parol evidence to explain writing, see *Morrall v. Waterson*, 7 Kan. 128, and note.

Error from Jefferson district court.

Action by defendant in error to establish a trust, and compel plaintiff in error to reconvey. The land in controversy was a fractional quarter section in Jefferson county. By amendment of the petition the action was converted into an action to quiet title. It appeared from evidence that in 1861 the defendant in error was the owner in fee of the land in question, and he then and ever since has occupied the same with his family as a homestead; that he conveyed said land to plaintiff in error, his son, by deed, in February, 1863. Trial at the May term, 1870. The decree is as follows:

"This cause having been duly heard, and the findings of the court having been filed, whereby the court finds for the plaintiff and against the defendant, now, therefore, on motion of the plaintiff, it is adjudged and decreed that the said Jesse Newell is the owner and in possession of the land and premises described in the pleadings herein, to-wit, [describing the land;] and it is further adjudged and decreed that all claims of the defendant, Abraham Newell, to said land and premises be henceforth held for naught, and that the said defendant be forever enjoined, restrained, and forbidden from making any sale, conveyance, or incumbrance of said land and premises, or any part thereof, except such as is directed by this judgment; and that said defendant, within thirty days from this date, make, execute, acknowledge, and deliver to the said plaintiff, Jesse Newell, a deed conveying any and all interest of said Abraham Newell in said land and premises, with the appurtenances thereof, to the said Jesse Newell; and in case the said defendant fails to make said conveyance, as required by this judgment, then this judgment or decree shall stand and operate, both at law and in equity, as such conveyance, and shall have the same operation and effect as if said conveyance had been executed conformably to this judgment. It is further considered and adjudged that the plaintiff recover of and from the defendant his costs in this action, to be taxed."

J. B. Johnson and J. Safford, for plaintiff in error.

John W. Day, Clough & Wheat, and Ross Burns, for defendant in error, contended that there was no error in permitting the filing of the amended petition, and cited section 140 of the Civil Code; *Smith v. Palmer*, 6 Cush. 519; *Swan v. Nesmith*, 7 Pick. 220; *Merrill v. Russell*, 12 N. H. 74; *Carbaga v. Seeger*, 17 Pa. St. 518; 3 *Estee*, Pl. 293, 298. They also contended that as the property was conveyed to plaintiff in error in trust, to hold as agent, and to sell to pay debts, etc., those debts having been paid, he should now reconvey,—citing *Morris v. Nixon's Ex'rs*, 1 How. 126; *Baldwin v. Peet*, 22 Tex. 708; *Hidden v. Jordan*, 21 Cal. 93; *Sheriff v. Neal*, 6 Watts, 540; and parol evidence is admissible to show that said conveyance was in trust for payment of the debts, etc. *Jackson v. Lodge*, 36 Cal. 28; *Conway's Ex'rs v. Alexander*, 7 Cranch, 238; *Nicoll v. Huntington's Trustees*, 1 Johns. Ch. 167; *Hayworth v. Worthington*, 5 Blackf. 361;

Babcock v. Wyman, 19 How. 299; Hill, Trustees, (8d Am. Ed.) 165, (original Ed. 107, 108.) If it is contended that Jesse Newell conveyed the premises in controversy to Abraham Newell with intent to hinder, delay, and defraud his creditors, the answer is that as *204 the property conveyed was the *homestead* of said Jesse, *and not subject to levy and sale under execution, it was *no fraud* upon creditors to thus convey said property. Section 9, art. 15, Const.; Cusie v. Douglas, 3 Kan. *123; Benz v. Hines, Id. *390; Dreutzer v. Bell, 11 Wis. 114; Glezen v. Rood, 4 Metc. 490; 1 Story, Eq. Jur. § 367; Leslie v. Joyner, 2 Head, 514.

VALENTINE, J. Jesse Newell was plaintiff in the court below and Abraham Newell was defendant. The principal object of the action was to obtain a judicial determination that the plaintiff had a better right to a certain piece of real estate than the defendant, and to obtain a decree in favor of the plaintiff for the title thereto. The plaintiff filed his petition setting up that he was in the possession of said real estate, that he held the equitable title thereto, that the defendant held the legal title thereto, but that he held it in trust for the plaintiff, and asked to have the defendant compelled to convey the legal title to himself. The defendant answered, and the plaintiff replied. The plaintiff then, with leave of the court, amended his petition so that the action was really converted into an action to quiet the title to said premises in favor of the plaintiff and against the defendant. The defendant excepted to the ruling of the court allowing said amended petition to be filed, and now assigns the same for error. We perceive no error, however, in such ruling.

The defendant afterwards answered to said amended petition, and the plaintiff replied. The parties then proceeded to trial before the court without a jury. The court made special findings of fact and of law. The most of the findings of fact are unquestionably sustained by the evidence. All of them are sustained by some evidence. And not one of them so lacks evidence to sustain it that we can set it aside or grant a new trial therefor. It seems from the record that Jesse Newell, the plaintiff, is the father of Abraham Newell, the defendant; that in 1861 the plaintiff was in debt; that he was about to enter the military service of the United States; and that he *205 desired before doing *so to make some provision for the payment of his debts. He finally conveyed some or all of his property, real and personal, to his son Abraham, with the parol understanding and agreement that Abraham would sell a sufficient amount thereof to pay said debts, and would then reconvey the balance thereof to his father. Some of said property was sold, and with the proceeds thereof, and with money obtained by the plaintiff, all of said debts were paid. The property in controversy was a portion of the property conveyed by the plaintiff to the defendant. The property in controversy was at the time it was so conveyed, and has been ever

since, in the possession of the plaintiff, and occupied by himself and family, as a homestead. No part of the same was sold to pay said debts, and the legal title thereto still remains in the defendant. And although the defendant should now reconvey the title to said property to his father, in accordance with their parol agreement and understanding, yet he refuses to do so, and claims the property as his own. The court below, among other things, found as follows:

"(9) That the defendant, Abraham Newell, fraudulently and designedly induced plaintiff, by false and fraudulent representations that he would faithfully act as agent of said plaintiff, to execute to him the said conveyance of the land in controversy, with the fraudulent intent not to reconvey said land to said plaintiff, as was then and there agreed upon between them as aforesaid.

"(10) That the defendant, Abraham Newell, at the time of the execution of the conveyance aforesaid by plaintiff to him, said defendant, received said conveyance and excepted said agency with the fraudulent intent and design of retaining said land as his own, and with the fraudulent intent not to reconvey said land to said plaintiff, as was then and there agreed between them as aforesaid."

Now, as the defendant obtained said conveyance from the plaintiff by false and fraudulent representations, we suppose we should hold the same void as between the parties when asked to do so by the innocent party; for fraud vitiates everything it touches. Or at least

we should hold that the party who obtained the conveyance fraudulently holds the legal title to the property in trust for the other party, and should surrender the same whenever called upon to do so by such other party. The defendant holds nothing but the bare naked legal title. He never had possession of the property. He never paid anything for it. The debts of the plaintiff have all been paid. And the defendant has been amply paid for all his services for the plaintiff. It is true the defendant gave his promissory notes for the property at the time the conveyance was made. But it was understood and agreed between the parties that the notes should never be paid, and they never have been paid, but, on the contrary, they have been surrendered to the court below for the benefit of the defendant. The notes were probably given by the defendant as a partial covering for the fraud he was then intending and attempting to perpetrate. The defendant has lost nothing, and has been placed in as good a condition as he was before the conveyance was made, and in the same condition. We therefore think that the judgment of the court below declaring that the title of the plaintiff was paramount to that of the defendant, and decreeing title to the plaintiff, should be affirmed.

This case differs from the case of *Morrall v. Waterson*, 7 Kan. *199, in at least two respects. In this case the deed was obtained fraudulently; in that it was not. And in this case the deed was executed for the purpose of enabling the grantee to sell the property, and there-

by to pay certain debts; in that case no such purpose was disclosed. It is possible that the judgment of the court below might be sustained, even if said deed had not been procured by fraud; but we do not now wish to so decide. The consideration of any deed may be inquired into, not for the purpose of invalidating the deed, but for the purpose of ascertaining rights founded upon the particular consideration, and upon other and extrinsic circumstances. Thus, the consideration along with other circumstances may be inquired into and may render a deed absolute upon its face a mortgage. Moore v. Wade, 8 Kan. *381, *387. Or such consideration and other circumstances connected with a deed absolute upon its face given to a surety, may give a co-surety, or the creditor, an enforceable lien on the property conveyed, and render said surety a trustee for his co-surety and creditor. Seibert v. Thompson, 8 Kan. *65; Seibert v. True, Id. *52. Or such consideration and other circumstances connected with a deed given to one person may create a resulting trust in favor of another person not mentioned in the deed. Franklin v. Colley, 10 Kan. *260. And such consideration and other circumstances may be shown by parol evidence.

Judgment affirmed.
(All the justices concurring.)

G. S. ANDERSON and others v. RELEAF KENT.¹

January Term, 1875.

1. **Homestead: Evidence: Declarations of Party in Possession.** Where the question is as to the existence of a homestead interest, declarations made in disparagement thereof, by the party alleged to have possessed and made during the time of the alleged possession, are competent evidence in favor of one claiming adversely.
2. **Abandonment before Sale.** Where A. claimed title by virtue of a deed from B. of certain premises which had theretofore been homestead of B. and his family, and of which the legal title was in A. and where it appears that B.'s family consisted only of himself and wife and that more than a month prior to the deed B.'s wife had left the premises and abandoned him with the intention of never returning to either; that three weeks before, B. had sold the furniture in the house to the grantee in the deed; and that, on the day of its execution, B. had surrendered possession and left the city: *held*, that in a contest between the grantee

¹As to homestead generally, see Randal v. Elder, 12 Kan. *276, and note; and mortgage on, under duress, Helm v. Helm, 11 Kan. *23, and note.

in the deed and subsequent judgment creditors of B., this court will not reverse a finding to the effect that the homestead interest of B. and his wife had so far ceased prior to the execution of the deed as to make it a valid conveyance.

3. **Ejectment: Another Trial: Waiver of Right to.** Where, after a judgment in an action of ejectment, the defeated party filed his motion for a new trial under section 806 of the Code, which was properly over-
 *208 *ruled, but made no demand for a second trial under section 599, *held*, that it was too late for him to insist for the first time in this court that he was entitled to a second trial as a matter of right under said last-cited section.¹

Error from Miami district court.

The case is stated in the opinion.

W. R. Wagstaff and J. A. Hoag, for plaintiffs in error.

Defendant in error claims title by deed bearing date June 18, 1872, and signed by Renfro alone. Renfro was a married man, and at that date the lot in controversy was his homestead. Hence said deed of June 18th is null and void, and conveys no title, and consequently cannot be the foundation for an action of ejectment. Const. art. 15, § 9; *Morris v. Ward*, 5 Kan. *239; *Dollman v. Harris*, Id. *597; *Anderson v. Anderson*, 9 Kan. *112; *Poole v. Gerrard*, 6 Cal. 71. The sheriff's deed conveyed to Anderson & Potts all the interest that Renfro and wife had in the premises on the twenty-sixth of June, at which time the homestead right had ceased by reason of the abandonment of both Renfro and wife. It is on this ground of voluntary abandonment that Anderson & Potts claim to have acquired a lien on the premises. This lien was acquired eight days after the execution of the pretended deed to Mrs. Kent, and eight days after the premises were abandoned by Renfro. The deed to Mrs. Kent is void because at the date of its execution and delivery Renfro was in the actual possession of the premises, and on the same day he declared to
 *209 his creditors that he held said premises as a *homestead. If

Renfro had not declared the premises to be his homestead, occupancy is presumptive evidence of the appropriation of a place as a homestead, and is notice to all. *Cook v. McChristian*, 4 Cal. 23; *Taylor v. Hargous*, Id. 268.

The court erred in admitting in evidence the letter signed "Bettie," which was objected to by plaintiffs in error. The letter contains communications made by husband and wife to each other during the marriage, and the objection that it was *incompetent* went to that point. Civil Code, § 323. There was no proof that said letter was in the handwriting of Betsey J. Renfro, nor that the direction upon the envelope

¹ Right to second trial, *Cheesebrough v. Parker*, 25 Kan. 506; upon amended pleading, *Beckman v. Richardson*, 28 Kan. 648; action certified from justice's court, *McNamara v. Culver*, 22 Kan. 661; upon default, *Hall v. Sanders*, 25 Kan. 538; other causes of action in same petition, *Rogers v. Clemmans*, 26 Kan. 523; *Keith v. Keith*, Id. 26. See *Northrup v. Romary*, 6 Kan. 146, and note.

was in her handwriting; and we submit that the evidence, until proof be made, is *incompetent*. 1 Greenl. Ev. § 577; 2 Wait, La. Pr. 365, 366.

Simpson & Brayman, for defendant in error.

Mrs. Renfro is not here asserting the conveyance to defendant in error to be void, and it is respectfully submitted that she is the person that can raise that question. The constitution and homestead exemption laws confer a personal privilege, which the household may waive or not, at his option. *Chamberlain v. Lyell*, 3 Mich. 4. The statutory provision, that no conveyance of a homestead shall be valid unless the wife joins therein, means only that a conveyance made by the husband alone shall not affect the joint right to enter the land as a homestead. *Gee v. Moore*, 14 Cal. 472. Therefore a conveyance by the husband alone, passes the title subject only to the wife's right. After an abandonment by a removal, without an intent to return, the husband can convey the former homestead without his wife's joining. *Guido v. Guido*, 14 Cal. 506. The husband, without the operation of the wife, may convey the entire property in which the right of the homestead exists, *subject to that right*, and the purchaser under such conveyance of the husband alone, will hold the estate subject to the homestead right, wherever properly demanded by the party entitled thereto. *Atkinson v. Atkinson*, 37 N. H. 434; *Daniels v. Andrews*, 30 Vt. 678. The limitation in the homestead law that the husband cannot convey the homestead without the wife's joining, does not avoid the conveyance by the husband alone, so as to give a lien to a subsequent attaching creditor, whose rights are not affected by the law. *Howe v. Adams*, 28 Vt. 541.

BREWER, J. Defendant in error recovered a judgment in ejectment against plaintiffs in error. It was admitted on the trial below that the title to the property in dispute had been, prior to the conveyance offered in evidence, in one Erastus Renfro. Mrs. Kent offered in evidence a deed from said Erastus Renfro, dated June 18, 1872, and this was her title. Plaintiffs in error offered certain judicial proceedings against Erastus Renfro and wife, commencing with an attachment levied on said premises on June 26, 1872, and ending in the sheriff's deed; and this was their title. There was a general finding for plaintiff, Mrs. Kent. It is claimed that the deed to Mrs. Kent was void because it was an attempted conveyance of a homestead which the wife did not join. Was it a homestead at the time of the conveyance? Renfro's family consisted of himself and wife, and together they had occupied the premises as their homestead until some time in May, 1872, when the wife left, and, as appears from a letter of hers to her mother, with the intention of not returning. The furniture remained in the house, though sold some three weeks prior thereto to Mrs. Kent, and Renfro continued to occupy it until the day or the day before the execution of the deed. On the seventeenth

June he was in Johnson county, at the home of Mrs. Kent, and together they returned to Paola, reaching the house on the morning of the 18th. On that day, in the morning, he executed the deed, and left town on the evening train. On this same morning he was asked by one of the defendants to give them a mortgage on the place to secure their debt, but he declined, saying it was his homestead, and that he thought they ought not to ask him to mortgage his home-
 *311 stead. It is entirely clear that when Mrs. Renfro left in

May she abandoned all interest in the homestead. She not only declares in her letter her separation from her husband, but also adds: "I have not taken anything with me, not even all my clothes. If I can make a living for myself he can certainly get along with the property," etc. And it may also be reasonably inferred from the circumstances that the abandonment by him of the homestead and the execution of the deed were contemporaneous. We do not mean to decide that he had or had not a homestead interest after the abandonment by his wife, but if he had, it ceased with the execution of the deed and his surrender of the property. It does not appear whether the key and the possession were surrendered before or after the execution of the deed. Probably, under the circumstances of this case, it is immaterial which. There was clearly enough testimony to support a finding of the abandonment of the homestead before the execution of the deed. Neither Renfro nor his wife are contesting the validity of this conveyance; and if they are satisfied with it, a subsequent judgment creditor must make a clear case before he can ask a court to set it aside.

A second alleged error is in the admission of the letter from Mrs. Renfro to her mother, Mrs. Kent. The objections made to it were that it was "incompetent and irrelevant." The letter is quite lengthy, was written after she left her husband, and before the execution of the deed, and gives the reasons of her separation from her husband, and her intentions as to the future. It is, so far as this case is concerned, a declaration by one said to have a homestead interest in disparagement of that interest, which, by well-settled rules, is always competent. If there were objections to any particular statements in the letter they should have been pointed out, and are not covered by a general objection to the whole of the letter, some portions of which were unquestionably competent and relevant.

It is said that the court erred in not giving a second trial.

*212 *No demand was made for a second trial under section 599 of the Code, only a motion for a new trial under section 306. This disposes of the matter. It may also be noticed that this was really the second trial. The record shows that at a prior term a trial was had, a jury impaneled, the plaintiff's testimony offered, a demurrer to the evidence sustained, and the jury discharged from the further consideration of the case. It fails to show the entry of a formal judgment, but it does show that plaintiff appeared and moved

for another and a new trial, which motion was sustained, and the case continued to the next term.

The judgment will be affirmed.

(All the justices concurring.)

ATCHISON, T. & S. F. R. Co. v. E. M. CUTHBERT.

January Term, 1875.

1. **Railroads: Bond to Protect Laborers.** The railroad company is the proper obligee in the bond provided for in chapter 136, Laws 1872, to protect laborers, mechanics, and others, in the construction of railroads.¹
2. ———: **Conditions of Bond.** A bond given in pursuance of said chapter, which contains all the conditions provided therein, is not vitiated by an additional stipulation to save the company harmless from all trouble, damage, costs, suits, judgments, etc.
3. ———: **Liability of Company.** The liability created by said chapter is purely statutory, and a party seeking to enforce that liability must show all the facts required by the statute.

Error from Harvey district court.

The case is stated in the opinion.

- *213 **Ross Burns* and *J. G. Waters*, for plaintiff in error.
J. J. Barker and *J. W. Ady*, for defendant in error.

BREWER, J. This action was brought by defendant in error as material-man and laborer, to recover of the plaintiff in error the sum

¹ Said chapter applies, not merely when a railroad company is engaged in the construction of its first and main track, but also whenever it is enlarging its road by the addition of side tracks. *Missouri, K. & T. Ry. Co. v. Brown*, *post*, *557. One who is in the employ of a contractor with a railroad company simply as time-keeper and superintendent, is not a "laborer," in the sense in which that term is used in said chapter. *Missouri, K. & T. Ry. Co. v. Baker*, *post*, *568. The liability of the obligors on a bond given by a contractor with a railroad company for the construction of its road, under section 85, c. 84, Comp. Laws 1879, p. 785, does not extend to an account for provisions furnished to the laborers employed by a subcontractor upon the order of such subcontractor. Such an account is not for provisions supplied to the contractor, within the terms of the statute. *Wells v. Mehl*, 25 Kan. 205. Where a railroad company contracts with another railroad company for the construction of its road, although no bond is taken by the former company from the corporation with which the contract is made, yet the liability of the first company does not extend to an account for provisions or goods furnished to a subcontractor. *St. Louis, W. & W. Ry. Co. v. Ritz*, 30 Kan. 30; 8 S. C. 1 Pac. Rep. 27. Proof that a railroad company paid a bridge-builder for work done on one of its bridges, upon estimates made by the company's agents as the work progressed, is sufficient proof from which a finding may be made that such bridge-builder was a "contractor" within the meaning of said law. *Atchison, T. & S. F. R. Co. v. McConnell*, 25 Kan. 370. Construction of a new bridge, held a construction of a part of the company's road. *Id.* Laborers and mechanics employed by a subcontractor in the building of a railroad are within the protection of said law. *Mann v. Corrigan*, 28 Kan. 194.

of \$147.50, due and unpaid from the contractor; the defendant in error alleging in his petition as cause of action that the plaintiff in error did not take and have recorded within the office of the register of deeds in any of said counties wherein the work was done any bond from the contractors conditioned for the payment of all just debts due to laborers and others. It was heard in the court below on the following agreed statement of facts, signed and filed by the attorneys for both parties:

"For the purpose of this action in all its stages, and in all courts to which it may be carried, we agree that the following may be considered as the facts: *First.* The bond, a copy of which is herewith filed, marked 'B,' was taken by the defendant, and was filed by the defendant in the county of Ellsworth, Kansas, at the time as appears by the certificate of the register of deeds of said county on the back thereof; and said bond was a good and sufficient bond for the purposes in said bond named, and covers all the work of the said contractors, Oxelson and Riney, named in said bond, done for the defendant by said Oxelson and Riney, or their employees. *Second.* The amount for which the plaintiff sues is due and unpaid from said contractors, Oxelson and Riney, as set out in plaintiff's petition; that is, the work done by said plaintiff, and the amount due therefor, has not been paid by said Oxelson and Riney, or by any one else. *Third.* The work was done by the said plaintiff in the months of June, July, August, and September, 1872, in the counties of Harvey, Reno, Rice, Pawnee, and Ford, and amounts to the sum of \$147.50."

Copy of bond attached, marked "B:"

"Know all men by these presents that we, C. W. Oxelson and John Riney, as principals, and H. B. Miller, as surety, all householders of the county of ——— and state of Kansas, are held and firmly bound unto the Atchison, Topeka & Santa Fe Railroad Company, a corporation duly organized under a charter granted by the late territory (now state) of Kansas, and doing business in said state, in the sum of five thousand dollars, lawful money of the United States, to be paid unto the Atchison, Topeka & Santa Fe Railroad Company, its successors, representatives, and assigns; to which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, administrators, and assigns, firmly, by these presents. Sealed with our seals, and dated, the fourteenth of July, 1872.

"The condition of this obligation is such that whereas, the above-named C. W. Oxelson and John Riney have contracted and agreed to and with the said Atchison, Topeka & Santa Fe Railroad Company to construct, complete, and furnish all materials therefor, for said company, the grading and masonry described as follows, to-wit, lying within the limits of sections Nos. 44, 55, 58, and 61: now, therefore, if the said C. W. Oxelson and John Riney shall well and truly carry out and perform all said contract in every and all respects; and shall

well and truly pay all laborers, mechanics, and material-men, and persons who supply said Oxelson and Riney with provisions, goods, materials of any kind, all just debts due, or to become due, to such persons, or to any person to whom any part of such work is given, or whom any part thereof is done, and incurred in carrying on such work, and contract so as aforesaid agreed to be done and performed by the said C. W. Oxelson and John Riney for the said railroad company; and shall well and truly save, keep, and bear harmless the said railroad company of and from all trouble, damage, costs, suits, judgments, and executions arising or to arise by reason of the incurring of such debts, and in the premises,—then, and in that case, this obligation to become null and void; otherwise to be and remain in full force, virtue, and effect in law.

C. W. OXELSON. [Seal.]

"JOHN RINEY. [Seal.]

"H. B. MILLER. [Seal.]

"Signed, sealed, and delivered in presence of,
"A. A. ROBINSON.

"*State of Kansas, County of Ellsworth—ss.:* I, J. F. Dyer, register of deeds of said county, do certify that the above is a true copy of the bond of C. W. Oxelson and John Riney to the Atchison, Topeka & Santa Fe Railroad Company, filed in my office September 18, 1874.
"J. F. DYER, Register."

*215 *The case upon the above-agreed statement of facts was tried by the court without the intervention of a jury, and judgment rendered [at April term, 1874] for the defendant in error for the sum of \$147.50.

The liability of the plaintiff in error is sought to be enforced under the provisions of an act entitled "An act to protect laborers, mechanics, and others, in construction of railroads," approved March 1, 1872, and found on page 286 of the Laws of 1872. This law requires a railroad company to take from the person with whom a contract is made a good and sufficient bond, conditioned that such person shall pay all the laborers, mechanics, and material-men, and persons who supply such contractor with provisions or goods of any kind, all just debts due to such persons, or to any person to whom any part of such work is given, incurred in carrying on such work; and if any such railroad shall fail to take such bond, such railroad company shall be liable to the persons herein mentioned to the full extent of such debts so contracted by the contractor. The law further gives all such persons a right of action on the bond for the full awards of debt against such contractor. There is also a provision that this bond shall be filed in the office of the register of deeds of the county where the work of the contractor shall be. So far as respects this last provision, while it is alleged that the railroad company did not have the bond recorded in the counties in which the work was done, there is

total failure of evidence to sustain the allegation. It was suggested by counsel on the argument that these counties were not then organized. It is unnecessary, however, to inquire what effect such a state of facts might have upon the obligation of the company under the statute, for no such excuse is suggested in the evidence. The record presents merely a case of failure of proof. Now, in this case, a purely statutory liability is sought to be enforced. Independent of the statute, there is no law or reason for making the railroad company responsible for the debts of Oxelson and Riney. Hence a party claiming under this statute must show all facts necessary to bring his *216 case within its terms. If he alleges that the company failed *to file its bond in the proper county, and thereby became liable to him, he must show the failure, or the fact will be found against him.

As it is conceded that the bond was good and sufficient, the only question really in the case is whether the bond complies with the requirements of the statute. It is objected that the bond runs to the company, and not to the laborers, mechanics, etc., or to the state; that it is simply a bond of indemnity, and not a bond under the statute. It seems to us that the company is the proper obligee. None is specifically named in the statute, but it says the company shall take a bond. This, in the absence of any express designation to the contrary, sufficiently indicates that it should run to the company. Again, in the second section, it is expressly provided that the laborers, mechanics, etc., for whose benefit the bond is required, shall have a right of action *on the bond*. There would be no need of this section if it was the intention that the bond run to them. Though not named as obligees, they may sue as "persons expressly authorized by statute," and entitled to the benefits of the security.

It is conceded that the bond contains all the conditions of the statute, but it also contains the additional stipulation that the contractors "shall well and truly save, keep, and bear harmless the said railroad company of and from all trouble, damage, costs, suits, judgments, and executions arising, or to arise, by reason of the incurring of such debts, and in the premises;" and it is claimed that this addition vitiates the bond. We do not think so. There is nothing in this inconsistent or in conflict with the other conditions,—nothing limiting, restricting, or in anywise modifying or affecting, the obligations assumed by those conditions, so far, at least, as those dealing with the contractors are concerned. Such an addition does not avoid the instrument. The law does not say that the bond shall contain only such conditions. It must contain those, and it may contain any others, provided they do not in any manner affect adversely the interests of those parties who are sought to be protected. We think, therefore, *217 that the bond is valid under the statute, and it being conceded to be good and sufficient, it follows that the court erred in holding the company liable. As the facts are agreed, we must not only reverse

the judgment, but also remand the case, with instructions to enter judgment in favor of the railroad company, defendant below. It is understood that the cases of the same plaintiff in error against William Ward, and same against James H. Anderson, involve only the same questions, and are to be decided in the same manner. (All the justices concurring).

STATE OF KANSAS *ex rel. v.* MALCOLM CONN.

January Term, 1875.

County Treasurer: Failure to Qualify: Vacancy in Office: Election for Unexpired Term. John R. Horner was the duly elected, qualified and acting county treasurer of Morris county, from July, 1872, to July, 1874. In November, 1873, he was duly re-elected to said office, his second term to commence in July, 1874. But he never legally qualified for this second term of office, and never entered upon the duties thereof. He continued, however, to hold the office until August 7, 1874, when the county commissioners of said county declared the office vacant, and appointed Malcolm Conn to fill the vacancy. Conn qualified, and took possession of the office, and has been in possession thereof ever since. On October 6, 1874, the county commissioners of said county again declared the office vacant, so far as Horner was concerned, and again appointed Malcolm Conn to fill the vacancy. But Conn never qualified under his second appointment. At the November election, in 1874, L. P. Rude was duly elected to said office, provided, however, that any election should have been held at that time for that office. Rude afterwards duly qualified, and now claims the office. Conn, however, claims that he has the paramount right to said office as against Rude, or any one else. *Held*, in an action in the nature of *quo warranto*, brought in the name of the state by the county attorney of Morris county against Conn, that Conn is not entitled to said office.

***218 *Original proceeding in *quo warranto*.**

The case is stated in the opinion and syllabus.

Duncan McDonald and Ruggles & Sterry, for the State.

M. B. Nichols, J. T. Bradley, and John Martin, for defendant.

VALENTINE, J. This is an original proceeding in the nature of *quo warranto*, to determine by what authority Malcolm Conn attempts to hold the office of county treasurer of Morris county. It appears from the pleadings and evidence that John R. Horner was the duly-elected, qualified, and acting county treasurer of said county from July, 1872, to July, 1874. In November, 1873, he was duly re-elected to said office, his second term to commence in July, 1874; but he never legally qualified for his second term of office, and, as we find from the evidence, he never entered upon the duties of his second term of office. He continued, however, to hold the office until August

7, 1874, when the county commissioners of said county declared the office vacant, and appointed Malcolm Conn to fill the vacancy. Malcolm Conn qualified by giving bond and taking the oath of office, and immediately took possession of the office, and has been in possession thereof up to the commencement of this action. On October 6, 1874, the county commissioners of said county again declared the office of county treasurer vacant, so far as Horner was concerned, and again appointed Malcolm Conn county treasurer. But Conn never qualified under this second appointment. At the November election, in 1874, L. P. Rude was duly elected county *219 treasurer of said county, provided, however, *that any election should have been held at that time for that office. Rude afterwards duly qualified, and now claims the office. Conn, however, claims that he has the paramount right to said office as against Rude, or any one else. Is he legally entitled to the office? This is the only question in this case. There is no theory upon which it can logically be maintained that Conn legally holds said office. If Horner is still legally entitled to hold the office, then of course Conn is not. If both the appointments of Conn were void, then of course Conn is not now entitled to hold the office. But even if both of said appointments were valid, still Conn would not be entitled to hold the office. If the first appointment were valid, then it necessarily follows that there must have been a vacancy in the office when Conn was appointed, for a valid appointment can be made by the county commissioners only to fill a vacancy. Gen. St. 269, § 64; *Graham v. Cowgill*, 13 Kan. *114.

No authority is anywhere given to the county commissioners to appoint a county treasurer where the office is already legally filled. Hence, if the first appointment was valid, the second appointment was void, the office being at the time of the second appointment already legally filled. And if the first appointment was valid,—being an appointment to fill a vacancy,—the appointee, Conn, would hold his office under the appointment only until the next general election, and until his successor (elected at such election) should qualify. Gen. St. 269, § 64; *Id.* 418, 419, §§ 57-59; *Bond v. White*, 8 Kan. *333; *Hagerty v. Arnold*, 13 Kan. *367. Hence, as L. P. Rude was duly elected as Conn's successor at the general election held in November, 1874, and as Rude afterwards duly qualified, Conn is no longer entitled to hold the office, but Rude is. But suppose the first appointment of Conn was void, and that the second appointment was valid, still Conn would not be entitled to hold the office, for he never qualified under the second appointment. He forfeited his right to hold the office under that appointment. Gen. St. 293, 294, *220 §§ 173, 179; *State v. Matheny*, *7 Kan. *327. He allowed vastly more than twenty days to elapse after he received notice of his second appointment, and after his term commenced, without qualifying, and never qualified under said appointment.

Our theory of the case is as follows: John R. Horner was legally the county treasurer of Morris county from the time he first took possession of the office until the first Tuesday of July, 1874, and for twenty days thereafter. Gen. St. 268, § 61; Const. art. 9, § 3; Gen. St. 293, 294; §§ 173, 179. Whether he could have continued to hold his office for a longer time than that, under his first election and qualification, we do not now choose to decide; and whether Conn was ever legally the county treasurer of said county we shall express no opinion. But upon these two questions, see Const. art. 9, § 3; *Borton v. Buck*, 8 Kan. *302, *312, *et seq.*; *Graham v. Cowgill*, 13 Kan. *114; *Bond v. White*, 8 Kan. *333. But we think it is certain that Horner forfeited his office for the second term by not qualifying within the time prescribed by law. Gen. St. c. 25, pp. 268, 293, 294, §§ 61, 173, 179; *State v. Matheny*, 7 Kan. *327. He should have qualified by giving bond and taking the oath of office some time after his election in November, 1873, and between that time and twenty days after the first Tuesday of July, 1874. But he did not do it, and hence his second term of office was forfeited, and the office became vacant. We shall assume, but without so deciding, that the first appointment of Conn was legal and valid. But whether it was so or not, Horner had forfeited that term. He had wholly abandoned the office. He made no claim to hold over under his former term, or under any other term, and the office was filled by a person holding it under an appointment only. Under such circumstances, we think the election of Rude was legal, and that he is entitled to the office. But whoever may be entitled to the office, Conn is not.

Judgment will be rendered in favor of the state, and against
 *221 *the defendant, removing the defendant from said office of county treasurer.

(All the justices concurring.)

JOHN MORRIS v. R. P. GERMAN.

January Term, 1875.

Mortgages: Foreclosure: Attorney's Fees: Proof Required. On the foreclosure of a mortgage containing a stipulation to pay reasonable attorney's fees in case of foreclosure, it is error for the court without the hearing of any evidence, upon simply its own knowledge, to tax the amount of such fees.

Error from Shawnee district court.

The case is stated in the opinion.

W. P. Douthitt and *C. M. Foster*, for plaintiff in error, contended that what was a reasonable attorney's fee for foreclosure was, under

the pleadings, an issue of fact, to be tried by jury. If the court had the power to tax an attorney's fee, it should have had evidence. It cannot take judicial notice of the value of professional services. *Bowser v. Palmer*, 33 Ind. 124; *Wyant v. Pottorff*, 87 Ind. 512.

G. C. Clemens, for defendant in error, cited *Tholen v. Duffy*, 7 Kan. *405, and section 399 of the Civil Code as amended by the act of 1870, p. 175. The court (which does not include the jury) is to tax the attorney's fees just as it taxes costs. "Tax" means "ad*222 justment;" *fixing the amount*. No testimony is re*quired. To hear *testimony* as to the amount to be allowed would take away the power given to the court, and leave it to witnesses to fix the amount.

BREWER, J. This was an action in the district court to foreclose two mortgages. The mortgages contained a stipulation to pay "reasonable attorney's fees" in case of foreclosure. There being a dispute as to the amount due on the notes, the case was tried by a jury. No testimony was offered concerning attorney's fees, and the verdict found simply the amount due on the notes. The motion for a new trial having been overruled, the court rendered judgment for the amount of the verdict, and a decree for the foreclosure and sale of the mortgaged premises. It also, upon the application of the plaintiff, and without hearing any testimony, taxed an attorney's fee of one hundred dollars, and included it in the judgment. To this at the time the defendants excepted. We think the court erred, and that what was a "reasonable attorney's fee" was a question of fact to be settled upon evidence. A party recovers attorney's fees upon the foreclosure of a mortgage, not by virtue of any statutory authority, but by virtue of the contract. In the absence of any stipulation therefor, none can be recovered. They are in no sense costs. *Swartzel v. Rogers*, 3 Kan. *380; *Stover v. Johnnyeake*, 9 Kan. *367. If the amount is fixed by the mortgage, there is nothing to litigate except as to the validity of the mortgage. If it is designated as a certain per cent., there is nothing but a mere calculation. But if the stipulation is to pay "reasonable attorney's fees," or what amounts to the same thing, "attorney's fees," then a matter is presented which can be settled only upon evidence. The statute does not determine what are "reasonable attorney's fees," and it is not a matter of which the court can take judicial notice.

We are referred to Laws of 1870, p. 175, § 18, in which it is provided that "the court shall tax the costs, attorney fees, and *223 expenses which *may accrue in the action, and apportion the same among the parties according to their respective interests," etc. We do not understand this as giving the court the power, of its own discretion, and without testimony, to assess the amount of the attorney's fees, any more than the amount of the costs. It authorizes the court to tax costs, whose amounts are specified in the statute, at-

torney's fees, whose amounts are fixed by the contract of the parties, or otherwise settled, upon the basis of their stipulations, and adjust and apportion them between the parties, and upon the respective interests. We do not decide that the court is not the proper tribunal to hear the evidence and from that assess the attorney's fees. Indeed, it seems to us that, at least as to all mortgages executed since the passage of the act of 1870, above noticed, (the mortgages in this action were executed before that act,) it is the proper tribunal. All we decide is that such assessment, by whatever tribunal pronounced, must be based upon proper evidence. We are referred also to the decision in *Tholen v. Duffy*, 7 Kan, *405, in which a contract to pay ten per cent. was sustained, and quotations are made to us from the language of that opinion. We did not decide in that case that courts can take judicial cognizance of the proper amounts of attorney's fees, or assess them without evidence. We upheld the contract because the amount did not appear so excessive as to be unconscionable for a court of equity to enforce. The principle of that case would apply here, if, the amount having been determined upon evidence, it was insisted that such amount was so grossly excessive as ought not to be upheld. The question is one which in the very nature of things may require evidence. The proper fee depends upon several circumstances,—the amount in controversy; the difficulty of the questions; the amount of time and labor employed. Now, all of these things do not necessarily come before the court, or within its knowledge; and to ask a court to determine reasonable compensation therefor without being fully advised therein would be manifestly improper. *Bowser v. Palmer*, 33 Ind. 124; *Wyant v. Pottorff*, 37 Ind. 512.

*224 It will be unnecessary, however, to *send this case back for a new trial. It will be sufficient to remand the case, with instructions to modify the judgment by striking out the allowance for attorney's fees, and it is so ordered. The costs of this court will be divided.

(All the justices concurring.)

URIAH DORMAN v. ALEXANDER CROZIER and others.

January Term, 1875.

1. **Mechanic's Lien: Affidavit by Agent Should be Positive.** An affidavit made by an agent of another, certifying a statement of a claim filed with the clerk of the district court under section 3 of the mechanic's lien law of 1871, for the purpose of procuring a mechanic's lien on certain real estate, should be sworn to positively. An affidavit for such a purpose, made by such an agent, stating that "the facts, as above set forth, are true and correct according to the best of his [the agent's] knowledge and belief," without showing that he had any knowledge upon the subject, is not sufficient.¹
2. —: **Amendment of Affidavit: When to be Made.** When an affidavit made in such case is defective, it can be amended only by attaching a sufficient affidavit to the statement, within the time allowed by law for filing the statement with the clerk.
3. **Mortgages: Attorney's Fees: Not Recoverable.** It is error to tax attorney's fees in a foreclosure suit, unless the mortgagor has stipulated to pay them.

Error from Miami district court.

Crozier & Co. brought their action to foreclose a mortgage executed by William Toms and wife, and Gustavus E. Weylandt and wife, which mortgage was recorded in November, 1869. Uriah Dorman, Joseph Haefner, Charles Quest, V. C. Jarboe, Frank Playter, and others were joined as co-defendants, as having some interest in or lien upon the mortgaged premises. On the trial, at the May term, 1872,

the district court found the priority of liens, and gave judgment against Toms and wife, and Weylandt and wife, as follows: *First*, in favor of Crozier & Co. for \$4,154 debt, and \$200 attorney's fee; *second*, in favor of Haefner, for \$2,710 debt, and \$75 attorney's fee; *third*, in favor of Quest, for \$542 debt, and \$25 attorney's fee; *fourth*, in favor of Jarboe, for \$2,163.50 debt, and \$75 attorney's fee; *fifth*, in favor of Playter, for \$746.44 debt, and \$75 attorney's fee; *sixth*, in favor of Dorman, for \$2,119.98 debt. No attorney's fee was provided or stipulated for in the mortgages to Crozier & Co. and Jarboe. Dorman's claim was a mechanic's lien, for lumber and material furnished to Toms, for which a statement was filed in the office of the clerk of the district court, July, 14, 1871. The mortgages to Haefner and Quest were recorded July 19, 1871; that to Jarboe was recorded August 19, 1871; and that to Playter was recorded October 25, 1871. Dorman's claim, when offered in evidence, was objected to by mortgagors and the other defendants, as not being verified as required by the statute. The verification was as follows:

"State of Kansas, Miami County—ss.: W. J. Bound, of lawful age, and the agent of Uriah Dorman, a non-resident of the county of

¹See *Weaver v. Sells*, 10 Kan. 458; *Shellabarger v. Bishop*, post, *482.

Miami, being by me first duly sworn, deposeth and says that he is the agent of Uriah Dorman, and the facts, as above set forth, are true and correct according to the best of his knowledge and belief.

"WM. J. BOUND.

"Subscribed in my presence, and sworn to before me, this fourteenth of July, 1871.

[Seal.] "G. W. WARREN, County Clerk."

The court sustained the objection. Dorman then asked leave to amend the affidavit; and, leave being granted, the following affidavit was attached to said statement:

"*State of Kansas, Miami County—ss.:* W. J. Bound, of lawful age, being duly sworn, deposes and says that the statements and allegations set forth in the above statement of Uriah Dorman, claiming a lien on certain property belonging to Toms & Weylandt, are true therein stated and set forth.

WM. J. BOUND.

"Sworn to before me, and subscribed in my presence, this thirteenth of May, 1872.

[Seal.] "JOHN L. BEESON, Clerk Dist. Court."

*226 *Dorman's "statement" or claim for a mechanic's lien was then admitted in evidence, but the court postponed his lien holding it subsequent to those of the other defendants, as above stated. From such decision and judgment, and from the allowance of attorney's fees as were not stipulated for, Dorman brings the case here in error.

B. F. Simpson, for plaintiff in error.

The lien of Dorman would date from the commencement of the delivery of the lumber and materials, and was prior to that of any of the defendants in error, and it was error in the court to postpone it to the liens of defendants in error because of the amendment; the holding that the statement of lien would only operate as such from the date of the filing of the amended affidavit, instead of holding that the amendment related back to the making of the original affidavit. If this construction is the true one, it entirely destroyed the lien, because under the statutes the statement was not filed in time. The only object of the statement, so far as the other lienholders are concerned, is to give them notice; and this was accomplished as well under the original as the amended affidavit. Where an amendment is made only as to form, and does not change or affect the character of the demand, it relates back to the filing of the original paper. *Buel v. St. Louis Transp. Co.*, 45 Mo. 562; *Hallett v. Chicago & N. Ry. Co.*, 22 Iowa, 259.

The court erred in taxing attorney's fees on the mortgages of *Crozier & Co.* and *Jarboe*; there being no provision in said mortgages authorizing it; and this error is apparent on the face of the record.

Martin, Burns & Case, for defendants in error.

On the fourteenth of July, 1871, the paper purporting to be a mechanic's lien in favor of Dorman was filed in the office of the register of deeds of Miami county. The court very properly decided that this paper did not establish a prior lien *in favor of Dorman as against the other parties having *bona fide* liens. The statement was not verified as required by law, so as to affect *bona fide* lienholders. The amended or substituted affidavit did not cure the defect, if it could be allowed at all. The amended affidavit is in the present tense. *Robinson v. Burton*, 5 Kan. *293-*304. The statement, to be valid, must be *verified* when filed; and, to be valid, it must have been filed, under the Laws of 1871, within two months from the furnishing of the lumber and materials. Dorman's statement was not properly verified until nearly a year after the time fixed by law. It was void as a lien, and could not be cured.

VALENTINE, J. An affidavit made by an agent of another verifying a statement of a claim filed with the clerk of the district court under section 3 of the mechanic's lien law of 1871, (Laws 1871, p. 254,) for the purpose of procuring a mechanic's lien on certain real estate, should be sworn to positively. See *Atchison v. Bartholow*, 4 Kan. *124; *Ex parte Bank of Monroe*, 7 Hill, 177. An affidavit for such a purpose, made by such an agent, stating that "the facts as above set forth are true and correct, according to the best of his [the agent's] knowledge and belief," without showing that he had any knowledge upon the subject, is not sufficient. Where an affidavit made in such case is defective, it can be amended only by attaching a sufficient affidavit to the statement within the time allowed by law for filing the statement with the clerk. Code, § 139.

It is error to tax attorney's fees in a foreclosure suit unless the mortgagor has stipulated to them. *Coburn v. Weed*, 12 Kan. *182; *Foot v. Sprague*, 13 Kan. *155.

This case will be remanded to the court below, with the order that the judgment of the court below be modified by striking out the amounts allowed as attorney's fees to A. Crozier & Co., and to V. C. Jarboe. In other respects the judgment of the court below will be affirmed.

(All the justices concurring.)

E. H. SANFORD v. H. D. SHEPARD.

January Term, 1875.

1. **Evidence: Competency: Value of Land.** It is not error for the court to exclude the testimony of a witness, as to the value of land, where it is not shown that such witness has any knowledge of what the value of the land was at the time material to the issue in the case; and even where such a witness is acquainted with the land, and with the neighborhood in which the land is situated, but when it is not shown that better evidence could not be procured, it is not error to exclude such testimony.
2. **Pleadings: In Justices' Courts: Statute of Limitations: Practice.** It is not necessary, in a justice's court, that the statute of limitations should be specially pleaded, or that the question should be raised by demurrer; but the question may be raised by objecting to evidence introduced on the trial for the purpose of proving a claim barred by the statute; and, where a case is appealed from a justice's court to the district court, it should be tried in the district court, so far, at least, as the statute of limitations is concerned, in the same manner as it would be tried if tried in the justice's court.¹
3. **Instruction: Construction of Contract.** Where the court below instructed the jury that the word "soon," used in a contract, implied "within a reasonable time," *held* not error requiring a reversal of the judgment.
4. **Conveyance: Agreement to "Quitclaim:" Title Immaterial.** Shepard and Sanford agreed to exchange lands which they respectively held under tax titles, and Sanford conveyed his title to Shepard, and Shepard, in consideration therefor, paid Sanford \$400, and agreed that he would "soon" transfer his title to Sanford by a quitclaim deed; but before Shepard transferred his title to Sanford it was ascertained that Shepard's title was not worth much, and Sanford then desired to recover the value of the land, (less said \$400,) the title to which he had transferred to
 *229 Shepard. *Held*, that it was not necessary that *Shepard should have had a good or perfect title to the land which he agreed to convey to Sanford in order to prevent Sanford from recovering for the value of the land Sanford conveyed to Shepard. Sanford was merely entitled to his "quitclaim" deed from Shepard for the land to which Shepard held a tax title.

Error from Osage district court.

Shepard sued Sanford in a justice's court on an account for goods sold and delivered, claiming a balance of \$194.95. The record does not contain the pleadings before the justice, nor show what defense or defenses were there interposed by Sanford. The case was taken to the district court by appeal, where, by consent of parties and leave

¹In a justice's court, the existence of a corporation may be put in issue by the defendant without a denial under oath, and even without a written denial of any kind. *Stanley v. Farmers' Bank*, 17 Kan. 592. On appeal to the district court, the case is heard and determined only as a case within the jurisdiction of a justice of the peace. *Wagstaff v. Challiss*, 31 Kan. 212; S. C. 1 Pac. Rep. 631; *Robbins v. Sackett*, 28 Kan. 304. Counter-claim in justice's court. *Wagstaff v. Challiss*, 29 Kan. 506. See *Thomas v. Reynolds*, Id. 810.

of court, new pleadings were filed. Shepard filed a petition, counting on a book-account for goods, wares, and merchandise sold and delivered, and claimed said balance of \$194.95, and interest. Sanford answered, setting up several defenses: *First*, that plaintiff was indebted to him in the sum of \$2,000 "as a balance due defendant, after a payment of \$400, on account of the value of 162½ acres of land in Lyon county, [describing the land,] with interest thereon from August 12, 1869, being the day of the delivery of the deed of said premises by defendant to plaintiff." A *second* defense was a claim for an alleged indebtedness "in the sum of \$500 for and on account of hewn and sawed timber, and other timber taken from the lands of defendant by plaintiff, in Lyon county, in 1867, 1868, and 1869." A *third* defense was a claim for \$100 for services as an attorney at law rendered by Sanford for Shepard, in November, 1869. A *fourth* defense was for a check for \$40 delivered by defendant to plaintiff, in October, 1869. These defenses were pleaded as set-offs, and defendant claimed judgment for the balance due him. Shepard replied—*First*, a general denial; *second*, that the demands of Sanford exceeded the amount over which a justice's court has jurisdiction; *third*, that defendant's first defense was founded upon an agreement between plaintiff and defendant to exchange lands held by the parties, respectively, under tax titles; that such exchange on the part
 *230 of plaintiff was to be by quitclaim deed; *that no time was fixed for the execution of such deed; that defendant had never demanded a deed, and plaintiff was ready and willing to convey by quitclaim, as he had agreed. Trial at the April term, 1873. The bill of exceptions contains a memorandum signed by Shepard, and dated August 12, 1869, acknowledging the receipt of a deed from Sanford, in which Shepard says, "and I agree to make a deed (quitclaim) of S. W. ¼ sec. 24, T. 14, R. 12, Wabaunsee county, soon." Verdict and judgment in favor of Shepard for \$90.75. Sanford brings the case here on error.

E. H. Sanford, plaintiff in error, for himself.

Ellis Lewis, for defendant in error.

VALENTINE, J. The plaintiff in error claims in his brief that the judgment of the court below should be reversed for "(1) error of law at the trial;" and "(2) refusal to grant the motion for new trial." He then elaborates these grounds for error, and we will notice his points in the order presented. The first is as follows: "(1) The court erred in ruling out the testimony of Weaver, Stinson, and others, in relation to the value of the land and timber. The statute of limitations was not pleaded, and failure to demur was a waiver."

As the case is presented to us, we do not think that the court below erred in excluding said testimony. It was not only not shown that the witnesses knew the value of the land and timber at the required time, but it was actually shown that they did not know such value.

It is true, the witnesses were acquainted with the land, and with the neighborhood in which the land was situated, but they did not know the value of the land at the time material to the issues in this case. It is possible that, if their testimony had been the best that could have been procured, it would have been admissible; but there was

*231 no claim, or even pretense, that it was the best that could have been procured. It does not appear but there were many persons who knew the value of said lands whose testimony could have been procured. When testimony is offered which, from its nature and character, appears not to be the best the case admits of, it is the duty of the party offering it to show affirmatively that the evidence he is attempting to introduce is the best evidence that can be procured; and if it is then excluded, it devolves upon such party to show affirmatively to the appellate court that the trial court erred.

This action was commenced in a justice's court, and appealed to the district court, where the judgment complained of was rendered. Now, we do not think that it is necessary in a justice's court that the statute of limitations should be specially pleaded, or that the question should be raised by demurrer; but the question may be raised by objecting to evidence introduced on the trial for the purpose of proving a claim barred by the statute. And, when a case is appealed from a justice's court to the district court, it should be tried in the district court, so far at least as the statute of limitations is concerned, in the same manner as it would be tried (if tried) in the justice's court. See sections 71-74, Justices' Act, (Gen. St. 791,) and section 122, Justices' Act, as amended, (Laws 1870, p. 184, § 7.)

We now come to the next portion of the plaintiff's brief, which claims that the court below erred in its instructions. The plaintiff claims that the court erred in the third, sixth, seventh, eighth, ninth, tenth, and thirteenth instructions which were given, and in refusing to give the first and second instructions asked by plaintiff in error.

The exceptions to said instructions given, as shown in the record, were as follows: "All these instructions excepted to by the defendant. To the giving of the third paragraph of the foregoing instructions the defendant then and there excepted; also the sixth and seventh instructions." The plaintiff in error does not now complain

of the third paragraph or instruction; and as to the eighth

*232 ninth, tenth, and thirteenth instructions, there was no sufficient exception. See *Ferguson v. Graves*, 12 Kan. *39, *44 and cases there cited. Whether there was a sufficient exception taken to the giving of either the sixth or seventh instruction is doubtful. But suppose there was, then were such instructions erroneous?

As to the sixth instruction the plaintiff in error in his brief says "In the sixth instruction the court errs in saying the word 'soon' means in a reasonable time. This leaves the jury to accept a wrong definition, and shifts the responsibility the law imposes upon the court." The instruction reads as follows: "(6) If there is no time

specified for the performance of an act, or if it is specified that it is to be performed *soon*, the law implies that it is to be performed within a *reasonable time*." There is certainly no error in this sufficient to reverse the judgment.

The seventh instruction reads as follows: "(7) If you believe from the evidence that, at the time the defendant executed and delivered his deed to plaintiff for the Lyon county land, there was an agreement that the plaintiff was not at that time to convey to defendant the Wabaunsee county land mentioned in plaintiff's reply, then and in that event a demand by the defendant, and a refusal by the plaintiff, prior to the commencement of this action, would be necessary in order to entitle the defendant to recover the value of the land by him deeded to the plaintiff, unless the plaintiff had placed himself in a condition that he could not convey said land to defendant." Upon which the plaintiff in error in his brief says: "As to the seventh general instruction, it should have been given with the proviso that Shepard had a title at the time he was to convey. The conveyance was to be 'soon.'"

We should hardly think that such a proviso should be inserted. Shepard did not agree to execute to Sanford anything more than a *quitclaim* deed for the Wabaunsee county land. There is no evidence that Shepard ever pretended that his title was perfect, and it was not necessary that he should have had a perfect title. It is not claimed that there was any fraud in the transaction; and, in the absence of fraud, it was not necessary that Shepard should have had a
 *233 good title. *The transaction that called forth this instruction seems to have been an exchange of lands held by the parties, respectively, under tax titles. Sanford transferred his title to the Lyon county land to Shepard, and Shepard, in consideration therefor, paid him \$400, and agreed that he would "soon" transfer his title to the Wabaunsee county land to Sanford by a *quitclaim* deed. It seems, however, that afterwards, but before Shepard transferred his said title to Sanford, it was ascertained that Shepard's title to said Wabaunsee county land was not very good, and therefore Sanford now wants to recover from Shepard the value of said Lyon county land, less said \$400. But Shepard wants Sanford to take said *quitclaim* deed for said Wabaunsee county land. And this is really all that Sanford is entitled to.

The refusal to give the first instruction asked for by plaintiff in error raises the same question as the giving of said sixth instruction, and hence we need not say anything further with reference thereto.

The second instruction asked for by plaintiff in error, and refused, is as follows: "(2) As to the demand for the timber on the defendant's land under the contract adduced on the trial, if the jury find that the timber was to be first demanded, that the demand was not made for the whole or any part of said timber, the value of the recovery would be the true value of so much of said timber as may be proven to be

taken away from the defendant by the plaintiff without such demand." The only reference in the brief of plaintiff in error to this instruction is as follows: "Likewise in refusing the second special instruction, as to the demand for timber." Was said refusal an error? And, if so, why? Was there any evidence to found such an instruction upon? If the court erred in refusing to give it, the error is certainly not apparent; and the plaintiff in error has not taken the trouble to point out the error to us, or to state in what it consists.

The judgment of the court below is affirmed.

(All the justices concurring.)

*234 *WILLIAM B. McCAUSLIN and others v. THOMAS MCGUIRE.

January Term, 1875.

1. **Tax Deed: Subscribing Witnesses.** It is not necessary to the validity of a tax deed, or to make it *prima facie* evidence of title, that it be witnessed by more than one attesting witness. And *quære*, is it necessary that it be witnessed at all?
2. **Tax Sale: Purchase by County: Payment.** Where land has been bid off at a tax sale, by the county treasurer, for the county, it is not necessary that anything be paid at the time for the land.
3. **Tax Deed: Presumption: Payment.** Where a tax deed for land so bid off to the county recites that "the said county treasurer did, on the sixth day of October, 1862, duly assign the certificates of the sale of the property as aforesaid, and all the right, title, and interest of the said county to said property, to Thomas McGuire," etc., without stating that McGuire, or any one for him, paid anything for said assignment, or for the property, *held*, that it is not necessary that such a statement should be made, as it will be presumed that the certificate was *duly assigned*, and that the assignee paid the amount required by law at the time of said assignment.¹
4. —: **Certificate of Acknowledgment.** Where an officer, taking the acknowledgment of a deed, certifies "that before me, a register of deeds," etc., and then signs his name, "L. J. T., Register of Deeds," *held*, that the certificate is sufficient, although the officer has not inserted his name in the body of his certificate.
5. —: **Land Sold to County: Deed to Assignee.** Where land has been bid off, at a tax sale, by the county treasurer, for the county, and the tax sale certificate has been assigned to an individual, a valid tax deed may be made to such individual on said tax sale certificate.
6. —: **Form of.** A tax deed need not be in the exact form prescribed by the statute, but the form should be so varied that the deed will in every case state the exact truth.

Error from Jefferson district court.

Action for partition of real property, brought by William B. McCauslin, Charles F. McCauslin, John Gregg, John W. Corwine, George

¹ A tax deed is *prima facie* evidence of everything, from the valuation of the land up to the execution of the deed, and that includes assignments of the sale certificate. *Gardenhire v. Mitchell*, 21 Kan. 87; *Board of Regents v. Linscott*, 80 Kan. 240; S. C. 1 Pac. Rep. 81. See *Magill v. Martin*, *ante*, *67; *Morrill v. Douglass*, *post*, *293.

Corwine, Christian Blaser, Ellen E. McCauslin, Harriet F. Millar, George B. Millar, and Frank Millar, as plaintiffs, who claimed that they were the owners of the undivided one-half of a certain quarter section of land. The *plaintiffs admitted that McGuire, the defendant, was the owner of the other one-half interest, but he claimed title in fee to the entire tract. The district court, at the May term, 1873, found in favor of the defendant, "that the defendant was the legal owner in fee-simple of all of said land, and that the plaintiffs had no interest in nor title to any part of said land," and gave judgment accordingly.

Keeler & Johnson, for plaintiffs in error.

The tax deed under which defendant claims title is not duly witnessed, and is therefore not *prima facie* evidence, and was not admissible in evidence without proof *aliunde* that all the tax proceedings prior to its execution were legal and regular. Comp. Laws 1862, p. 878, § 10. It has only *one* subscribing witness. The statute referred to (which was in force at the time) requires the deed to be "duly witnessed," and then gives a form for tax deeds, the blanks in which cannot be logically or grammatically filled without the insertion of at least *two* names as attesting "witnesses." The reasons for requiring "attesting witnesses" are to give additional certainty that the execution is genuine, and to multiply the evidence by which that genuineness can be proved. Neither of these objects, nor any object whatever, is attained by having the officer who certifies the acknowledgment sign his name as a witness also. The whole object to be attained by his signature and witnessing is attained when he signs it officially; and there is no more sense nor reason in his signing again as a witness than there would be in the same person signing his name twice, as a witness to a will, in order to satisfy the statutory demand for two witnesses. Hence we claim that, upon a rational construction of the statute, the deed is not witnessed at all. But, whether the

officer is a competent attesting witness or not, the deed fails to comply with the statute, which requires *"*witnesses*." It is a well-settled principle that the courts cannot dispense with the regulations prescribed by statute to be observed in the execution of statutory power. *Young v. Dowling*, 15 Ill. 481; *Atkins v. Kinnan*, 20 Wend. 240, 249; *Bloom v. Burdick*, 1 Hill, 180, 140; *Sharp v. Speir*, 4 Hill, 76, 86; *Jackson v. Esty*, 7 Wend. 148; *Blackw. Tax Titles*, 493.

The deed does not show that any consideration was ever paid for the sale certificate, or the assignment thereof. It is a substantial requirement of the statutory form of tax deed that it shall show the amount paid into the county treasury by the tax-lien purchaser. Such payment is the real and substantial foundation of his lien or title. The statute forfeits the title of the owner of the land, for the non-payment of the taxes, to any person who pays them in the manner prescribed, and the statute requires such payment to be shown in

the tax deed. The recital in this deed, that the county treasurer bid the land off for the county, does not show nor imply any payment, because the statute did not authorize the county treasurer to do anything as a bidder for the county. The statute (Comp. Laws, 8 § 44) provides that any person may become the purchaser of the certificate by paying into the county treasury the cost of redemption at that time; and this court decided, in *Guittard Tp. v. Marshall Co.* Kan. *388, and other cases, that "any person" means some other person than the county. The omission to state in this deed that such payment was made, leads to an absurdity in the latter part of the deed, where the county clerk says that he conveys the land in consideration of "said sum of \$18.61 taxes," etc., "to the treasurer paid as aforesaid." No payment to the treasurer having been stated or referred to anywhere else in the deed, the conveyance is left without a semblance of consideration; and, for aught that appears from the deed, the taxes, penalty, and charges still remain due and unpaid upon the land.

The deed says this land was sold on the seventh of May, 188*237 which, by reference to a calendar, is found to be Wednesday, and there is no averment in the deed that it was sold at a sale, or adjourned sale, begun and held on the first Tuesday in May. It is true that the insertion of the word "at" in a certain place would cause it to make such averment. But the court would have to exercise equity powers in order to reform the deed in that manner, which the court is not authorized to do, because courts of equity, even, are not allowed to cure defects in the execution of statutory powers. *Young v. Dowling*, 15 Ill. 481.

The name of the officer taking the acknowledgment is not given in the body of the certificate of acknowledgment. The statutory form, by leaving a blank for that name, requires it to be there inserted. A tax deed is not substantially in the form required by statute when it omits any averment therein required. The phraseology may be changed in many respects without substantially changing the form, provided equivalent averments are inserted; but, when the fact required to be inserted is omitted, it loses a part of the substance. If courts can dispense with one requirement they can, with equal propriety, dispense with another which they may think the legislature has unwisely or unnecessarily required; and thus, by gradual steps, assume the entire legislative powers upon the subject.

The deed purports to be based upon a sale certificate first issued to the county in a case where the land could not be sold for the taxes, penalty, and charges thereon. Comp. Laws, 867, § 42. The only statute in force at the date of this deed providing for or authorizing the issuance of a tax deed was section 10, p. 877, Comp. Laws, which provides that a tax deed may be issued only in cases in which the land is sold for taxes. This land was not and could not be sold, else the county treasurer had no authority to bid it off for the county.

as stated in the deed. Such bidding off by the treasurer is not a sale within the meaning of said section 10. The county does not, by such bidding off, acquire any *new* lien on or title to the land. It can never become entitled to a tax deed thereon, nor acquire any rights *233 as an occupying claimant *thereunder. Neither the certificate nor the land is any part of the general county property, the custody of which is given to the county board, and neither of them can be sold by the county. It is true that Comp. Laws, p. 867, § 44, provides a way by which the county, with the other corporations, may receive the taxes due them, respectively, by allowing "any person" (other than the county) to purchase the *certificate*, and thereby become entitled to the amount of the taxes when paid by the owner of the land; but such purchaser never becomes entitled to a deed thereon. But it may be said that the certificate issued to the county, and acquired by "any person" as a purchaser, is by law required to state that at a certain date the holder thereof will be entitled to a deed thereon. Let us see if that is true. Section 44 requires the treasurer to make to the county a certificate "similar" to that specified in section 43. If "similar" there means "technically and exactly like," then it requires the treasurer to certify, not only that the county will at a certain time become entitled to a deed, but also that the county paid the amount of tax, penalty, and charges thereon, both of which are untrue. The only reasonable construction of the term "similar certificate" is a certificate certifying the facts,—just as a certificate to a purchaser at the sale recites the facts. The facts required in a certificate to the county are that the land, describing it, could not be sold for the amount of taxes, penalty, and charges thereon, and was bid off by the county treasurer for the county for such amount, naming it. The statute nowhere prescribes a form for, nor provides for a deed upon a certificate to the county. Had the legislature intended that a tax deed should ever be issued on such a certificate, it would have provided a form of deed applicable to such case; or, at all events, would not have required all tax deeds to be in a form not applicable to such a case.

The middle portion of the deed (being about one-third of it) bears hardly any resemblance to the statutory form. It does not say that any person offered to pay the taxes, nor that the property was *239 stricken off at any price, nor that the *payment of any sum was made to the treasurer, nor that the amount of taxes, penalty, and charges was ever paid by anybody; neither does it give a description of property sold where the statutory form requires it,—the second description of land in said deed being in a connection which gives it no coherency or meaning except as an averment that no less quantity was bid for. But, even if it is held that this deed may depart from the statutory form enough to suit the peculiar facts in the case, the deed still fails to be good, because it does not set forth sufficient facts upon which to found a conveyance. It does not say that

the land could not be sold at any regular sale for the tax, penalty, and charges thereon, as required by section 42, Comp. Laws, 1862, p. 867; nor that any person ever paid, or offered to pay, a sum equal to the cost of redemption at that time, as required by section 44; nor does it say *what* county treasurer bid the land off; nor does it describe the land bid off by the treasurer other than by a reference to the land subject to taxation.

The evidence in the case shows that the plaintiffs and one Abel Whitney were tenants in common of this land before and up to January 21, 1865, at which time the defendant purchased Whitney's title, and received from Whitney a conveyance of the undivided one-half of said land; that at the same time, and as a part of the same transaction, defendant got from Whitney the certificate on which the tax deed in question was subsequently made to defendant. Now, we claim that upon this evidence the legal presumption is that Whitney held that certificate for the joint benefit of himself and the plaintiffs and that defendant, by receiving it as a part of his muniments of title, took only the rights that Whitney had, and the defendant cannot by means of that certificate, or of a tax deed subsequently taken thereon, acquire a title to the land to the exclusion of his co-tenants, the plaintiffs. One tenant in common before partition cannot purchase in an outstanding title or incumbrance on the joint estate for

his exclusive benefit, and use it against his co-tenants. The

*240 *purchase inures to the common benefit of all the co-tenants, the purchaser being entitled to contribution only. *Brown v. Homan*, 1 Neb. 448; *Maul v. Rider*, 51 Pa. St. 377; *Rothwell v. Dewees*, 2 Black. 613; *Titaworth v. Stout*, 49 Ill. 78; *Keele v. Cunningham*, 2 Heisk. 288; *Van Horne v. Fonda*, 5 Johns. Ch. 406; *Mead v. Small*, 2 Greenl. 207; *Farmer v. Samuel*, 4 Litt. 187; *Graham v. Fox*, 6 Dana, 172; *Pratt v. St. Clair's Heirs*, 6 Ohio, 227; *Copinger v. Rice*, 33 Cal. 408; *Page v. Webster*, 8 Mich. 263.

John W. Day and Ross Burns, for defendant in error.

The clause, "such deed, duly witnessed and acknowledged," which occurs in section 10, c. 198, Comp. Laws 1862, p. 877, is borrowed from the tax law of Wisconsin. The general law of that state provides that no deed for the conveyance of any land, or interest therein, shall be valid unless the same be executed in the presence of two witnesses. In this state our tax law does not designate the number of witnesses, nor does any law of this state require an instrument of conveyance to be witnessed. At common law attesting witnesses are not necessary to the validity of a deed. Where the statutes make no provision as to the number of witnesses, the common-law rule applies, and a deed that is *acknowledged* before a proper officer needs no witness. *Gray v. Ulrich*, 8 Kan. *112, 121; *Phil. Ev.* 413-421, 2 Bl. Comm. 307, note 21; 4 Greenl. Cruise, Real Prop. 31; *Dougherty v. Randall*, 3 Mich. 581. This deed is duly acknowledged, and this court has decided that "we do not think, where a deed is ac-

knowledge, any witnesses are necessary. *Stebbins v. Guthrie*, 4 Kan. *369. And see *Shoat v. Walker*, 6 Kan. *72.

It is claimed that "the deed does not show that any consideration was ever paid for the sale certificate, or the assignment thereof." The tax deed shows that the land was subject to taxation for the year 1861, and that the taxes assessed on said land for that year remained due and unpaid on the first Tuesday of May, 1862, (the time fixed by law for the sale of the same for delinquent taxes,) and that at the time aforesaid the treasurer of said county of Jefferson exposed the same to public sale at the county-seat in said county, in conformity to all the requirements of the statute in such case made and provided, for

*241 the payment of the taxes then due thereon, and that no person bid therefor the amount of such tax, penalty, and charges so due and unpaid, and that the land was bid off by the county treasurer for the county of Jefferson for the sum of \$7.57; that sum being the whole amount of taxes, interest, and costs then due and remaining unpaid on said property. The tax deed thus far shows a compliance with the statute. Section 42, Comp. Laws, 867. Section 44 of the same act made it the duty of the county treasurer, where land was bid off for the county, to make a certificate to the county similar to those given to individual purchasers; and also provides that said certificate shall be subject to purchase by any person offering to pay therefor a sum equal to the cost of redemption at that time, and the county treasurer should assign the same to the purchaser, the same being made assignable by the county treasurer in like manner as those given to other purchasers,—the same as an individual. This tax deed further recites that the treasurer duly assigned the sale certificate, and all the right, title, and interest, of the said county to said property, to Thomas McGuire. It further recites that "two years having elapsed since the date of said sale, and said property has not been redeemed therefrom as provided by law, now, therefore, * * * for and in consideration of the said sum of \$18.61, taxes, interest, and costs due on said land for the year 1861, to the treasurer paid as aforesaid," etc. We think this shows a consideration paid to the county. It is true that the deed does not recite that McGuire paid to the treasurer \$18.61 at the time the certificate was purchased by him, and the transfer made by the treasurer, but it recites the fact that the treasurer duly assigned the certificate. An officer duly doing a thing, means *regularly, properly*. If regularly and properly done, he must have received the amount of taxes, interest, and penalty then due; and the clerk certifies that the sum of \$18.61, taxes, interest, and costs, was so due on said land, and was so paid by Thomas McGuire to the treasurer as aforesaid, who is, in a former part

*242 of said deed, described as "the county treasurer of the county of Jefferson." *Bowman v. Cockrill*, 6 Kan. *326.

It is claimed that the deed is void because the land was sold on the seventh of May, 1862, which is found by reference to a calendar to

be Wednesday, and that there is no averment in the deed that it was sold at any sale or adjourned sale begun and held the first Tuesday in May. It makes no difference whether the sale was made on Wednesday, or on any other day of the week. It is plain to be seen that the word *at*, before the "an adjourned sale of," in the form of the deed given in the statute, has been inadvertently left out or omitted from the deed in question by the draughtsman. It cannot be seriously claimed that this slight omission invalidates this deed. It is simply a clerical omission, not a substantial defect. *Bowman v. Cockrill*, 1 Kan. *324; *Taylor v. Miles*, 5 Kan. *498, *510; *Davis v. McFarrell*, 4 Mich. 140, 154; *Groesbeck v. Seeley*, 13 Mich. 329; *Wright v. Dunham*, Id. 414.

It is claimed the deed is void because the name of the officer taking the acknowledgment is not given in the body of the certificate of acknowledgment. The acknowledgment forms no part of the deed, but, even if it did, the certificate of acknowledgment to this deed is in substantial compliance with the requirements of the statute.

It is claimed that the deed is void for the reason that the land was bid off by the county treasurer for the county, and for that reason the deed could not be made on a certificate issued to the county, and transferred by the county treasurer. The argument of counsel on this proposition is ingenious. If this theory, contended for by counsel, can be sustained, then the owner of lands sold and bid in by the county for delinquent taxes can never lose the legal title to his land by reason of such sale, nor the purchaser from the county there ever acquire a legal title thereto. This would be a strange anomaly indeed. But we do not understand the law to mean this. We think a person purchasing at a tax sale, and holding a certificate of purchase, and a person holding a transferred certificate of a tax sale, stand in the same relation. If the land is not redeemed in the time prescribed by law, the holder of the certificate is entitled to a deed in either case; and, if the proceedings and deed are regular, the deed passes the title absolutely. Section 42, Comp. Laws, 867, provides that when the land cannot be sold for the amount of tax, penalty, etc., it shall be *bid off* by the county treasurer *for the county*, for such amount. Section 44 provides that the treasurer shall make a certificate to the county *similar* to that made to an individual, which certificate shall be assignable by the county treasurer in like manner as those given to *other purchasers*. The county here is called a purchaser; the only difference being that the county purchases on *credit*, and pays when it sells the certificate, while other purchasers at the sale pay when they make the purchase. Where there is a purchase or a purchaser, there must be a sale and a seller. Section 10, Comp. Laws, 877, provides that *if any land sold for taxes* shall not be redeemed, etc., the county clerk shall, on presentation to him of the *certificate of sale*, execute, in the name of the county, a deed of the land unredeemed, which means that the deed

shall be made to the holder of the tax-sale certificate, whether the certificate was issued to him as the purchaser, or to the county, and then assigned to him.

Again, it is claimed the deed does not follow the form given in the statute. There is no form prescribed by law for this particular conveyance; but we think the form of the deed is substantially good, and the law fully complied with. In this particular kind of a case the deed certainly would not be good if it were made precisely in the form laid down in the statute. It is necessary to change the *form* of the deed to *suit the circumstances of each case*; the law only requiring that the deed shall be *substantially*, not *exactly*, in the form given in the statute. *Bowman v. Cockrill*, 6 Kan. *311, *324; *Comp. Laws*, 878, § 10.

It is scarcely necessary in this action to discuss the seventh point argued by counsel for plaintiff.

*244 *VALENTINE, J. This was an action brought by plaintiffs in error against McGuire, for the partition of a certain quarter section of real estate. The plaintiffs in error claim to own an undivided half of said real estate. The defendant in error claims to own the whole of it. The plaintiffs' title is as follows: Patent for the land from the United States to David Eckert, dated October 1, 1855; deed of general warranty for the land, from Eckert to Morris S. Knight, dated August 9, 1857; deed for an undivided half of the land from Knight to two of the plaintiffs, dated August 7, 1857. The defendant's title is as follows: Said patent, and said deed from Eckert to Knight; sheriff's deed conveying the interest of Morris S. Knight in said land (being the other undivided half of said land) to Abel Whitney, dated November 12, 1863; deed for an undivided half of said land from Whitney to the defendant in error, dated January 25, 1865; tax deed for the whole of said land from the county clerk of Jefferson county to the defendant in error, dated April 29, 1866. All the questions involved in this case are with reference to the validity and effect of said tax deed. Said tax deed reads as follows:

"Know all men by these presents, that whereas, the following described real property, viz., the S. W. $\frac{1}{4}$ of section 31, in township 9, of range 18, containing 160 acres, situated in the county of Jefferson and state of Kansas, was subject to taxation for the year 1861; and whereas, the taxes assessed upon said real property for the year 1861 aforesaid remained due and unpaid at the date of the sale hereinafter named; and whereas, the treasurer of said county did, on the seventh day of May, 1862, by virtue of the authority in him vested by law, (an adjourned sale of,) the sale begun and held on the first Tuesday of May, 1862, expose to public sale at the county-seat in said county, in substantial conformity with all the requisitions of the statute in such cases made and provided, the real property above described,

for the payment of the taxes, interests, and costs then due and remaining unpaid on said property; and whereas, at the time
 245 and place afore said, no person bid the amount of tax, penalties and charges on said land, the said land was bid off by the county treasurer for the county of Jefferson for said amount, to-wit: the sum of seven dollars and fifty-seven cents,—being the whole amount of taxes, interests, and costs then due and remaining unpaid on said property for the S. W. $\frac{1}{4}$ of section 31, in township 9, of range 1 containing 160 acres, which was the least quantity bid for; and whereas, the said county treasurer did, on the sixth day of October, 1862, duly assign the certificate of the sale of the property as aforesaid, and all the right, title, and interest of the said county to said property, to Thomas McGuire, of the county of Jefferson and state of Kansas; and whereas, two years have elapsed since the date of said sale, and said property has not been redeemed therefrom as provided by law: now, therefore, I, Terry Critchfield, county clerk of the county aforesaid, for and in consideration of the said sum of \$18.61, taxes, interest, and costs due on said lands for the year 1861, to the treasurer paid as aforesaid, and by virtue of the statute in such case made and provided, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said Thomas McGuire, his heirs and assigns, the real property last hereinbefore described, to have and to hold unto him, the said Thomas McGuire, his heirs and assigns, forever; subject, however, to all rights of redemption as provided by law.

"In witness whereof, I, Terry Critchfield, county clerk, as aforesaid, by virtue of the authority aforesaid, have hereunto subscribed my name, and affixed my official seal, on this twenty-seventh day of April, 1866.

[County Seal.]

"TERRY CRITCHFIELD, County Clerk.

"L. J. TROWER, Witness."

"State of Kansas, Jefferson County—ss.: I hereby certify that, before me, a register of deeds in and for said county, personally appeared the above Terry Critchfield, clerk of said county, personally known to me to be the clerk of said county at the date of the execution of the above conveyance, and to be the identical person whose name is affixed to and who executed the above conveyance as clerk of said county, and acknowledged the execution of the same to be his voluntary act and deed, as clerk of said county, for the purposes therein expressed. Witness my hand and official seal this twenty-eighth of April, 1866.

[Seal.]

"L. J. TROWER, Register of Deeds."

*246 *This deed was recorded in the county register's office, April 28, 1866. There is nothing in the record of this case, as brought to this court, which shows when this action was commenced. But as the action was not tried until May 28, 1873, and as the court

then found generally in favor of the defendant and against the plaintiffs, and rendered judgment in favor of the defendant and against the plaintiffs, thereby sustaining the regularity and validity of said tax deed, we should presume, in favor of the findings and judgment of the court below, that this action was not commenced until after more than two years had elapsed after the recording of said tax deed, and therefore that the two-years statute of limitations had run in favor of said tax deed before this action was commenced. Therefore we cannot declare the tax deed void unless it is void upon its face, or unless it is affected with some incurable irregularity not shown upon its face. The plaintiffs claim that it is void upon its face for about six supposed irregularities. We shall mention them in their order.

1. It is claimed that the deed is not duly witnessed. This deed was witnessed by one witness, and only one. He was the same person who took the acknowledgment of the execution of the deed. The only reasons for claiming that said deed was not duly witnessed are as follows: In section 10 of the tax law then in force (Comp. Laws, 878) there was a clause which reads as follows: "And such deed, [a tax deed,] *duly witnessed* and acknowledged, shall be *prima facie* evidence of the regularity of such proceedings from the valuation of the land by the assessor, inclusive, up to the execution of the deed, and may be recorded with like effect as other conveyances of land." And in the same section, at the bottom of the form given for tax deeds, where witnesses usually sign their names, the word "Witnesses" is printed. It will be perceived that the statute quoted does not expressly require that a tax deed shall be witnessed; nor does the statute state how it shall be witnessed,—whether by one, two, or a dozen witnesses. The statute simply says that "such deed *duly* *247 *witnessed," etc., "may be recorded with like effect as other conveyances." Now, what does "duly witnessed" mean? We think it means "witnessed according to law." And how does the law require that a deed of conveyance should be witnessed? It in fact does not require that a deed of conveyance shall be witnessed at all. The common law never did require that deeds of conveyance should be witnessed by attesting witnesses. Jac. Law Dict. "Deed," ii, 8; 2 Bl. Comm. 307, and note 21; Com. Digest, "Fait," B, 4; 4 Greenl. Cruise, Real Prop. 31, c. 2, § 77 *et seq.*, and notes; 4 Kent, Comm. 458; 2 Washb. Real Prop. 572; 2 Hil. Real Prop. 208, § 153. And no statute can be found in this state that requires any such thing. Tax deeds were unknown to the common law, and our statutes do not require that they shall be witnessed in any different manner from other deeds, but leave the matter entirely optional with the parties executing and receiving them. The statutes above quoted were borrowed almost literally from Wisconsin, where attesting witnesses were necessary to all deeds; and this accounts for the words "witnessed" and "witnesses" being used. In this state the certificate

of the officer taking the acknowledgment of a deed, with his signature and seal if he has one, is considered a sufficient attestation of the deed; and with such a certificate the deed may be read without other proof. We think the deed in this case was duly witnessed; that it is valid, (if it is in other respects sufficient;) and that it is *prima facie* evidence of title.

2. It is claimed that the deed does not show that any consideration was paid for the tax-sale certificate, or the assignment thereof. The property was bid off at the tax sale by the county treasurer for the county of Jefferson, and the county was not required by any law to pay anything therefor. The deed recites that the certificate of sale was *duly assigned* to the defendant; and this it does in almost the exact language given in the form prescribed by the statute. That we think was sufficient. It will be presumed that the purchase money, and all that was necessary, was paid when the certificate was "duly assigned." The certificate, with all the rights, title, and interest of Jefferson county to the land in question, could not have been "duly assigned" to the defendant, as is stated in the deed, if the purchase money was not paid.

3. The sale seems to have been on May 7, 1862, which was Wednesday. But the deed plainly enough shows that the sale was an adjourned sale of the sale begun and held on the first Tuesday of May, 1862."

4. The name of the officer taking the acknowledgment is not given in the body of the certificate. That is not material. The officer certifies "that before me, a register of deeds," etc., and then signs his name, "L. J. TROWER, Register of Deeds." There can be no misunderstanding as to whom the pronoun "me" refers. It personates unmistakably the person signing the certificate, and, with its connection, clearly expresses his official character.

5. The property was bid off by the county treasurer for the county, and the certificate of sale was issued to the county, and afterwards assigned by the county treasurer to the defendant. It is claimed that no tax deed could be made on such a sale or such a certificate. Everything seems to have been done in accordance with the law as the law existed at the time the same was done. We think a valid tax deed may be made on such a sale and such a certificate, when the certificate, and the interest of the county, has been duly assigned, in this case. A valid tax deed may be made under the laws of Kansas to the assignee of a county, the legal holder of the tax-sale certificate. *Sprague v. Pitt, McCahon*, 212; S. C. 1 Kan. (Dassler's Ed.) 610.

6. It is claimed that the middle portion of said tax deed is not in the statutory form. This is true; but still it is in the proper form to express the facts as they exist in this case, and as they must exist under the law in all such cases. The form of this deed is varied from the statutory form only far enough to express the facts in the case.

In the case of Bowman v. Cookrill, 6 Kan. *311, *324, *325, we held that a tax deed need not be in the exact form prescribed by the statute; and in two later cases, Norton v. Friend, 13 Kan. *532, *249 and Magill v. Martin, ante, *67, we have held that the form of the tax deed must be so varied in all cases where the facts and the statutory form do not agree, that the deed will state the facts as they really are. The deed must state the exact truth, and must always show a legal sale, or the deed will be void.

7. We hardly think that the question desired to be raised under the seventh heading of plaintiffs' brief is in the case. The question is whether one of two or more tenants in common can procure a valid tax title to land held by himself and his co-tenants. It seems from the tax deed that the property in controversy was taxed for the year 1861. It was sold May 7, 1862, for the taxes of 1861, to the county of Jefferson. On October 6, 1862, the tax-sale certificate, and the interest of Jefferson county in and to the land, were transferred to the defendant, Thomas McGuire. And the tax deed is *prima facie* evidence of all of these recitals. If there was any evidence in conflict with these recitals, the court below may have believed these recitals, and disbelieved the other evidence in conflict therewith. The court below found generally in favor of the defendant and against the plaintiffs, and therefore it would seem that the court did find that these recitals were true, notwithstanding there may possibly have been some evidence tending to contradict them. If there was any evidence tending to contradict these recitals, it was slight parol evidence. If these recitals are true, neither Butts nor Whitney ever owned said tax-sale certificate. But even if Butts did own the certificate, if Whitney never owned it, the point attempted to be raised is really not in the case. But, even if Whitney at one time owned the certificate, still the point does not seem to be in the case. The assignment of the tax-sale certificate seems to have been made on October 6, 1862, yet Whitney did not have any other interest in the land until he got such interest under his sheriff's deed, on November 12, 1863. It would therefore seem that he obtained his right to said land under his tax-sale certificate about thirteen months before he obtained any right under the sheriff's deed. If the true facts are that Whitney *250 had said tax-sale certificate as signed to him, and then afterwards bought the undivided half of said land at sheriff's sale, we suppose it will not be claimed that he had no right to take a tax deed to himself for the land on his tax-sale certificate, or to assign his tax-sale certificate to the defendant so that the defendant could take a tax deed upon the land. What the real facts are we cannot tell. But, if there was really any mere irregularity in the assignment of said tax-sale certificate, we should not, for that reason alone, and against all the presumptions in favor of the tax deed, which has had more than three times the necessary length of time for the statute of limitations to run in its favor, and against all the presumptions

in favor of the findings and judgment of the court below, declare tax deed void, and reverse the judgment of the district court. It is admitted that there never was any unity of title between Whitney and McGuire on the one side, and the plaintiffs on the other side, for the land all held under different titles. Was there any unity or possession, and, if not, was Whitney or McGuire deprived of the privilege of acquiring a tax title? We do not think it is necessary to answer these questions.

The judgment of the court below is affirmed.
(All the justices concurring.)

ROBERT A. COLLIER and others v. J. HENRY BLAKE and others.

January Term, 1875.

1. **Trusts and Trustees: Title Held in Trust: Death of Trustee: Duty of District Court.** Where the title to real estate in Kansas is held by a person who holds it as a sole trustee of an express trust, and such person dies, the trust immediately vests in the district court of the county in which the real estate is situated; and it is the duty of such court upon the application of some person interested in the trust, to forthwith appoint a successor to said trustee, and the trust will then vest in the newly-appointed trustee.
- *251 *2. **Evidence: Will Made and Probated in Foreign State: Competency.** Where the rights of all the parties to certain real estate are derived from certain deeds of trust made to one W. T., and the deeds of trust refer to a certain will of one I. T., and also to a certain record of a certain court in Kentucky where said will was probated, showing the nature and character of the trust created by said deeds, held that it was not error for the court below to allow said will and said record to be introduced in evidence, although the will had never been probated in Kansas.
3. **Trusts and Trustees: Power of Trustee to Sell and Convey Land Held in Trust, when Cestui que Trust cannot Convey.** Where a certain will contained, among other provisions, the following, to-wit: "I give to my son Anderson one-fourth part of my estate, out of which one thousand dollars is to be deducted, as stated in this will, for the use of Miss E. D. It is understood that whatever falls to him shall not be subject to any debts owing by him at this time, or may be owing hereafter, but my son Anderson is to have the proceeds of whatever sum may fall to him; but the principal is to be in the hands of a faithful trustee who shall take charge of said estate, whatever it may be, and hold the same for the use and benefit of my said son Anderson; and for the purpose of carrying out this gift I make and appoint my son Wilkinson trustee for my son Anderson, during his life-time; and at the death of

¹See the full notes on trusts and trustees, *Tatge v. Tatge*, 25 N. W. Rep. 6; *Harris v. Harris*, 8 Pac. Rep. 9; *Merwitz v. Floring*, 2 N. E. Rep. 534. See, also, *Central Branch U. P. R. Co. v. Wilcox*, *post*, *259.

son Anderson one-fourth part of the amount of said estate is to be given to my grandson William T., and one-fourth to my granddaughter Mary Emily T., and the balance to be equally divided between the other five grandchildren, Josephine S., Genevieve T., Alonzo T., Clifton T., and Irene T;" and where, under this will, and under the order of the proper court, the said trustee invested the said trust fund coming into his hands by virtue of said will in real estate in Johnson county, Kansas, taking deeds of conveyance to himself therefor, which deeds conveyed said real estate to himself, in fee-simple, in trust for said Anderson and said grandchildren, according to said will: *held*, that said Anderson and said grandchildren did not take or have, by virtue of said will and said deeds, any such vested legal interest in said real estate that they could, by their deeds of conveyance to a third person, (but without any order or decree of any court therefor,) defeat or terminate said trust; but, on the contrary, the trustee, notwithstanding their deeds, would continue to hold the legal title to said real estate, with the power, under the direction of the proper court, to execute said trust, and could, by order or decree of the proper court, sell and convey said real estate, and invest the trust fund in other property.

Error from Johnson district court.

Blake, as trustee, commenced an action in the district court *252 of Johnson county against Anderson Turpin, Robert A. Collier, William Turpin, Josephine Sparks, Hiram Sparks, Irene Smith, O. M. Smith, Alonzo H. Turpin, William Henry Collier, Emma Burgess, and Sabina Turpin, to set aside and annul a certain quitclaim deed executed by Anderson Turpin to his children, and certain quitclaim deeds made by said children to said Robert A. Collier; to require said Robert to account to said Blake, as trustee of said Anderson Turpin, and for an order to sell the lands held by said Blake as such trustee. The action was tried at the November term, 1872, of the district court. Findings and judgment in favor of the plaintiff, according to the prayer of his petition. Robert A. Collier and William H. Collier, two of the defendants, bring the case here on error, joining their co-defendants and the said Blake as defendants in error.

Clough & Wheat and J. D. Shafer, for plaintiffs in error.

Holmes & Dean and F. M. Black for defendants in error.

VALENTINE, J. On May 14, 1855, Isaac Turpin, of Jessamine county, Kentucky, made his last will and testament, and in the same year died. On March 3, 1856, this will was probated in the county court of said Jessamine county. The will, among other provisions, contains the following, to-wit: "Next, I give to my son Anderson Turpin one-fourth part of my estate, out of which one thousand dollars is to be deducted, as stated in this will, for the use of Miss Eliza Dearinger. It is understood that whatever falls to him shall not be subject to any debts owing by him at this time, or may be owing hereafter, but my son Anderson is to have the proceeds of whatever sum may fall to him; but the principal is to be in the hands of a faithful

trustee, who shall take charge of said estate, whatever it may be, and hold the same for the use and benefit of my said son Anders
 *253 Turpin; and for *the purpose of carrying out this gift I make and appoint my son Wilkinson Turpin trustee for my said son Anderson, during his life-time; and at the death of my son Anderson one-fourth part of the amount of said estate is to be given to my grandson William Turpin, and one-fourth to my granddaughter Mary Emily Turpin, and the balance to be equally divided between the other five grandchildren, Josephine Sparks, Genevieve Turpin, Alonzo Turpin, Clifton Turpin, and Irene Turpin."

All the above-mentioned grandchildren were the children of said Anderson Turpin. The trustee accepted said trust, and on settlement of the estate there came into his hands, as such trustee, a considerable amount of money. The trustee invested portions of this fund in the lands and lots in controversy, and took conveyances thereof to himself: one dated the eighth of March, 1859, from one Collins; one dated the sixth of June, 1860, from one Hill; and one dated the sixteenth of December, 1858, from one William C. Turpin. The substantial portions of said first-mentioned deed, so far as it is necessary to state them in this opinion, read as follows: Said Collins "do hereby grant, bargain, and sell unto said Wilkinson Turpin, trustee of said Anderson Turpin and his children, in fee-simple, the land, [described in the deed,] to have and to hold the said tract of land unto the said Wilkinson Turpin, as trustee for the said Anderson Turpin and his children, in fee-simple, forever, together with all the appurtenances thereunto belonging. And it is understood that the consideration of money for said tract of land is derived from the estate of Isaac Turpin, deceased, and that the said Wilkinson Turpin holds said land as trustee of the said Anderson Turpin and his children, as designated under the last will and testament of the said Isaac Turpin, deceased, of record in the clerk's office of the Jessamine county court for the state of Kentucky; and that the said fund has been applied and is being invested for the purchase of said land by the said Wilkinson Turpin in pursuance of the judgment of the circuit court for the county of Jessamine, state of Kentucky, rendered in a suit of equity of the said Wilkinson Turpin and Jane Turpin, his wife, against the said Anderson Turpin and others," etc. The other deeds to the said trustee are of like tenor and effect.

*254 The district court finds that there was thus invested *in land of such trust fund the sum of \$5,000. Anderson Turpin lived upon this property, or at least a part thereof, from 1860 to June 1863, when he was compelled to leave the same, since which time he has neither occupied the property, nor received any benefits therefrom. On August 5, 1870, Wilkinson Turpin, the trustee, died, and on the fifteenth of November, 1870, the district court of Johnson county, Kansas, on the application of Anderson Turpin, appointed J. Henry Blake, the plaintiff below, the successor in said trust, with

all the powers possessed by the original trustee, which appointment he accepted.

Three of the children of Anderson Turpin mentioned in the will, to-wit, Mary, Emily, and Clifton, died before the commencement of this suit. The defendant R. A. Collier married Genevieve Turpin, she also being dead at the commencement of this suit; and the defendants William Henry Collier and Emma Burgess are her children. At or about the time Anderson Turpin was compelled to leave said premises, to-wit, in 1863, he, as well as the trustee, authorized defendant R. A. Collier to take charge of the property as their agent, and to rent the same, which he did; and on the eighth of June, 1865, the said trustee, Wilkinson Turpin, by letter of attorney, constituted and appointed said Collier, at his request, agent, and thereby authorized Collier, in the name of the said Wilkinson Turpin, as trustee, to take possession of and rent out all the property in controversy. On the fourth of August, 1865, Anderson Turpin made a deed of quitclaim of said premises to his children, William Turpin, Josephine Sparks, Irene Smith, Alonzo Turpin, and Genevieve Collier, she then being alive. On the seventh of October, 1865, Alonzo Turpin, and on the seventh of June, 1865, Sparks and wife, and on the twenty-fifth of February, 1865, Irene Smith and husband, made to defendant Collier their respective deeds of quitclaim to said property. On the twenty-third of January, 1865, defendant R. A. Collier caused to be made to him two tax deeds, both together covering the property, except house and lot, in controversy, which tax deeds recite that the lands were sold *255 on the seventh of January, *1862, for taxes of 1860, to Johnson county, and certificates assigned by Johnson county, one to one Gregg, and the other to one Ocheltree, and by them assigned to Collier on the twenty-fourth of December, 1864. There is evidence not only that Collier was agent when he took these tax deeds, but also that he had received and then had money from Anderson Turpin to pay the taxes with. It is also found by the court that Collier himself procured the deed from Anderson Turpin to his children to be made through urgent solicitations, and for the purpose that Collier himself might obtain the title, and that such deed was procured without consideration. The cause was tried on an amended petition, answer, and reply. The petition sets out the will, trusteeship, investment of funds in these lands, and the terms of the trust, death of the old trustee, and appointment of the new trustee; that the property produces nothing; and attacks the deed from Anderson as conveying nothing, and as having been fraudulently procured, and asks that the property be sold, and the principal sum be set apart at interest, and the balance, if anything, be paid to Anderson. The answer of defendant Collier claims a different construction to be put upon the trust; sets up the deed from Anderson Turpin to his children, and deeds from part of these to Collier, and claims title thereunder; sets up the tax deeds, and claims title under them; and also sets out the power of

attorney from the trustee, and claims that taxes paid by him amount to as much or more than rents received, and sets up the one, three, and five year statutes of limitations. The reply denies all matter, and states the agency of Collier, and sets out fully the facts complained of in procuring the deed from Anderson Turpin. The action was tried before the court without a jury, and the court made separate findings of fact and of law.

We shall consider only the material and substantial questions involved in this case, and shall pass over the others without notice to them. The appointment of J. Henry Blake was valid. "Upon the death of a sole or surviving trustee of an express trust, *256 same shall vest in the court having *jurisdiction thereof, and such court shall forthwith appoint a successor, in whom the trust shall vest." Gen. St. 1098, § 10. The district court of Johnson county unquestionably had jurisdiction to make the appointment, and the proceedings with reference thereto were unquestionably regular. Wilkinson Turpin was the trustee of an express trust. The deeds to him from Collins, Hill, and William C. Turpin made him the trustee, and they referred to the will of Isaac Turpin, which explained the nature, extent, and character of the trust, and which also made him the trustee of an express trust. Said deeds and said will are the common muniments of title of all the parties; all the parties hold under them; and the rights of all the parties are derived from them, and are to be determined by their terms. Hence all that we have to do, in order to determine the rights of the parties, is to construe said instruments. All the parties admit the existence of said instruments; all admit the character of their contents; all admit their validity; and hence it makes no difference whether the will was ever probated in Kansas or not.

The sections of the statute referred to by the plaintiffs in error with regard to probating wills, have no application to this case. None of the parties in this case are holding adversely to the will, but all are holding under it. Said sections probably apply only to property in this state upon which the will may operate, at the time of the death of the testator, so as to transfer the property in a different manner from what the law, aside from the will, would transfer it. But, whether this is so or not, the deeds to Wilkinson Turpin, under which all the parties claim, referred to said will as showing the nature of the trust of which Wilkinson Turpin was the trustee, and referred to said will as being of record in the office of the clerk of the court of Jessamine county, Kentucky, where said will was probated, and hence it was not error for the court below to allow proof of said will, or proof of the said record of the same, to be introduced on the trial of the case, although there was no proof that said will *257 had ever been probated in Kansas. Even if *said will and said record were void, as against the heirs of Isaac Turpin deceased, still they are valid as against any party claiming under

said deeds, as they show the kind of trust created by said deeds, its nature and extent.

What, then, were and are the rights of the parties under said deeds and said will? The rights of J. Henry Blake are the same as the rights of Wilkinson Turpin, the original trustee, would be if he were still living and still the trustee. Gen. St. 1098, § 10. And hence it must follow that at least the whole legal estate in the property in controversy is now in said Blake. We think the whole estate, legal and equitable, in said property is in Blake. He has the whole power, under the instructions and supervision of the court, to take care of it, to use it, and to dispose of it. Neither Anderson Turpin, nor any one of Anderson Turpin's children, has any interest in the real estate ^{as} real estate. They have an interest in the trust fund, which is for the time being invested in real estate. They had that interest in the fund before it was invested in real estate; they have it now; and they will continue to have such interest in said fund, even if the real estate be sold, and the fund invested in something else. Remotely they have an interest in whatever the fund may be invested in; but they have no such direct interest in the thing in which the fund may be invested as to constitute an estate when the fund is invested in real estate. The right of Anderson Turpin, under the will, is to have only the proceeds of the fund,—the increase thereof. He is not to have any of the principal of the fund; and he has never had any power to sell it or incumber it. The principal of the fund is to remain a permanent fund for the benefit of Anderson Turpin's children. They are to have the fund after Anderson Turpin's death. But their interest in the fund does not constitute an estate in the property in which the fund may for the time being be invested; or, at most, such interest can amount only to a contingent remainder therein. It cannot amount to any vested estate. Their in-
 *258 terest will not pre*vent the trustee from selling the property by order of the court, freed from all right, title, or interest which they may have therein. And if the property is unproductive, so that no proceeds are procured therefrom for the benefit of Anderson Turpin, it ought to be so sold. They may therefore never have any estate in the property. If Anderson Turpin should die while the title to the property is still vested in the trustee, his children would then have the right to have the title conveyed to them, if practicable, according to their respective interests in the trust fund; but their right, at most, can only amount to a contingent remainder. Neither Anderson Turpin nor his children had, at the time they executed said quitclaim deeds, any interest in the property in controversy which they could convey. Hence the quitclaim deed from Anderson Turpin to his children, and the quitclaim deeds from his children to Collier, were void. Even if procured and executed in good faith, still they were void as conveyances; and, being void as conveyances, Anderson Turpin and his children could not defeat or terminate the trust by mak-

ing them. They alone had no power, in any manner, to terminate the trust. Usually, where all the beneficiaries of a trust unite, none of them are laboring under disability, they may, with the consent of the court, terminate the trust. But when they attempt to terminate the trust in contravention of the object of the trust, they certainly cannot do so unless they have the consent of the court, and the consent of the court should generally not be given in such cases. In the present case it would be in violation of the object of the trust to terminate the same before the death of Anderson Turpin. It was clearly the intention of Isaac Turpin, when he created the trust, that Anderson Turpin should have the benefit of the increase of the trust fund during his life-time, and that the trust should not during that time, be terminated, diverted, incumbered, diminished or materially impaired. But whatever interest Anderson Turpin may have had in said property, still he was prohibited by statute

*259 from disposing of the same. The statute in force when said deeds creating the trust, and when said quitclaim deeds, were made, reads as follows:

"Sec. 4. No person beneficially interested in a trust for the receipt of the rents and profits of lands can dispose of such interest, unless the right to make disposition thereof is conferred by the instrument creating the trust." Laws 1858, p. 402, § 4; Comp. Laws 1862, 1897, § 4.

Now, this law was in force when Wilkinson Turpin, as trustee, purchased the land in controversy; it was in force when Anderson Turpin made said quitclaim deed to his children; and it was in force when his children made said quitclaim deeds to Collier; and we suppose it will be admitted that Anderson Turpin was beneficially interested in the receipt of the rents and profits of said land. And will it be contended that a trust in lands in Kansas can be created and the trust not be governed by the laws of Kansas?

It is not necessary to discuss any of the other questions supposed to be involved in this case.

The judgment of the court below is affirmed.
(All the justices concurring.)

CENTRAL BRANCH U. P. R. CO. v. NANCY J. WILCOX.¹

January Term, 1875.

Trusts and Trustees: What Facts Create a Trust: Trustee to Convey to Equitable Owner. Under the Kickapoo treaty of 1862 (13 U. S. St. at Large, 623) the Central Branch Union Pacific Railroad Company, otherwise known as the Atchison & Pike's Peak Railroad Company, purchased from the government of the United States all the surplus lands belonging to the Kickapoo Indian reservation, and obtained certificates of purchase therefor from the secretary of the interior; and, before the railroad company obtained patents for said land, one S. C. P., who was the president and attorney in fact for said railroad company, and duly authorized, did, by an assignment written and printed on the same
 *260 piece of paper on which one of said certificates of purchase was written and printed, "transfer and assign to N. J. W. all the right, title, and interest of the said Atchison & Pike's Peak Railroad Company" to a certain quarter section of said land, "and require the issue of a patent to N. J. W., as assignee of said company, in accordance with the terms of said certificate," and the said N. J. W. afterwards took possession of said land under said certificate, and the assignment thereof, and made valuable improvements thereon; and afterwards the said railroad company caused the patent for said land to be issued to itself, and now refuses to transfer the legal title to said land to said N. J. W. *Held*, that the railroad company holds the legal title to said land in trust for said N. J. W., and that the company may be compelled to transfer the same by deed to said N. J. W.

Error from Atchison district court.

Nancy J. Wilcox, as plaintiff, filed her petition against the railroad company as defendant, alleging that on the second of January, 1866, the then secretary of the interior executed and issued to said railroad company two certain certificates of purchase, copies of which are set forth in the opinion, and that afterwards, on the tenth of August, 1866, the said defendant, "by S. C. Pomeroy, its president, agent, and attorney in fact, in that behalf by it thereunto duly appointed and authorized," for value received, made, executed, and delivered to said plaintiff certain instruments of writing, transferring and assigning to said plaintiff all the right, title, and interest of the said railroad company in and to the lands mentioned in said two certificates of purchase, and requiring "the issue of a patent to Nancy J. Wilcox, as assignee of said company, in accordance with the terms of said certificate." Trial at the June term, 1873, of the district court. Separate findings of fact and conclusions of law were made. The eighth finding of fact is as follows: "(8) That Samuel C. Pomeroy did not receive said certificates from the defendant in blank, and thereafter execute the same in blank with the name of grantee left out; that the

¹See *Collier v. Blake*, *ante*, *250.

same were never delivered to L. C. Challiss, nor any other person except the defendant; and that G. L. Gaylord never sold the land to plaintiff upon any terms or conditions whatever, and that plaintiff had anything to do with the same; but that they were lawfully transferred, for a valuable consideration, from defendant to plaintiff, as is particularly described in exhibits attached to plaintiff's petition." As a conclusion of law the court found that "the plaintiff is entitled to judgment as prayed for in her said petition, and that the order that defendant make and execute a deed to plaintiff of the two tracts of land, within sixty days from the rising of the court, that in default thereof the sheriff of Atchison county be ordered to make such conveyance to plaintiff;" and judgment was entered accordingly.

A. G. Otis and O. S. Everest, for plaintiff in error.

Admitting all the facts of the petition, the written instrument set forth as executed by S. C. Pomeroy, as president and attorney in fact of plaintiff in error, are mere quitclaim deeds. They release and convey only the right, title, and interest the railroad company had in the tenth of August, 1866, in the two tracts of land. At this date the company had no title, legal or equitable, therein, under the terms of the Kikapoo treaty. It is neither averred nor assumed by plaintiff that it had any. Its road was then unconstructed; and the terms of the treaty—the conditions precedent—wholly unperformed on its part. Plaintiff's after-acquired title did not inure to the benefit of the defendant in error. *Simpson v. Greeley*, 8 Kan. *597; *Bruce v. Luke*, 9 Kan. *201.

The court erred in sustaining objection to the question asked of witness Wilcox. The question asked was, "Are these the two certificates sued on?" The defendant had a right, on cross-examination, after the certificates were formally in evidence by plaintiff's counsel, to ask any question identifying them, and to call the attention of witness to the two certificates produced. The court also erred in overruling the written objections of defendant to the deposition of S. C. Pomeroy, and allowing the same to be read. Six of the questions were leading, irrelevant, and not proof of any fact within the issue.

*262 Question No. 7 is this: "Were these assignments, when made and delivered by the company, so far as the papers themselves concerned, intended to convey the title to the land itself, or only the right to purchase the land provided for embraced in the treaty with the Kikapoos?" The question is leading, and also asks the opinion of the witness as to the legal effect of these certificates, and the contents of the ten instruments attached thereto. The intention of the company is to be gathered from the instruments themselves, and they are to be construed, as to their legal effect, by the court, not by the witness.

Their plain legal interpretation cannot be thus construed and changed, altered, or modified. *Germania Fire Ins. Co. v. Curran*

Kan. *18; Tefft v. Wilcox, 6 Kan. *46, *55, *59; 1 Greenl. Ev. §§ 275, 277, 440, 441.

The court erred in overruling defendant's demurrer to plaintiff's evidence. The evidence of witness Wilcox clearly showed that plaintiff was not a *bona fide* purchaser, but bought with full notice of the defects of title. She took Gaylord's guaranty to refund her the purchase money she had paid him if she did not succeed in getting her patent from the government. The whole testimony establishes these facts: That the plaintiff was not put in possession by defendant, or with its consent; that the improvements she made were merely nominal, of the value of \$85 only; that plaintiff bought of one G. L. Gaylord, in March, 1870, and took possession thereafter, and paid him therefor, taking his guaranty to refund the purchase money if she failed to get her patent; that plaintiff dealt only with Gaylord, and paid him alone, and utterly fails to show that defendant knew of or recognized her entry, or that defendant ever received one dollar of consideration from anybody for these lands. Her entry, March 8, 1870, was not under the deeds of release or written instruments purporting to be of date August 10, 1866, four years before, but under her purchase from Gaylord, and under his guaranty of indemnity. And

no demand was ever made on the railroad company by plaintiff *263 for a deed, nor was a deed tendered to it for execution. *No fraud on the part of the railroad company is established, or even sought to be. And article 6 of the treaty required the railroad company to pay for all these lands, including these tracts, before it could get title to any, or its patent.

Findings of fact and conclusions of law are erroneous. Finding of fact No. 8 is wholly unsupported by evidence, and directly contrary to it. The court could only find its conclusions of fact upon and in accordance with the evidence, and not directly contrary to such evidence, and against all the evidence. The second conclusion of law, "that the writing signed S. C. Pomeroy on said certificates was an assignment thereof from the defendant to the plaintiff," is contradicted by the writing itself. It is no more an assignment of this certificate sued on than of any other certificate. It is not an assignment of any certificate, but a quitclaim deed of the land. There was no authority given by the treaty to the railroad company to assign the certificates.

The written instruments themselves do not purport to be executed by the railroad company, but by S. C. Pomeroy. The *addenda*, "President of and Attorney in Fact for the Atchison & Pike's Peak Railroad Co.," may well be considered words of *descriptio personæ*. No seal of the company is affixed. We may well hold that these are not the conveyances of the railroad company at all. The case of Hatch v. Barr, 1 Ohio, 390, is in point directly, where such a signature was held to convey no title from the corporation. See, also, Thayer v. Payne, 2 Cush. 329; Savings Bank v. Davis, 8 Conn. 192;

Hills v. Bannister, 8 Cow. 32; McClure v. Bennett, 1 Blackf. 144.
Mears v. Graham, 8 Blackf. 144.

Clough & Wheat, for defendant in error.

The answer in this case, not being sworn to as required by the Code § 108, admits all the substantial allegations of the petition. It admits the proper execution and delivery of the certificates of purchase set forth in the petition, and the proper assignment and *264 livery of said certificates to the *plaintiff, Nancy J. Wilcox.

It admits also the execution and delivery of the patent by the United States to the plaintiff in error, a copy of which is set forth in the petition, and which includes the lands in controversy, and the court also finds such to be the facts. The real defense in this case is that these certificates, with the assignments and transfers thereon, do not, by their terms, entitle the plaintiff to a conveyance as prayed for in the petition, but that the assignment of the certificates conveyed *only* the right to Nancy J. Wilcox to receive patents from the United States for the lands mentioned in said certificates, upon payment by said Nancy to the government of the United States, or said railroad company, of \$1.25 per acre, with interest from the date of purchase by the railroad company, (see 13 U. S. Stat. at Large, 636 § 5,) in addition to the \$2,400 paid by said Nancy to the railroad company when she obtained the transfer of the certificate. That this is the *only real point* in the case is shown by the second paragraph of the answer, and by the action of plaintiff in error in objecting to the giving or receiving of any evidence under the petition in said case, and by his interposing a demurrer to the evidence after plaintiff had closed her testimony.

By the provisions of the Kickapoo treaty aforesaid, there is no apportionment of the purchase money of the lands thereby disposed of. Neither the government nor the Kickapoos sold, nor did the railroad company purchase, any one 160 acres of land at \$1.25 per acre. On the contrary, section 5 of the treaty says distinctly, "provided said railroad company purchase the whole of such surplus lands at the rate of \$1.25 per acre." When the contract of purchase was completed and the patent issued, the title, by relation, *commenced at the time when that contract was made*. The case of *Parker v. Winsor*, 5 Kan. *362, *373, does not militate at all with our views in this case, because, when *this* suit was brought, both the legal and equitable title had passed from the Kickapoos and the United States to the *265 railroad company. When the case of *Parker v. Winsor* was brought, neither title had so passed; and this is referred to by the court in its opinion, (page 373,) and made, as we think, the basis of its decision in that case. Both the legal and equitable title having passed when this suit was commenced, (because it is found by the court that the patent had issued, that the lands had been paid for, and the road built in accordance with the provisions of the treaty,

both titles *related back to the date of the original purchase*, in accordance with the doctrine so fully laid down by the supreme court of the United States, in *Landes v. Brant*, 10 How. 373.

Nor does the general doctrine, relied upon in the court below by counsel for plaintiff in error, apply,—“that a quitclaim deed does not convey an after-acquired title,”—because *this patent conveyed no new title*, but was only the *consummation and perfecting* of the title *contracted for* in the original purchase by the railroad company when they elected to take all the surplus Kickapoo lands. *Stark v. Starrs*, 6 Wall. 402; *Crews v. Burcham*, 1 Black, 352; *Doe v. Wilson*, 23 How. 457; *Fackler v. Ford*, 24 How. 323. The plaintiff in error, after receiving the patent, was shown to be a trustee, holding the title to the lands in controversy in trust for defendant in error; and upon the introduction of evidence of a demand upon and refusal by plaintiff in error to make a deed to said lands to said Nancy, she was entitled to the decree she obtained in the court below. And it makes no difference what evidence was admitted or rejected; and any exceptions taken thereto need not be noticed by us, or this court. Code, §§ 140, 304; *Kansas Pac. Ry. Co. v. Pointer*, 9 Kan. *626; *Seibert v. True*, 8 Kan. *53.

With reference to the assignment of error that the findings of fact are not sustained by sufficient evidence, we would state that the first, second, third, fourth, eighth, and ninth findings are admitted by the pleadings, and are found from the pleadings, and neither party could have been permitted to show the contrary. We suppose that the eighth finding of fact is the only one that plaintiff in error really objects to, and the whole of this finding, except the last four lines, has nothing whatever to do with the case; and that portion of said finding was made solely, as is apparent upon its face, at the solicitation of plaintiff in error. Yet in view of the provisions of section 108 of the Code, and of the allegations of the petition, and of the failure of plaintiff in error to deny any of said allegations or averments under oath, the district court or any other court could not find otherwise.

The entire deposition of Pomeroy might be stricken out, and it could not affect the case in the least. As to the objection made that certain questions were leading, we would state that we believe it is conceded law that no such objection to questions asked a witness, and not objected to at the time as leading, can afterwards be raised on the trial. *Luke v. Johnnycake*, 9 Kan. *511; *Kansas Pac. Ry. Co. v. Pointer*, Id. *627.

We claim, further, that the wording of the treaty itself, quite as much as the wording of the certificates, shows that the government and the railroad company both intended that the \$1.25 per acre should be paid by the railroad company, and not by its grantees. We think, too, that the treaty contemplated the *issue of patents* to the railroad company, or its assigns, but that the *payment* should be made *in bulk*,

for the *whole lands*, by the *railroad company* alone; and for the purpose of securing such payment, according to the terms of the treaty, the railroad company was required to issue its bonds in double the amount of the entire purchase money.

VALENTINE, J. Suit was brought in the court below, by defendant in error, to compel a conveyance to her from plaintiff in error of certain specified tracts of land, being part and parcel of the Kickapoo reservation, in Atchison county. The plaintiff below bases her case upon two certificates of purchase issued by the United States government to the defendant below, of date January 2, 1866, which had passed into plaintiff's possession, and upon two written instruments written upon the same pieces of paper with said certificates, executed by S. C. Pomeroy, president of and attorney in fact for the defendant railroad company, and purporting to have been so executed.

*267 cuted to plaintiff at the date thereof, August 10, *1866. The plaintiff further averred in her petition that the defendant obtained a patent from the United States for these tracts of land September 5, 1871; that it obtained the same fraudulently, as against the plaintiff, and with intent to convert said lands to its own use; that she, the plaintiff, had entered into possession of said lands, and made improvements thereon, and praying for a decree for conveyance from defendant. The defendant answered—*First*, a general denial; *second*, a specific denial that said certificates and written instruments conferred on plaintiff any right or interest in said tracts of land, and averred that it, the defendant, was the sole owner of the same. The answer was not verified by affidavit. The plaintiff replied by filing a general denial. Trial was had by the court, without a jury. Defendant objected to the introduction of any evidence under the petition, as not stating a cause of action. Objection overruled, and exception taken. After plaintiff's evidence was in, defendant filed demurrer to the evidence, which was also overruled, and exception taken. After the evidence closed, all of which appears in and made a part of the record here, the court found its conclusions of fact upon the evidence, and its conclusions of law, and rendered judgment that defendant make and execute to plaintiff a deed of the tracts of land named.

On behalf of the plaintiff in error counsel submit in this court that the court below erred in overruling defendant's objection to the introduction of evidence under plaintiff's petition. This is the principal and about the only substantial question in the case. The question really is whether the petition below states facts sufficient to constitute a cause of action. We think it does. It is not necessary to plead the public laws or treaties of the United States. They will be taken notice of judicially, without pleading or proving them. Hence all the provisions of the Kickapoo treaty of 1862 (13 U. S. St. at Large, 62) will be taken notice of judicially, although some of the provisions

thereof may not have been specifically mentioned in the petition.

This proposition does not seem to be controverted by counsel on
 *268 either side. Now, *it is claimed by counsel for plaintiff in error that under the provisions of that treaty the railroad company had no title, legal or equitable, to the land in controversy when the said assignment was made by said Pomeroy, as attorney in fact for said railway company, to the plaintiff below. This we admit, and shall decide the case upon that theory. *Parker v. Winsor*, 5 Kan. *362, *373; *Douglas Co. v. Union Pac. Ry. Co.*, 5 Kan. *615, *621, *et seq.*; *Baker v. Gee*, 1 Wall. 333; *Railway Co. v. Prescott*, 16 Wall. 603; *Union Pac. R. Co. v. McShane*, 2 Cent. Law J. 104; *Brisbois v. Sibley*, 1 Minn. 230, (Gil. 190.)

Although it was provided in the fifth article of the said treaty, as it was originally drawn, that "such certificates" as those sued on in this case "shall be deemed and held in all courts as evidence of title and possession in said railroad company," yet the said words "title and" were stricken out of said article before it was ratified, and the words "the right of" inserted in their place, by way of amendment, so that said provision now reads that "such certificates shall be deemed and held in all courts as evidence of the right of possession" only. 13 U. S. St. 629. But, although the railroad company had no title to said land at the time said certificates were assigned, yet they had a valid contract with the government under which they had the exclusive power to obtain title, and this title they could obtain either for themselves or for their assignees; and at the very time said certificates were assigned the railroad company had the right of possession to said land, to the exclusion of all others. They had a right to assign all their interest in the land, including their right to obtain title, and their right of possession; or, in other words, they had a right to make a valid contract for the sale of the land. And such a contract the government would undoubtedly recognize as valid under said treaty. See articles 5 and 6 of the treaty.

The plaintiff in error seems to claim that said assignments amount only to quitclaim deeds. Now, although they read in some respects like quitclaim deeds, yet in fact they are not deeds at all. They were not intended to perform the office of deeds. They were
 *269 not intended to convey any present *estate or title in or to the land. But they are merely simple contracts, intended to transfer the inchoate interest of the railroad company in and to said land, and to transfer their right to obtain said title at some future time from the government. They sold their right to have the patent from the government for the land issue to themselves, and required by their agreement that it should issue to Nancy J. Wilcox. The two certificates are alike except as to the description of the land, and the two assignments are also alike, with the same exception. Below we give a copy of one of said certificates, with the assignment thereof, which reads as follows:

"No. 700.

UNITED STATES OF AMERICA.

"DEPARTMENT OF THE INTERIOR, January 2, 1866.

"Whereas, it is provided by the fifth article of the treaty between the United States and the Kickapoo tribe of Indians, concluded June 28, 1862, as afterwards amended and proclaimed on the twenty-eighth day of May, 1863, that, after certain portions of the lands belonging to said tribe of Indians shall have been allotted and set apart for the use and benefit of the members of said tribe, the Atchison & Pike's Peak Railroad Company shall have the privilege of becoming the purchaser of the remainder of the lands not so set apart and allotted, upon certain conditions therein prescribed; and whereas, the said lands have been allotted and set apart to the members of said tribe, as prescribed by said treaty, and the said railroad company has elected to become the purchaser of the remainder thereof, and by its president, the Honorable Samuel C. Pomeroy, has executed and delivered to the secretary of the interior its bond in the penal sum of three hundred and ten thousand dollars, being double the value of such remainder or surplus of said lands, estimated at the rate of one dollar and twenty-five cents per acre, conditioned as by the terms and provisions of said treaty is required, which said bond has been accepted and approved by the secretary of the interior:

"Now, therefore, it is hereby certified that under and by virtue of the provisions and terms of the said treaty, as amended, the Atchison & Pike's Peak Railroad Company has become the purchaser, and is entitled to the possession of 160 acres; being the S. E. $\frac{1}{4}$ of *270 section nineteen, township Five S., Range seven*teen E. 6th P.

M., the same being parcel of the said surplus or remainder of said lands; subject, however, to all the terms and conditions, considerations and stipulations, in said treaty in that behalf mentioned and set forth.

"It is also hereby further certified that in case the said Atchison & Pike's Peak Railroad Company shall well and truly do and perform all things required to be done and performed on its part, in the time and manner prescribed by said treaty, and shall well and truly pay for said surplus or remainder of said lands, as by said treaty stipulated, then and in that case the said Atchison & Pike's Peak Railroad Company, or the assignee hereof, will be entitled to demand and receive from the United States of America a patent in fee-simple for the premises above described.

"In testimony whereof, I have hereunto set my hand, and caused the seal of said department to be hereunto affixed, this *second* day of January, 1866.

[L. S.]

"JAS. HARLAN, Secretary."

"For value received, I, S. C. Pomeroy, president of and as the duly authorized attorney in fact of the Atchison & Pike's Peak Railroad Company, for said company, do hereby transfer and assign to Nancy

J. Wilcox all the right, title, and interest of the said Atchison & Pike's Peak Railroad Company to the *S. E. $\frac{1}{4}$ of section nineteen, (19,) township five (5) south, range seventeen (17) east of 6th P. M.*, and require the issue of a patent to *Nancy J. Wilcox*, as assignee of said company, in accordance with the terms of said certificate.

"Witness my hand and seal this *tenth day of August, 1866.*

"Attest: S. C. POMEROY, [L. s.]

"President of and Attorney in Fact for the Atchison & Pike's Peak Railroad Co."

"*State of New York, County of New York:* On this *tenth day of August, 1866*, before me personally came *S. C. Pomeroy, president of and atty. in fact for A. & P. P. Railroad Co.*, to me well known; and acknowledged the foregoing assignment to be *his voluntary act and deed, and the voluntary act and deed of the said A. & P. P. Railroad Company.*

CHAS. V. WARE,

[L. s.]

"Notary Public, New York City."

It will be noticed that the railroad company agreed to "*require the issue of the patent to Nancy J. Wilcox, as assignee of said*
 *271 *company, in accordance with the terms of said certificate.*"

This was a valid contract. If not authorized by the treaty in direct terms, it is certainly authorized by it by necessary and unavoidable implication. The assignment was on the same piece of paper as the certificate, and was printed thereon in blank, under the supervision of the secretary of the interior, which shows what the opinion of the secretary of the interior was. Now, as the company did not allow the patent to issue to Mrs. Wilcox, as they agreed, but took the patent to the company, we think the company ought to convey the title to the land to Mrs. Wilcox. Under the provisions of said treaty and said certificate and said assignment, we think it should be inferred that the railroad company should have done all that was necessary to be done so that they could *require* the patent to be issued to the plaintiff, and the evidence in the case amply shows that this was the understanding of the parties. It is claimed by plaintiff in error that said assignment was made in the name of S. C. Pomeroy, and not in the name of the company. Admitting, for the purposes of the case, that said assignment was so made, and still it makes no difference. It is not a deed conveying title. It is only a simple contract providing for a conveyance of title. It is not necessary that such a contract be made in the name of the principal. *Butler v. Kaulback*, 8 Kan. *668, and cases there cited; *Welsh v. Usher*, 2 Hill, Ch. (S. C.) 167. This contract, however, shows who the principal was, and who the agent was. It shows that Pomeroy acted merely as the agent of and for the railroad company.

We now come to the supposed errors in admitting and excluding evidence. The most of the evidence complained of which was either admitted or excluded, was wholly immaterial to the issues in the case,

but was of such a character that the action of the court certainly did not tend to prejudice any of the substantial rights of either of the parties. That the defendant was a corporation, as alleged in the petition, was expressly admitted by the pleadings; and that said certificates, said assignments, and said patent were all duly executed, was impliedly admitted by the pleadings. The plaintiff in *272 *error did not put their execution in issue by denying their execution by a pleading verified by affidavit, and hence the statements of the petition, alleging their due execution, must be taken as true. Code, § 108; Gulf R. Co. v. Wilson, 10 Kan. *105, *111, *112; School-district v. Carter, 11 Kan. *445.

Under the pleadings the question asked the witness Wilcox, and nearly all of the deposition of Pomeroy, were wholly immaterial, and neither their admission nor exclusion could have materially affected the case. In those portions of Pomeroy's deposition material to the case, and read in evidence, we do not see any question sufficiently leading to require a reversal of the case.

We do not think the demurrer to the evidence should have been sustained, for the allegations of the petition were amply proved. We take no notice of the evidence which was merely immaterial, or which did not tend to prove any issue in the case, and which did not tend to prejudice the substantial rights of the plaintiff in error. There was some of this kind of evidence introduced. The most of the facts found by the court were facts admitted by the pleadings. Whether the eighth finding of fact was warranted by the testimony outside of the pleadings, or not, is wholly immaterial. The pleadings impliedly admit the due execution of said certificates and said assignments, and evidence could not properly have been admitted to show that they were not duly executed. It makes but very little difference whether the court below was technically correct in all its conclusions of law or not, provided the pleadings, and the evidence thereunder, and the facts found from such evidence, sustain the judgment. And we think the pleadings, the evidence thereunder, and the facts found therefrom, amply sustain the judgment, and it is therefore affirmed.

(All the justices concurring.)

*273 *SAMULI O. SWENSON and others v. AULTMAN and others.

January Term, 1875.

1. **Continuance: Diligence in Procuring Testimony.** Where a witness whose testimony is material could be procured by the exercise of reasonable diligence, but the witness tells the party wanting his testimony that he will be present at the trial of the case so that his testimony may be used, and such party uses no diligence to procure the testimony of said witness, *held*, that such party is not entitled to a continuance for the want of the testimony of such witness. [Wilkins v. Moore, 20 Kan. 538.]¹
2. ———: **Motion for: Materiality of Testimony.** Before a judgment of the district court can be reversed because such court overruled a motion for a continuance to procure the testimony of an absent witness, it must appear somewhere from the record that such testimony was material and competent in the case. This should really appear from the affidavit itself filed for the purpose of procuring the continuance; but, beyond all doubt, it should appear from the record, or some part thereof.
3. **Principal and Agent: Declarations of Agent: Authority to Bind Principal.** It is a general rule that the declarations of an agent, in order to bind his principal, must not only come within the scope of the agent's authority, but they must also be made by the agent while he is transacting his principal's business, and be connected therewith as a part of the *res gestæ*.²
4. **Continuance: Discretion of Court.** Continuances are to some extent within the discretion of the trial court; and unless it is shown that the trial court abused its discretion in granting or refusing a continuance, the appellate court will not declare the rulings of the trial court in such a case erroneous. [Payne v. National Bank, 16 Kan. 155; Wilkins v. Moore, 20 Kan. 538.]

Error from Davis district court.

The case is stated in the opinion.

James Ketner and Chas. G. Cox, for plaintiffs in error.

McClure & Humphrey, for defendants in error.

*274 *VALENTINE, J. This was an action brought by Aultman, Miller & Co. against Samuli O. Swenson and John P. Swenson, on a promissory note and a mortgage. John P. Swenson originally owed the debt to Aultman, Miller & Co., and his wife, Samuli O. Swenson, executed said note for the debt, and they both executed the mortgage to secure the payment of the note. Mrs. Swenson set forth in her answer that her signature to the note and mortgage was

¹Upon facts, *held* that no sufficient diligence was shown to compel a continuance. *Tucker v. Garner*, 25 Kan. 457. Before a party has a right to a continuance on the ground of absent testimony, it must affirmatively appear that such party has used due diligence in seeking to obtain such testimony, and also that the same is material. *St. Louis, W. & W. R. Co. v. Ransom*, 29 Kan. 299; *Board of Regents v. Linscott*, 30 Kan. 259; *S. C. 1 Pac. Rep. 81*, and cases cited.

²See *Jenkins v. Lewis*, 25 Kan. 481; knowledge of agent, how affecting principal, see note to *Huff v. Farwell*, 25 N. W. Rep. 255; scope of employment, *Brooke v. New York, L. E. & W. Ry. Co.*, 1 Atl. Rep. 210, and note; purchase by agent, *Savage v. Savage*, 8 Pac. Rep. 762.

obtained fraudulently. When the case was called for trial she asked for a continuance of the same until the next term of the court, and filed two affidavits in support of her motion for a continuance. The court overruled said motion, the defendants excepted, and this is the sole ground for error in this case.

The first affidavit was filed for the purpose of obtaining a continuance so as to procure the testimony of one William Stafford. The affidavit, however, does not show that any legal diligence was used to get the testimony of said Stafford. Although it appears that Stafford resided in the same county where this suit was brought and tried at and after the time it was brought, yet no subpoena was ever issued to procure his attendance. And although he afterwards removed from said county to Chicago, Illinois, yet no attempt was ever made to procure his deposition. Stafford told the defendants that he would be present at the trial, but that does not excuse the defendants' want of diligence in not attempting to procure his testimony. *Educational Ass'n v. Hitchcock*, 4 Kan. *36. The witness' testimony could have been procured by the exercise of reasonable diligence. Hence we think the court below did not err in refusing to grant a continuance for the want of the testimony of such witness.

The other affidavit was filed for the purpose of getting a continuance to procure the testimony of one Charles H. Purinton. We think this affidavit is sufficient to procure a continuance, provided the alleged testimony of said Purinton is competent and material in this case. The said alleged testimony is as follows: "The said Purinton, if present, would swear and prove that he was present in Junction City, Kansas, on the twenty-sixth of February, 1872, the date of the execution of the note and mortgage between Mrs. Samuli O. Swenson, wife of affiant, John P. Swenson, and that at that time one Rhodes, the then general agent of the said plaintiffs, told him that all he wanted was to induce Mrs. Swenson to give her note and mortgage upon her own individual property to secure the payment of the money due to them from John P. Swenson, to-wit, the sum of \$4,087.06, and then John P. Swenson might go to the devil, and immediately after securing said note and mortgage he, the said Rhodes, as such general agent, told the witness Purinton that he had come it over Swenson (meaning John P. Swenson) at last, and that by the assurance that he, as the duly-authorized agent of the said plaintiffs, would constitute the said John P. Swenson their agent for the counties of Davis, Morris, Dickinson, Clay, and Cloud, in the state of Kansas, for the term and period of five years from that date. Witness will also swear that the agency of said plaintiffs aforesaid would have been worth at least \$1,500 per year, and that, after the procurement of said note and mortgage as aforesaid, the said Rhodes, as the duly-authorized agent, and acting for the said plaintiffs, disregarding the promises and agreement aforesaid, gave the agency aforesaid to other parties in Junction City."

Now, before we can reverse the judgment of the district court because it overruled said motion for a continuance, it must appear somewhere from the record of the case that this evidence was material and competent. This should really appear from the affidavit itself. Gen. St. 689; Code, § 317. But, beyond all doubt, it should appear from the record, or some portion thereof. In the present case it does not appear from anything brought to this court that said evidence, or any portion thereof, was material and competent. The evidence is, in substance—*First*, what an agent of the plaintiffs said to a third person prior to the time of the execution of said note and mortgage as to what the agent *intended* to do; *second*, what said agent said to this same third person after said note and mortgage were
 *276 *executed as to what the agent had done, and what he intended to do; *third*, what the opinion of said witness was as to the value of a certain agency which said agent agreed to confer upon John P. Swenson. It is not claimed in this court that the last-mentioned evidence was competent and material; and it was not competent and material, for there is nothing in the whole record that tends to show that said witness had any knowledge or intelligent opinion as to what was the value of said agency which said agent agreed to confer upon Swenson.

It is a general rule that the declarations of an agent, in order to bind his principal, must not only come within the scope of the agent's authority, but they must also be made by the agent while he is transacting his principal's business, and be connected therewith as a part of the *res gestæ*. 1 Greenl. Ev. § 113; Story, Ag. §§ 134–136; Paley, Ag. 256, 257; U. S. Exp. Co. v. Anthony, 5 Kan. *490. Now, the declarations in the present case were not made while the agent was transacting his principal's business, and they formed no part of the *res gestæ*. A part of said declarations was made before the agent commenced to transact his principal's business, and the other part was made afterwards. No portion of said declarations was made during the time the agent was negotiating with the defendants, and no portion thereof formed any part of the transaction had with the defendants. These declarations should have been made during the transaction, and as a part thereof, in order to constitute any portion of the *res gestæ*. State v. Montgomery, 8 Kan. *351, *360, *et seq.*; Luby v. Hudson R. R. Co., 17 N. Y. 131; Sweatland v. Illinois & M. T. Co., 27 Iowa, 433; Osgood v. Bringolf, 32 Iowa, 265. But if said declarations had been so made, Swenson and wife would have known it, and they would not now be claiming that they were defrauded in consequence of them. All that these declarations tend to prove is that the agent did not intend to appoint Swenson as an agent
 of the plaintiff at the time when said agent agreed to do so.
 *277 Does this *make any difference? If the agent made a contract for his principal to appoint said Swenson an agent, and then neglected or refused to do so, would not his principal be just as

liable if the agent made the contract in good faith as though he acted in the worst of faith, and never intended to appoint Swenson to said agency? Does not the question depend upon whether there was a breach of any valid contract, without reference to what the intention of the agent were? This question, however, is not in the case. The only question is whether the declarations of an agent, when not in the performance of any business for his principal, can be used as evidence against his principal. We do not think they can. It does not seem from the record that the agent himself was examined as a witness on the trial. Continuances are, to some extent, within the discretion of the trial court; and unless it is shown that the trial court abused its discretion in granting or refusing a continuance, the appellate court will not declare the ruling of the trial court in such a case erroneous. *Hottenstein v. Conrad*, 9 Kan. *436; *Davis v. Wilson*, 1 Kan. *74.

The judgment of the court below is affirmed.
(All the justices concurring.)

AARON A. BELL *v.* CHARLES H. TAYLOR.¹

January Term, 1875.

1. **Judicial Sales: Sales in Gross of Separate Tracts.** A sheriff's sale of separate lots, made in gross, is irregular and voidable, and may be set aside on motion of the judgment debtor.
2. ———. The rule is the same though the debtor has but an undivided interest in the separate lots.
3. ———. This is not an arbitrary and inflexible rule. Circumstances may exist which show that more can be realized by a sale in gross, and then such a sale will be upheld.

*278 *Error from Mitchell district court.

Taylor recovered a judgment against Bell and two others. In June, 1873, he sued out a writ of execution on his judgment, directed to the sheriff of Mitchell county. The sheriff, finding no goods and chattels of any kind of the defendants, levied said writ on "the undivided one-third of block 16; and the undivided one-third of lots 1, 2, 9, 10, 11, and 12, in block 18; the undivided one-third of lots 1, 2, 3, 4, 5, and 6, in block 34; and the undivided one-third of lots 1, 2, 3, and 4, in block 35,—in the town of Beloit," as the property of Bell and sold the same "to Charles H. Taylor for the sum of \$238.85, the highest and best bid," etc. At the November term, 1873, of the district court, Bell filed his motion to set said sale aside "for the

¹See *Dexter v. Cochran*, 17 Kan. 451; *Johnson v. Hovey*, 9 Kan. 47.

reason that said lots were not sold separately, but in bulk." The court overruled this motion, and, on motion of Taylor, confirmed said sale.

Horton & Waggener, for plaintiff in error, contended that a sheriff's sale of separate lots in gross was irregular, and should be set aside on motion of the judgment debtor, and cited *Johnson v. Hovey*, 9 Kan. *61.

H. & S. Cooper, for defendant in error.

BREWER, J. The question in this case arises on the confirmation of a sale. The property sold was an undivided third interest in certain lots in the town of Beloit, which, from the numbers, were apparently separate, but which were sold in gross. A motion to set the sale aside on this account was overruled, and the sale confirmed. Such a sale has been decided by this court to be irregular and voidable, and on that account may be set aside on motion of the judgment debtor. *Johnson v. Hovey*, 9 Kan. *61. Counsel for defendant *279 in error claims that this is not an arbitrary rule; that hence *the reason of the rule, and therefore the rule itself, fails. The reason is that when sold separately the property will probably realize more than when sold in mass. This it is claimed may be true when the debtor owns the entire interest in the lots, but is not true when he only owns a small undivided interest therein. In such a case it is said no man would care to buy unless he bought an interest in enough lots to give him, on partition with the owners of the other interests therein, an entire lot. Hence he would not care to purchase an interest in a single lot for fear he would be compelled to pay unduly for an interest in the succeeding lot or lots. This reasoning, we think, is unsound. It assumes a state of facts which is as likely not to exist as to exist, and of whose existence or non-existence in this case we are not advised,—that is, that the remaining interests in all the lots are owned by the same parties; for if the other interest in each lot is owned by a different party, each lot would have to be partitioned separately. So, also, in such case, the most interested bidders would be little encouraged to bid. A man who owned two-thirds of one lot might be very anxious to buy the other third if he could buy that separately, and at the same time very unwilling to buy the undivided third of a dozen other lots in order to secure the third of that one. We do not mean to hold that the rule is arbitrary, and to be enforced in every case. Circumstances may often exist to make it for the interest of the debtor, and to justify and uphold a sale in bulk of separate lots. But nothing appears here outside of the record, and *prima facie* every such sale is irregular, and may be set aside by the debtor on motion, if such motion be made before the confirmation.

The order of the court will be reversed, and the case remanded, with instructions to set aside the sale.

(All the justices concurring.)

*280

*JOHN R. BOYD v. AMOS SANFORD.

January Term, 1875.

1. **Bill of Exceptions: Insufficient Record.** Where the certificate to the bill of exceptions only shows that "it presents nearly all of the testimony introduced by the parties," it is impossible for this court to say that the verdict was not sustained by the evidence.
2. **New Trial: Newly-Discovered Evidence: Affidavit.** On a motion for a new trial on the ground of newly-discovered evidence, an assertion in the affidavit of the moving party that he had used due diligence to obtain such evidence is not sufficient. The facts showing such diligence must be disclosed. [State v. Kellerman, *ante*, *135; Wilkes v. Wolback, 30 Kan. 375; S. C. 2 Pac. Rep. 508; Carson v. Henderson, Pac. Rep. 728.]
3. —: **Misconduct of Party: Accident: Diligence.** Where the grounds of a motion for a new trial are misconduct of the prevailing party, and accident or surprise which ordinary prudence could not have guarded against, and the facts as claimed are that the prevailing party testified incorrectly as to the contents of a letter, it is not error to overrule the motion when it does not appear that the prevailing party was guilty of willful false swearing, nor that the losing party had used due diligence to have and produce the letter at the trial.¹

Error from Cherokee district court.

Sanford recovered a judgment against Boyd at the October term 1873, for \$120 for services as an attorney at law. Boyd moved for a new trial, which was refused.

W. M. Matheny, for plaintiff in error.

Amos Sanford, defendant in error, for himself.

BREWER, J. Three errors are alleged: *First*, that the verdict is contrary to the evidence. As the certificate of the judge to the bill of exceptions is only that "it presents nearly all of the testimony introduced by the parties," it is impossible for us to say that the verdict was not sufficiently supported by the evidence.

The *second* error alleged is in refusing a new trial on the ground of newly-discovered evidence. The newly-discovered testimony consists of two letters written by Sanford, the plaintiff, to the defendant. But no diligence is shown—no reason given—why they were not produced at the trial. True, the affiant swears that he could not, with reasonable diligence, have discovered and produced them on the trial; but this is insufficient. The facts which

¹ New trial denied on the ground of accident or surprise, see *Osborne v. Young*, 28 Kan. 769; *Parker v. Bates*, 29 Kan. 597; *Board of Regents v. Linscott*, 30 Kan. 240; S. C. 1 Pac. Rep. 81; *O'Leary v. Reed*, 30 Kan. 749; S. C. 2 Pac. Rep. 114; *Beal v. Coddington*, 32 Kan. 107; S. C. 4 Pac. Rep. 180; discretion of court, *Ragan v. James*, 7 Kan. 222. See, also, *Abeles v. Cohen*, 8 Kan. 128; insufficient showing, *Mehner v. Thieme*, 15 Kan. *368; *Taylor v. Thomas*, 17 Kan. 593; *Race v. Malony*, 21 Kan. 31.

show diligence must be disclosed. The court is to decide, and not the party, whether reasonable diligence has been used. *Smith v. Williams*, 11 Kan. *104.

The defendant below, plaintiff in error here, also filed a second motion for a new trial, on the ground of misconduct of the plaintiff, and accident or surprise which ordinary prudence could not have guarded against. The facts are these: The action was for professional services. That the services were rendered does not appear to have been questioned, nor was their value seriously contested. Defendant claimed that after they had been rendered plaintiff agreed to take a certain sum, to-wit, fifty dollars, in full payment; that he had paid part thereof, and tendered the balance. He testified on the trial that he had received a letter making such a proposition, but had lost it. Another witness testified to having seen the letter, and that such were its contents. The bill of exceptions does not show that plaintiff testified at all concerning the letter, or the proposition. But Boyd's affidavit filed on the motion states that the plaintiff on the trial "denied the contents of said letter, and testified that said letter stated 'if defendant would send him fifty dollars by a certain time, to-wit, the Tuesday after the writing thereof, he [plaintiff] would give defendant a full receipt.' This affiant also alleges that the letter was lost, and could not be produced on the trial, and has since been found." But he does not disclose what, if any, efforts were made to find and produce it at the trial, or how it happens to have been found within two days thereafter. Under these circumstances we cannot say that the court erred in overruling the motion. There is not enough to warrant the court in imputing willful false swearing to the *plaintiff,—nothing to show reasonable diligence on the part of the defendant. *Laithe v. McDonald*, 7 Kan. *254.

The judgment will be affirmed.
(All the justices concurring.)

LUCY R. SHED v. JACOB AUGUSTINE.

January Term, 1875.

1. **Principal and Surety: Pleading: Several Defenses not Inconsistent.** Usury, extension of time to the principal whereby the surety is discharged, and payment are not inconsistent defenses in an answer of a surety on a promissory note.¹
2. **Evidence: Judicial Notice: Foreign Laws.** The courts of this state do not take judicial notice of the laws of another state; and it is error to instruct a jury as to the meaning and effect of those laws in the absence of any evidence concerning them. [*Dodge v. Coffin*, 15 Kan. 284.]

¹ Discharge of surety, see full note to *Ray v. Brenner*, 12 Kan. *106; *Turner v. Hale*, 8 Kan. 86, and note; *Rose v. Williams*, 5 Kan. 298, and note.

8. **Instructions: Erroneous.** Where the jury may have been misled by such erroneous instructions, and may have based their verdict upon them it is the duty of this court to reverse the judgment, even though there are other matters upon which the jury might properly have returned the same verdict. [Hodgin v. Barton, 23 Kan. 744; Solomon R. Co. v. Jones 30 Kan. 611; S. C. 2 Pac. Rep. 657.]

Error from Davis district court.

On the eighth of May, 1855, at Mendota, Illinois, Augustine, a surety for one Rust, executed his promissory note for \$200, payable to the plaintiff six months after date, with interest at the rate of 10 per cent. per annum. The action below was on this note. Defendant answered, setting up three defenses: *First*, payment; *second*, that he signed the note without consideration, and the plaintiff, by agreement with the principal debtor, extended the time of payment one year, and without his knowledge or consent, and for a valuable consideration; *third*, usury. Trial at September term, 1873. Plaintiff moved the court to require defendant to strike out all except the defense of payment, as being inconsistent, or elect upon which defense he would rest his case. This motion was overruled.

*283 *Verdict and judgment in favor of the defendant.

Culbertson & Hoffmire and Case & Putnam, for plaintiff.

It was error to overrule plaintiff's motion. The defenses were inconsistent. *Munn v. Taulman*, 1 Kan. *258; *Butler v. Kaulback*, 8 Kan. *672.

The case must have been decided in favor of defendant on either the ground of *usury*, or that the plaintiff *extended the time of payment* of the note, for there is no proof of payment of the principal. The proof as to *extending the time* is contained in the evidence of the principal to the note, P. B. Rust, and shows that there was no binding contract to extend the time, and no consideration therefor. *Story Notes*, §§ 415, 426; *Chit. Bills*, c. 9, p. 442; *Bayl. Bills*, c. 9, p. 339; *Bank of U. S. v. Hatch*, 1 McLean, 93; *McLemore v. Powell*, 12 Wheat. 544. As to the payment of interest during the time of forbearance, see *Reynolds v. Ward*, 5 Wend. 501; *Central Bank v. Willard*, 17 Pick. 150; *Crosby v. Wyatt*, 23 Me. 157; *Bank of Utica v. Ives*, 17 Wend. 501; *Creath's Adm'r v. Sims*, 5 How. 206. The requisites indispensable for absolving the surety are (1) a consideration; (2) a promise to indulge for a *definite time*; and (3) the absence of the surety's assent. *Alcock v. Hill*, 4 Leigh, 622; *Bank of Utica v. Ives*, *supra*; *Norris v. Crummev*, 2 Rand. 328; *Hunter v. Jett*, 4 Rand. 104.

As to the usury, the court instructed what the law of Illinois was as to usury. There was no evidence before the court as to the law of Illinois. The Gen. St. 1868, p. 700, § 370, provide how the laws of other states shall be proved. The court could not take judicial notice of the laws of Illinois, and it was error to instruct upon the law without proof. *Walker v. Armstrong*, 2 Kan. *222; 1 Greenl. Ev. § 489

Porter v. Wells, 6 Kan. *455; Atchison, T. & S. F. R. Co. v. Blackshire, 10 Kan. 487.

N. C. McFarland, for defendant.

The defenses of extension of time, usury, and *payment* are not inconsistent with each other. They all *may* exist in a case. Nor do the cases cited by plaintiff's counsel (1 Kan. and 8 Kan.) decide to the contrary. But if it was error to refuse to grant the plaintiff's motion, it is not at all certain that it is such error as would *284 require a reversal of the judgment, the plaintiff not being prejudiced thereby. If there is sufficient evidence in the record to sustain any one of the defenses, the verdict and judgment must stand.

The evidence shows that the time of payment of the note was extended by the payee and principal, for a valid consideration, without the consent or knowledge of Augustine, the surety. Bearing in mind the rule so often laid down by this court, that it will not disturb the verdict unless it is clearly against the weight of the evidence, let us see what that evidence is: Rust, the principal, testifies that he was to pay 20 per cent. interest on the note; and that this was to be the rate on the new, or \$200, note is shown, because he repeats that he was to pay \$40 a year interest. He says: "I paid the interest, sometimes a little *before*, sometimes after, the same became due. After the note became due I paid, in six months, \$40. I am quite positive I paid four and one-half years' interest. I think I paid Mrs. Shed, in all, \$210. The note [first, or old, note] had run from the previous summer. All the amounts I paid were paid voluntarily, as interest. I think I paid at one time \$30. At the time I executed the new note I paid \$10. I paid these amounts as interest."

The plaintiff in her testimony does not deny that the rate of interest agreed to be paid was 20 per cent., and this evidently was the rate on both notes. She does not deny that the sums named by Rust were paid. She does not deny that they were all paid as interest. She does not deny that the first note had run from the previous summer, and as the note sued on is dated May 8, 1855, it is not probable that the first note had run over one year. It would seem as if the \$30 was paid on the old note, and, as all that was paid was interest, it is fair to suppose that the \$30 was the interest on the \$150 note for one year; and, if so, then the \$10 paid at the time of the execution of the \$200 note was interest paid in advance on that note. If the \$30 was not paid on the old note, then \$40 was probably paid in advance on the \$200 note. Rust says he "paid the interest, sometimes a little *before*, sometimes a little after, it was due." The plaintiff does *285 not deny this last statement. If interest was paid and received in advance for any period of time by such action of the parties, the payment of the note *was extended to that time*. The payment being as interest, the \$200 could not be due till the time expired for which interest had been paid. It was, in effect, an agree-

ment not to sue till then. *Rose v. Williams*, 5 Kan. *483, *484; *Crosby v. Wyatt*, 10 N. H. 318; *Savings Bank v. Ela*, 11 N. H. 33; *Savings Bank v. Colcord*, 15 N. H. 119; *Dubinson v. Folkes*, 30 Mich. 432; *Scott v. Saffold*, 37 Ga. 384; *Flynn v. Mudd*, 27 Ill. 32; *Uhler v. Applegate*, 26 Pa. St. 140; *McComb v. Kittridge*, 14 Oh. 348; *Blazer v. Bundy*, 15 Ohio St. 57. The decisions cited by plaintiff in Maine and Massachusetts must give way to these authorities. Nor is the fact changed by the testimony of the plaintiff that she "never agreed to extend the time of payment." It is probable that she did not make what she called an "agreement." *Kettell v. Wigg*, 13 Mass. 72. Nevertheless, her negotiations with Rust amounted to such agreement. Whether she did make such agreement is a conclusion which must be arrived at from what was said and done.

Nor does it make any difference whether the court charged correctly as to the law of the state of Illinois on the question of usury. If there is evidence in the record, under the law as laid down by this court, to the weight of evidence, to support the verdict under any one of the defenses, the court will not reverse the judgment for erroneous rulings of the court below on other issues. The jury could not have found, under the evidence, that the defense of *payment* was made out, nor could they have found, under the charge of the court, that the defense of *usury* was sufficiently made out. The court must, therefore, have found for the defendant on the defense of the *extension of time*, and their verdict on this defense cannot now be disturbed.

BREWER, J. This was an action in the district court, brought by plaintiff in error against Augustine, on a promissory note signed by him as surety. Plaintiff was the payee of the note. The answer, as it finally stood, contained three separate defenses: (1) Usury; (2) payment; and (3) an extension of time to the principal, whereby the surety was discharged. Plaintiff claimed that these defenses were inconsistent, and moved the court to require the defendant to elect upon which he would stand. This motion the court overruled, and properly so. All three defenses might be true. The contract might, in its inception, have been usurious, and to that extent have been modified thereby in accordance with the laws of the state where the contract was made. Extension of time might also, after the making of the usurious contract, have been given to the principal, whereby the surety would have been discharged from all liability thereon; and after such extension had released the surety, the principal might have paid the note, and thus destroyed all liability on the instrument. As all these defenses might, in fact, have existed, they were not inconsistent, and the motion was properly overruled.

No proof was made as to the laws of the state of Illinois,—the state in which this note was executed. Notwithstanding this omission, the court charged the jury as to the effect of usury upon the

contract according to the laws of that state. This was manifest error. The courts of one state do not take judicial notice of the laws of another. They must be proved as other facts in the case. Counsel for defendant in error does not dispute this, but contends that, under the evidence, the jury could not have found against the plaintiff on the question of usury, but must have found against her on the question of extension of time to the principal, and that, therefore, the error is immaterial. We do not think this is clear. There was no evidence upon the plea of payment; but there was evidence tending to show an agreement to pay, and a payment, of 20 per cent. interest, and a payment of interest at that rate for four and a half years. The court charged the jury that 10 per cent. was the extent of legal *287 interest in Illinois, and that a party taking usurious *interest forfeited three times the amount of such interest, and could recover for the remainder of the note only. Upon this the jury might well have found for the defendant. True, this instruction seems to have been qualified by one given subsequently, which told the jury that usurious interest, voluntarily paid, could not be applied on the principal, but must be applied on "the interest accruing from the time of executing the said note, at the rate of ten per cent. per annum." But the jury may have understood that the extra and usurious interest was to be carried forward, and treated as an advance payment of subsequently accruing legal interest, and, in addition, that the party forfeited three times the amount of such usurious interest. In this case three times the usurious interest, upon the basis heretofore indicated, would have exhausted the principal. We cannot say, therefore, that the error was immaterial. Indeed, it seems to us full as likely that the jury found for the defendant upon the question of usury as upon the question of extension of time. The judgment must, therefore, be reversed, and the case remanded for another trial.

In reference to the question of extension of time, no objection is made to the instructions given, but it is insisted that the testimony fails to show any extension. We will not anticipate what may be shown on a subsequent trial, but would simply remark that, to make the proposed defense good in law, there must appear to have been a distinct agreement, without the consent of the surety, to give to the principal debtor an extension, and a valid consideration therefor,—a consideration which must be other than the payment of interest at the rate, and in the manner, required by the original contract for the use of the money.

Judgment reversed.

(All the justices concurring.)

*288 *S. N. WILLIAMS and another v. B. A. FEINIMAN and others

January Term, 1875.

1. Sales: Where Made: Order Taken by Traveling Agent. Where a person living and doing business in another state sends his agent in this state to solicit orders for goods, and the agent here takes orders, and sends them to the store of his principal, who fills the orders, and, without any special arrangement as to the manner and place of delivery, delivers them to the carrier in such other state, to be carried at the expense of the purchaser to the latter's place of business in this state, *held*, that the place of sale is in the state where the agent's principal lives and does business.¹
2. ———. There is no complete sale—no transfer of title to particular goods—until they have been separated from the entire stock. Before such separation, there can be, at best, only a contract to sell.

Error from Anderson district court.

This action was originally brought before a justice of the peace to recover the price of goods sold and delivered by B. A. Feiniman Co. to Williams & Pattee. Plaintiffs' bill of particulars shows that "goods" sold were several half-barrels of whisky, and several kegs and cases of brandy, gin, and wine, amounting to \$293.97, on which the defendants were credited with payments to amount of \$95. The plaintiffs were wholesale liquor dealers, residing and doing business at Kansas City, Missouri. The defendants were doing business at Garnett, in this state. Answer, a general denial. The action was taken to the district court, where a trial was had at the September term, 1873. The real defense interposed at the trial was that the goods, for the price of which suit was brought, were intoxicating liquors, sold and delivered in Anderson county, Kansas, without the seller having a license as dram-shop keeper or retailer of intoxicating drinks. The court gave judgment for the plaintiffs.

J. J. & D. W. Hoffman, for plaintiffs in error. No brief on file.

*289 **Bergen & Kirk*, for defendants in error, contended that the sales to Williams & Pattee were made in Kansas City; that the particular goods bought were part of a large stock; that they were separated, and shipped at purchasers' risk, at Kansas City, upon which, and at which place, the sale was complete, and they cited 2 Pars. Cont. 586; *McIntyre v. Parks*, 3 Metc. 207; *Sortwell v. Hughes*, 1 Curt. 244; *Smith v. Smith*, 27 N. H. 244; *Kline v. Baker*, 99 Mass. 253. The laws of this state do not attempt to make the sale of intoxicating liquors void, except the sale be made in this state, and then only when the sale is upon credit, or without license. *Dram-shop Act*, (Gen. St. 402, § 14.)

¹See *Haug v. Gillett*, *ante*, *140; *McCarty v. Gordon*, 16 Kan. 87; *Snider v. Koehler*, 17 Kan. 432. See, also, as to delivery, to satisfy statute of frauds, the note to *Jamison v. Simon*, 8 Pac. Rep. 502. Contracts by letter and telegraph, see note to *Philadelphia W. Co. v. Detroit Works*, 24 N. W. Rep. 885.

BREWER, J. This case is, in all essential particulars, similar to that of *Haug v. Gillett*, recently decided by this court, (*ante*, *140,) except that in this case the vendor resided, and had his place of business, outside the state. Feiniman & Co. are wholesale liquor dealers, in Kansas City, Missouri, in which place they have paid all taxes required by the state or national authorities for carrying on that business. Their store and stock of goods was in that place, and they had neither store nor stock in this state. The goods for which this action was brought were sold either by orders given to a traveling agent of Feiniman & Co., at the store of plaintiffs in error, in Garnett, Kansas; by orders sent by letter or telegram to the house, in Kansas City; or by contract made directly between the parties, in Kansas City. Where orders were taken they were subject to the approval of the firm in Kansas City, and in all cases the goods were there selected and separated from the stock of Feiniman & Co., and delivered to the carrier in Kansas City. The charges for carriage therefrom were paid by the plaintiffs in error. Clearly, there was no complete sale—no transfer of title to the particular goods—until they had been separated from the entire stock. Before such separation there was, at best, only a contract to sell. Now, the thing *290 forbidden by the dram-shop act is *a sale*, not a contract *to sell. True, its penalties reach to any gift of liquors, or any other shift or device to evade the provisions of the act; but the case here presents nothing of that nature. It is an ordinary, straightforward business transaction, and if forbidden at all, it must be because embraced within the plain prohibitions of the statute. But, as we have seen, the thing forbidden is a sale, and no sale was completed until the goods were separated and delivered to the carrier. It is not claimed that there was any special agreement to deliver the goods at Garnett, and both the partners of Feiniman & Co. testify that they were to be delivered at the depot in Kansas City, and to be thenceforward at the risk of the purchaser. And, indeed, it is the ordinary rule, in the absence of any special agreement, that a delivery to the carrier is a delivery to the purchaser, and completes the sale. 1 *Para. Cont.* (3d Ed.) 445, and notes; *Hil. Sales*, 118; *Smith v. Smith*, 27 N. H. 244; *Finch v. Mansfield*, 97 Mass. 89; *Kline v. Baker*, 99 Mass. 258. The judgment, therefore, must be affirmed.

(All the justices concurring.)

JAY S. BUSH v. HENRY PEAKE and others.

January Term, 1875.

Special Verdict: Laws of 1870. Under the Laws of 1870 it was the duty of the court, upon the demand of either party, to instruct the jury to return a special verdict.

Error from Marion district court.

Peake & Marsh recovered a judgment against Bush at the September term, 1873, of the district court. Bush appeals, and

*291 only question is as to the right of a party to have a *special verdict under section 286 of the Civil Code, as amended by section 7 of chapter 87 of the Laws of 1870, upon his demand therefor.

R. M. Ruggles, for plaintiff in error.

R. J. Christie, for defendants in error.

BREWER, J. Plaintiff in error on the trial in the district court demanded a special verdict, which was refused. This was error. Under the Laws of 1870, upon the demand of either party, it was the duty of the court to instruct the jury to return a special verdict. *Leaveworth, L. & G. R. Co. v. Rice*, 10 Kan. *426. For this error the judgment must be reversed, and the case remanded for a new trial. (All the justices concurring.)

LEVI McVEY v. JOHN BURNS.

January Term, 1875.

1. **Replevin: Right to Dismiss Action.** A plaintiff in a replevin action may, notwithstanding he has obtained possession of the property under the writ, at any time before a final submission, dismiss such action without prejudice.
2. ———: **Defendant's Rights.** Notwithstanding such dismissal, the defendant may, unless the property be restored to him, have his rights in the property and possession inquired into and determined by the court.¹

Error from Osborne district court.

¹An action to foreclose a mortgage may be dismissed, without prejudice to a future action, before the case is called for trial, notwithstanding the defendant has filed an answer amounting to a counter-claim; but such defendant has no right of proceeding to the trial of his claim, regardless of the dismissal. *A. v. Loan Ass'n*, 21 Kan. 474. While the defendant in a replevin action has a right, notwithstanding dismissal by the plaintiff, to an inquiry and adjudication in an action of his claims to and interest in the property replevied, and, in case he avers himself of this right, can collect no more from the sureties on plaintiff's bond.

Burns brought replevin for one bay mare and one brown horse, claiming ownership and right of possession. McVey answered—*First*, a general denial; and, *second*, that he was constable, and as such officer he had taken and held possession of said mare and *292 horse under and by virtue of a writ of *execution issued by him upon a judgment duly rendered against said Burns for the costs of a certain action, (describing it.) Reply, general denial, and a special averment that the process under which defendant claimed the right of possession was void, and setting up a copy of such process. To this reply defendant demurred. At the April term, 1874, the demurrer was sustained. Afterwards, when the case was called for trial, the following proceedings were had:

"[*Title.*] And now at this day this case came on to be tried, the plaintiff appearing by Smith & Knight, his attorneys, and the defendant by A Saxey, his attorney, and the said defendant demanded a jury to try the case; and thereupon the plaintiff moved the court to dismiss the case without prejudice to a future action, which motion the court sustained, and ordered that the property replevied in this case be returned to the said defendant; and it is hereby ordered and adjudged by the court that the plaintiff pay the costs of this action, —to all of which the defendant excepts."

A. Saxey, for plaintiff in error.

Smith & Knight, for defendant in error.

BREWER, J. The action below was replevin. The plaintiff there (defendant in error here) obtained possession of the property by the writ, and then, when the case was called for trial, moved the court to dismiss the action without prejudice. This motion was sustained, and of this ruling plaintiff in error complains. The court, at the same time that it sustained the motion to dismiss, ordered that the property replevied be returned to the defendant, and that the plaintiff pay the costs of the action. We see no error in the ruling of the court. In all cases an action may be dismissed by the plaintiff without prejudice at any time before the final submission. Civil Code, § 397. If a counter-claim or set-off has been presented, the defendant may proceed to the trial of his claim, notwithstanding the dismissal. *293 Code, § 398. In a *replevin action, "if the property has been delivered to the plaintiff, and judgment rendered against him on demurrer, or if he otherwise fail to prosecute his action to final judgment, the court shall, on application of the defendant or his attorney, proceed to inquire into the right of property and right of possession of the defendant to the property taken." Code, § 184. And

than is awarded by such adjudication; yet this is not his only remedy, for, after a voluntary dismissal by the plaintiff, he may commence an independent action on the bond, and recover therein all his damages sustained by the taking of the property, including therein, if the title be in him, the value of such property. Manning v. Manning, 26 Kan. 98.

the court in such action, "before or after judgment, may compel delivery of the property to the officer or party entitled thereto, by attachment." Code, § 188. These sections afford ample protection a defendant in such an action when the plaintiff elects to dismiss suit without prejudice. In this case the record discloses no for application under these sections. Perhaps none was made. But court ordered the return of the property. If that order has been obeyed, surely the defendant below has no cause of complaint. not, let him apply to that court under section 188, or bring his action on the bond, in which, notwithstanding the form of the judgment in this case, he can recover full compensation. *Marix v. Frank*, Kan. *132.

The judgment will be affirmed.
(All the justices concurring.)

E. N. MORRILL and another v. J. C. DOUGLASS.¹

January Term, 1875.

1. **Quieting Title: Pleading and Proof: Specific Answer: Evidence under.** Where, in an action to quiet title, a petition is filed, alleging among other things, ownership and possession by the plaintiff, and answer, without any denial of the allegations of the petition, only up a specific title, it is error to admit evidence of any other than title pleaded; but where the answer contains, besides the plea of a specific title, a denial of the allegations of the petition, it is not error to admit evidence a voluntary conveyance from the plaintiff, a sheriff's tax deed, or any other legal testimony tending to show that plaintiff is not the owner as alleged, whether specifically set up in the answer or not.
- *294 *2. ———. Where the testimony only shows that plaintiff has no interest or possession, but fails to disclose any interest or title in the defendant, no affirmative relief can be granted the latter.
3. **Tax Deed: When not Void.** A tax deed which does not state the amount for which the sale certificate was assigned by the county, which gives the amount for which it was sold to the county, the date of such sale, and the date of the assignment, is not, by reason of such omission, void on its face. [*Board of Regents v. Linscott*, 30 Kan. 261; 1 Pac. Rep. 81.]
4. ———. Nor is a tax deed void simply because it shows that it is not upon the consideration alone of one year's tax and interest. [*Douglas v. Nuzum*, 16 Kan. 525.]
5. **Taxation: Assessment Roll: Separate Books.** An assessment otherwise regular, is not invalidated by the fact that it was returned and preserved in separate books for each township instead of in a single book for the county.

¹This case again in court, *Morrill v. Douglass*, 17 Kan. 291. See *Magill v. Martin*, ante, *67; *McCauslin v. McGuire*, ante, *284

6. **Public Records: When not Found: Presumption.** Where notices, affidavits, etc., are directed to be preserved in a particular office, a failure to find them there raises a presumption that no such documents ever existed; but this presumption is by no means conclusive.
7. **Tax Deed: Prima Facie Evidence of Regularity.** A tax deed is made *prima facie* evidence of the regularity of all prior proceedings; therefore of the fact that all notices and affidavits required were duly given. The treasurer is required to file in the county clerk's office all notices, affidavits, and papers in relation to tax sales. The sale in this case was for the taxes of 1862. The county clerk testified that he could not find certain notices in his office; that if they were in the office they should be in a certain bundle, which he produced, and in which they were not; that when he had first taken possession of the office he had sorted all the papers therein; that he could not swear that they were not in his office; and that when the papers of his office were kept in the old court-house some of them were eaten up by rats. *Held*, that a finding of the district court, upon this testimony, in favor of the validity of the deed, so far as affected by these notices, would not be reversed in this court.
8. **Taxation: Contract of County Commissioners in 1868 for Certain Assignments, Void.** In 1868 the county commissioners were not authorized to contract for the transfer and assignment of tax-sale certificates for lands struck off to the county at prior tax sales, and a contract therefor was *ultra vires*. and void.
9. —. Where the county commissioners assumed to make such a contract, by the terms of which some certificates were to be assigned for the amounts necessary to redeem the land, and others for a sum in gross, which was less than the amount requisite for redemption, and, in pursuance of such assumed contract, the treasurer and clerk assigned all the certificates named therein, and received pay according to the terms of the contract, *held*, that such assignments were valid as to those certificates for which they received the legal pay, and that tax deeds based thereon were not thereby avoided. [Noble v. Cain, 22 Kan. 493.]

Error from Jackson district court.

Action by E. N. Morrill and W. W. Guthrie, as plaintiffs, to quiet title to the E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 26, township 6, range 12 E., and the W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 1, township 6, range 18 E., in Jackson county. The plaintiffs claimed to be the legal owners, and in peaceable possession, of said lands, and alleged that Douglass, the defendant, "sets up and claims an estate and interest in and to said premises adverse to the title of the plaintiffs, but that the same is null and void;" and asking that said defendant's claim and title may be determined and adjudged to be null and void as against the title of the plaintiffs. The action was tried at the April term, 1874, of the district court. The plaintiffs showed a regular chain of title, from the patent down, in themselves, and that the land was vacant. The defendant offered in evidence three tax deeds to show title in himself. Two of these deeds were dated September 8, 1868; one of them upon the sale of 1863 for taxes of 1862, the other upon the sale of 1864 for taxes of 1863. The other deed was dated January 30, 1872, issued on said sale of 1863 for the taxes of 1862, and was procured by

defendant to cure some real or supposed defects in the former deed issued to him on that sale. *Clippinger v. Tuller*, 10 Kan. *377,* 38. It is this last tax deed which is commented upon and sustained by the court in the opinion, *infra*. Said deed is as follows:

"Know all men by these presents, that whereas, the following described real property, viz.: N. E. qr. sec. 8, town 6, range 16; and $\frac{1}{2}$ S. W. qr. sec. 9, town 6, range 16, [here follow 50 other tracts, described in the same manner as the 2 tracts mentioned, and including the land described in plaintiffs' petition,]—situate in county of Jackson and state of Kansas,—was subject to taxation for the year 1862; and whereas, the taxes assessed upon said real property for the year 1862, aforesaid, remained due and unpaid *296 at the date of the sale *hereinafter mentioned; and whereas the treasurer of said county did, on the seventh of May, 1868, by virtue of authority in him vested by law, at an adjourned sale of the sale begun and publicly held on the first Tuesday of May, 1868, propose separately and severally to public sale, at the county-seat in said county, in substantial conformity with all the requirements of the statute in such case made and provided, the real property above described, for the payment of taxes, interests, and costs then due and unpaid upon said property; and whereas, at the time and place aforesaid, the said real property above described could not be sold for the amount of said taxes, penalty, and charges thereon, respectively, by any person or persons, in any parcel or parcels, at said public sale or any adjourned sale thereof, the whole of said lands above described were severally bid off by the county treasurer of Jackson county, state of Kansas, for the several sums of money, dollars and cents, respectively placed opposite each respective tract in schedule hereto attached, and marked 'A,' being the whole amount of taxes, interest, and cost then due and remaining unpaid on each of several tracts of said real property, respectively, for said county of Jackson in said state of Kansas, and which whole tracts, respectively, were sold in each case the least quantity bid for; and whereas, the county clerk of said Jackson county, state of Kansas, did, on the eleventh of May, 1868, in consideration of the several sums of money, dollars and cents, taxes, interest, and costs due, respectively, on said several tracts of land for the year 1862, paid into the county treasury of said county by John C. Douglass, of the county of Leavenworth and state of Kansas, duly assign the certificates of the sale of the property as aforesaid, and all the right, title, and interest of said Jackson county to said property, to said John C. Douglass; and whereas the said county clerk did, on the eleventh of May, 1868, duly assign the certificates of the sale of the property as aforesaid, and all the right, title, and interest of said county of Jackson to said property to John C. Douglass, of the county of Leavenworth and state of Kansas:

"SCHEDULE A, ABOVE REFERRED TO.

N. E. $\frac{1}{4}$ sec. 8, town 6, range 16, \$4.80

W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ sec. 9, town 6, range 16, \$3.67

"[Here follow, in like manner, the other 50 tracts first described, as above mentioned;] and whereas, two years have elapsed since the date of said sale, and the said property has not been redeemed therefrom as provided by law:

*297 *Now, therefore, I, E. D. Rose, county clerk of the county aforesaid, for and in consideration of the sums of money, dollars and cents, set opposite to each tract of land, respectively, in said Schedule A; and being the taxes, cost, and interest due on said land for the year 1862 to the treasurer, as aforesaid; and by virtue of the statute in such case made and provided,—have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said John C. Douglass, his heirs and assigns, the real property last hereinbefore described, to have and to hold unto him, the said John C. Douglass, his heirs and assigns, forever, subject, however, to all rights of redemption provided by law.

"In witness whereof, I, E. D. Rose, county clerk, as aforesaid, by virtue of authority aforesaid, have hereunto subscribed my name, and affixed the official seal of said county, on the thirtieth day of January, 1872.

[Seal.]

"E. D. Rose, County Clerk."

This deed was duly acknowledged and certified, and recorded on said thirtieth of January, 1872. The district court found that Douglass had the legal title to, and was the owner in fee-simple of, the lands in controversy, and gave judgment decreeing that all title of the plaintiffs in said lands was null and void.

W. W. Guthrie and John S. Hopkins, for plaintiffs in error.

An assignee takes no greater rights than before existed in the county. *Judd v. Driver*, 1 Kan. *455. But, taken independently, each tax deed is void upon its face as a title. Yet it is on the record, and is a cloud upon plaintiffs' title, and is evidence, to extent of its recitals, against defendant claiming under it, and is so pleaded. *Dean v. Madison*, 9 Wis. 402; *Knowlton v. County of Rock*, Id. 410. When a deed has been made "on presentation to him of the certificate of sale," (section 112, p. 1055, Gen. St. 1868,) the certificate becomes *functus officio*, and no longer the subject of presentation to the clerk, with whom since the first deed it has been filed. If he may legally take two deeds, he may take twenty; if at interval of four years, equally so of forty years. The land-owner finds on record a tax deed which he knows cannot affect his land, and on this he rests.

*298 *He has a right to, and the tax-deed holder is estopped from denying his own act, so long as it is unquestioned; at least, when its effect is to entrap the land-owner. *Blackw. Tax Titles*, 311, 315.

The tax deed of January 30, 1872, is for same tax and property in No. 1. In one case it is stated as sold on May 5th; in other, 7th. In one case as assigned on May 18th; in other, on May 11 (which is right.) It does not, as required in statutory form, state the amount of the bid for each tract, or the sum paid for such tract, or to whom paid, and is shown to be upon the consideration alone of one year's tax. Now, while several tracts may be included in one deed, each separate requisite for a valid sale and conveyance can and must, in each case, be stated, as required, in statutory form, or the deed is not *prima facie* evidence, by which the *onus probandi* is changed, under rule of section 112, p. 1055, Tax Law 1862.

But, if rightly admitted, the deed was avoided by evidence offered by plaintiff: (1) The assessment roll is not as required. *Dukes v. Rowley*, 24 Ill. 221; *Baily v. Doolittle*, Id. 579; *Gilpatrick v. Fetter*, 12 Ill. 357. A county assessor was required to make out a "true roll" for his county, and return a *true copy* to the county clerk. A number of fractions for the several cities and townships will not constitute that "tax-roll," or a true copy. See sections 17-22, p. 8 Comp. Laws 1862. (2) The county clerk's office was made the repository of *all* evidence in reference to tax sales, etc. "When not found, the presumption arises that no such document has ever been in existence." 16 Mich. 135; 5 Gilman, 379. The county clerk appeared under *subpoena duces tecum*, and stated his inability to find such notices or papers. How otherwise could plaintiff prove a negative? All these "affidavits, notices, and papers in reference to such tax sale" are absolute prerequisites. *Weller v. St. Paul*, 5 Minn. 105, (Gil. 70.)

Section 112 of the tax law of 1868 does not make deed *prima facie* evidence of everything,—only to extent as therein specially provided. Section 20, p. 862, Comp. Laws 1862, required a step prior to assessment, and which the deed is not made evidence of. *Dukes v. Rowley*, *supra*; *Baily v. Doolittle*, *supra*. The certificates offered by defendant, as well as tax-sale book, show that the defendant had no interest in the certificates on which deed issued ten days after time stated in deed. This variance would avoid the deed. But defendant's "lump trade" with the county commissioners for "all they had on hand" was neither authorized by law nor tolerated in good policy. The right to purchase was alone from the treasurer; the commissioners had no authority whatever in the premises. Defendant not only bought of the commissioners, but the record shows he bought on credit, on the eighth of July, 1868, when the trade was finally concluded, but the certificates had been assigned two months before. He got 60 certificates, while only the cost of 25 was computed, and of the \$14,000 one-twentieth part was not computed. By such unauthorized purchase and transfer Douglass obtained legal ownership to *any of such certificates*. He was party to, if not fraud, at least a violation of law, and will not be permitted to re-

any advantages therefrom. The rule is *stricti juris*, rigidly applied. Such certificate is a "chose in action," and any remedy thereon is barred after five years.

J. C. Douglass, defendant in error, for himself.

BREWER, J. This case turns upon the validity of a tax deed. The district court found in favor of its validity. Three principal questions are presented on the record. It is claimed, in the first place, that under the pleadings it was error to admit this deed in evidence; in the second place, that the deed was void on its face; and, in the third place, that, if not void on its face, it was shown to be void by the testimony *aliunde*. Of these in their order.

1. In reference to the first question, the facts are these: The action was brought by plaintiffs below, who are plaintiffs in error, under section 594 of the Code. They alleged that they were the owners and in possession of the premises in controversy; that defendant *300 set up and claimed "an estate and interest therein adverse to theirs; but that the same was null and void. The answer first denied specifically the ownership and possession of plaintiffs, then set up a single tax deed, and closed with a plea of the statute of limitations. The deed set up in the answer was not the one afterwards received in evidence, and held valid. The latter was a subsequent deed, given upon the same sale. The reply, which is very full, was obviously prepared on the supposition that all the tax deeds held by the defendant had been specifically pleaded. While only one is set up in the answer, the reply frequently speaks of "each of said pretended deeds," and also alleges, in obvious reference to the deed held valid, "that such last-pretended deed is null and void because executed upon the same pretended sale, and for the same pretended consideration, for which the said first-described pretended deed was executed." It is apparent, therefore, that the plaintiffs were not surprised by the production of this second deed based upon the one sale. Was the deed improperly admitted in evidence? Counsel insists that defendant having pleaded the one deed, was limited in his evidence to that; that he had elected to rest his claims upon the one title, and had tendered an issue thereon. If the answer contained nothing but this single tax deed, there would be force in the argument. But it contains a specific denial of the plaintiffs' ownership, in language as full and satisfactory as the allegation of ownership in the petition. It thus tendered an issue upon that question, and upon such issue any evidence was competent which tended to show that the plaintiffs were not the owners. A voluntary conveyance from them,—a sheriff's or a tax deed,—whether running to the defendant or not, was evidence tending to show that the plaintiffs were not the owners, and therefore tending to defeat their right to maintain any action. Of course, if the title ran to some third party, without subsequently passing to the defendant, it would furnish no basis for

granting him affirmative relief,—it would simply tend to defeat plaintiffs' action. We do not mean to say that proof that plaintiffs had no title would necessarily defeat the action. *The possession, if actual possession is shown, gives them a right to have adverse claims thereto determined. *Brenner v. Bigelow*, Kan. *496; *Giltinan v. Lemert*, 13 Kan. *476. But testimony tending to show that the plaintiffs had no title, as well as that tending to show that they had no possession, is competent; and if they had neither title nor possession, they could maintain no action, even though defendant had no claim to the property. In other words, having no interest themselves, they could not litigate defendant's claims.

A second proposition is that the deed is void on its face. It recites a sale to the county, and an assignment of the certificate to defendant. It embraces a large number of other tracts of land. The objections to it are thus stated by counsel: "It does not, as required in statutory form, state the amount of the bid for each tract, or the sum paid for such assignment, or to whom paid, and is shown to be upon consideration alone of one year's tax." We think it does state the amount bid for each tract. It gives a table incorporated into the deed, and called "Schedule A," in one column of which is the description of the property, and opposite each tract is placed a certain amount in dollars and cents; and it declares that the "lands above described were severally bid off by the county treasurer of Jackson county for the several sums of money, dollars and cents, respectively, and placed opposite each respective tract in schedule hereto attached and marked 'A,' being the whole amount of taxes, interest, and costs then due and remaining unpaid on each several tract of said property, respectively."

In reference to the sum paid for the assignment, and the party to whom it was paid, the deed reads thus: "And whereas, the county clerk of said Jackson county, state of Kansas, did, on the eleventh day of May, 1868, in consideration of the several sums of money, dollars and cents, taxes, interest, and costs, due respectively on said several tracts of land for the year 1862, paid into the county treasury of said county," etc. *Now, this describes the place of payment as required by statute, (Laws 1866, p. 277, § 74,) and indicates with sufficient precision the amount paid. The amount which it was struck off to the county being given, as well as the date of such sale, the date of the assignment, the amount of taxes, interest, and costs then due is a mere matter of calculation. It would be no more certain if the calculation had been made and the result stated in figures. It might disclose an error in the calculation, but would such an error vitiate the deed? *Bowman v. Cockrill*, 6 Kan. *302. It must be remarked that the statutory form does not include a statement of the amount paid for an assignment, nor, indeed, does it seem to have been prepared with reference to a sale to the county.

and a subsequent assignment by it of the sale certificate. *Norton v. Friend*, 13 Kan. *582; *Magill v. Martin*, *ante*, *67. As to the last suggestion,—that it appears “to be upon the consideration alone of one year’s tax,”—we know of no reason why that is not sufficient consideration. The sale is made for the non-payment of one year’s tax, and if the owner of the land should see fit to pay the taxes of the subsequent years, we do not see how that would invalidate the sale, or prevent a deed. If it did, a land-owner might, with perfect safety, omit the payment of his taxes every fourth year. We think, therefore, that the deed was *prima facie* valid, and properly received in evidence.

3. The remaining proposition of counsel is that the deed was shown to be void by evidence *aliunde*; and under this head it is insisted that the assessment roll is not as required. Counsel for plaintiffs cite Comp. Laws 1862, p. 862, § 21: “The assessor shall make a correct list of all the taxable property in his county, to be called a ‘tax-roll.’” This, counsel insists, must be a single paper or book; that a number of fractions for the several cities and townships will not constitute such roll. Here four separate books were produced, indorsed, respectively, “Assessment Roll of Jefferson Township, 1862,”

“Assessment Roll of the Town of Holton, 1862,” etc. In each *308 was a certificate of the assessor that such roll contained all the taxable property in such town or township; and it was also in testimony that the county was then divided into the three townships and one town, and that these four books embraced all the taxable property of the county. We fail to see anything in this to invalidate the assessment, when the entire county is assessed, and by the proper officer, and a proper authentication made of the assessment of each township, and all returned to the proper officer. Surely, an omission to fasten these several assessments together into one roll or book can have wrought no prejudice to anybody, or in any direction. The assessment was sufficient.

Again, the county clerk was called as a witness, and testified that he was unable to find in his office any proofs of the notices required by sections 32, 36, 37, 38, and section 55, of the tax law of 1862; that if any such were in his office, they ought to be in a certain bundle of papers, which he produced; that they were not in such bundle; that he could not say they were not in his office, but that if they were, he had never seen them; and that when he first took possession of the office he had sorted over the files and papers, and placed them in proper packages, where they since had been kept, and that he was certain he had placed in the package produced all papers relating to such matters; that before the new court-house was built, and while in the old court-house, some papers had been eaten by rats. He was also asked whether bills had not been presented and paid by the county for the publication of such notices, but the court sustained an objection to such testimony. The notice required by section 32

is a notice of the amount of the different taxes on each hundred dollars' valuation, and also of the day on which the treasurer will attend in each township for the purpose of receiving taxes. This notice is required to be posted at each place of holding elections, and to be published for four weeks in some newspaper having circulation in the county. There is no express direction to any officer

*304 take and preserve any proofs of the publication or *posting of this notice. Sections 36, 37, and 38 require a notice of sale for taxes, which notice is to contain a list of the property to be sold. Posting and publication are also required of this notice. Affidavits of both such posting and publication are specifically required to be made and preserved. Section 55 provides for a notice of expiration of the time limited for redemption, which notice is to contain a list of the unredeemed lands and lots, with the amount of tax and interest calculated to the last day of redemption. Publication or posting is required of this notice, but there is no specific direction to any one to take and preserve proofs thereof. There is, however, in section 47, a general direction to the county treasurer to "file with the county clerk all affidavits, notices, and papers in reference to such tax sale, to be preserved by him." Upon this two questions arise. *First*, was the failure to find these notices in the county clerk's office proof that they never existed? If so, was the omission to give these notices fatal to the validity of the sale and deed? We shall rest our decision upon the answer to be given to the first question. It is probably true that when notices, affidavits, etc., are directed to be preserved in a given office, a failure to find them there raises a presumption that no such documents ever existed. *Hall v. Kellogg*, 16 Mich. 135. But this presumption is by no means conclusive. It amounts simply to *prima facie* evidence. The deed, on the other hand, is *prima facie* evidence that they did exist, and were duly and legally given and made. More than that, the testimony of the clerk as to the destruction of papers weakens the force of the presumption from his failure to find them. No attempt was made by plaintiffs to introduce other testimony. No examination was made of the treasurer's office; no inquiry of the party who was treasurer at the time of the sale, or his deputies, or of the party who was then county clerk, or none of the publishers of the newspapers. Under these circumstances we cannot say that the court erred in finding upon this question against the plaintiffs.

One other point remains, and that, like the last, is not

*305 *from difficulty. As heretofore stated, the sale was made by the county, which afterwards assigned the sale certificate to the defendant. The assignment was made in pursuance of a contract between the commissioners and defendant for the sale of a large number of sale certificates held by the county. The proposition of the defendant, which was accepted by the commissioners, was substantiated as follows: He proposed to buy all the claims for delinquent taxes

"belonging to Jackson county on the following terms: I will pay for all correct and regular descriptions, for all sales for the years 1861, 1862, 1863, 1864, 1865, and 1866, the amount required by law to redeem the same, provided that all claims other than the above, and to include the sales for 1858, 1859, and 1860, and irregular or defective descriptions since, shall be quitclaimed to me for \$100. Payment shall be made as follows, to-wit: \$1,000 in hand; \$1,000 per month thereafter, until the whole is paid." Payments were to be secured by bills of exchange drawn on and accepted by some responsible banker in Leavenworth. The amount of this purchase was about \$14,000, and about one-twentieth of this amount consisted of irregular and defective descriptions, and of sales for years prior to 1861. The sale certificates in this case were in evidence. They were in all respects, both as to form and amounts, as they would have been if defendant had had no such contract with the county, and was only the purchaser from the treasurer and clerk in the manner provided for in the statute. Upon these facts counsel for plaintiff in error claims that "defendant's lump trade with the county commissioners for all they had on hand was neither authorized by law, nor tolerable in good policy; that the right to purchase was alone from the treasurer; the commissioners had no authority whatever in the premises." Defendant, on the other hand, insists that the contract was good; but, if not good, that it can have no effect in this case, because the treasurer and clerk did no more than they were compelled to do; that is, transfer the certificate upon the payment of the

*306 amount necessary to redeem. In other words, *he insists that the invalidity of the contract can affect only those cases of sales before 1861, and of irregular and defective descriptions which were quitclaimed for \$100; for those, and those only, were transferred for less than the amount legally due.

It would seem to follow from the decisions already made in this court, and to appear from the provisions of the statute, that this contract between the defendant and the commissioners was *ultra vires*. The commissioners, it is true, are in a certain sense the general agents of the county; that is, to them is committed the general superintendence and management of the affairs of the county. There are, however, many limitations upon this general control. One is that they cannot interfere with duties specifically assigned to a given officer. They may not direct what instruments the register of deeds shall record, what fees he may charge, or what certificates give. They may not control the county attorney in the prosecution of criminal actions; nor can they give receipts for taxes, or assign sale certificates. These are duties assigned to particular officers, and the manner of their discharge specifically indicated. Comp. Laws, 865, § 33; Id. 867, §§ 43, 44; Laws 1866, p. 274, §§ 60, 61; Id. 277, §§ 73, 74; Gen. St. 1045, §§ 77, 78; Id. 1048, §§ 90, 91. "Whenever any person shall pay into the county treasury a sum of money or

warrant of the appropriate fund, or county orders equal to the cost of redemption at that time, or any such tract of land or town lot," is the language of the statute in reference to the assignment of a certificate of sale. Laws 1866, p. 277, § 74; Gen. St. 1048, § 91. The statute having thus designated the officers to discharge this duty, and the manner of its discharge, the commissioners have no authority to interfere. They can no more make a valid contract in reference to the matter than they could one with reference to the fees the register of deeds should charge a third party for recording his deeds and mortgages. *State v. Magill*, 4 Kan. *415; *State v. McCrillus*, Id. *260; *Clough v. Hart*, 8 Kan. *487. Though the property which *307 cannot be sold to individuals at a tax sale is struck off to the county, it does not become thereby, like ordinary property of the county, subject to the control of the commissioners. If the purchase was an absolute purchase by the county, with a view of acquiring a perfect title, it would seem to follow that the county should be responsible to the townships, school-districts, and the state for their proportion of the taxes upon the property purchased, and that the county should be permitted, as a result of its purchase, to subsequently obtain a deed. But see, to the contrary, *Judd v. Driver*, 1 Kan. *455; *State v. County of Atchison*, Id. *479; *State v. Magill*, *supra*; *Guittard Tp. v. County of Marshall*, 4 Kan. *389; *Sapp v. Morrill*, 8 Kan. *677; *Tarr v. Haughey*, 5 Kan. *626.

The contract, therefore, was *ultra vires* and void. Douglass acquired no rights by such contract, nor was the treasurer or clerk justified thereby in disregarding the provisions of the statute. Other parties than the county are interested in the full payment of taxes. City and township and school-district are alike concerned. We do not hold that the contract was against public policy or good morals. It might be well if authority was given, once in a while, to some county officials to dispose as best they could of all the interest of the county in such back-tax sales. But there was no such authority at the time of this contract, and hence it was without warrant of law, and void. But how does this affect the validity of the assignment of the sale certificates in this case? It seems to us that the result follows, as is claimed by the defendant, that the assignments were good for which full payment was made, and that the others alone are subject to attack. This contract was void. It was as though none had been made. It is not pretended that the treasurer and clerk were parties to this contract with defendant, and the authorities cited by counsel as to the entirety of certain contracts are not applicable. The assignments the treasurer and clerk executed were the only contracts they entered into. They assigned some certificates, receiving full payment therefor. This was legal, and passed full title *308 *to the assignee. Others they assigned, receiving only part of what they should have received. This was illegal. Whether they rendered themselves liable for the difference between the amount

received and that which should have been received or not, whether the assignments passed a good title or not, whether they can be avoided or not, and whether Douglass would be responsible to the county for the above difference or not, are questions into which it is unnecessary, and would therefore be improper, for us to enter. It is enough, in this case, that the assignments were for a full and sufficient consideration.

These are all the questions necessary for determination in this case, and, there appearing as to them no error in the ruling of the district court, the judgment will be affirmed.

(All the justices concurring.)

ABRAHAM JEFFS and another v. ROBERT FLICKENGER.

January Term, 1875.

1. **Pleadings: Answer Filed out of Time.** An answer filed two days after time is improperly filed, and should, on motion, be stricken from the files.
2. ———: **Reply: Waiver.** But if in such a case the plaintiff, thirteen days after the filing of the answer, having first applied to and obtained the written consent of the defendant therefor, files a reply thereto, he waives any irregularity in the time of filing the answers, and consents that the case may be tried upon the issues raised thereby.

Error from Doniphan district court.

The case is stated in the opinion.

*309 *W. D. Webb*, for plaintiffs in error, contended that the filing of the reply to the answer was a waiver, and cited *Green v. Dunn*, 5 Kan. *259; *School-district v. Griner*, 8 Kan. *224; *Hughes v. Miller*, 2 G. Greene, 9; *Barnum v. Fitzpatrick*, 11 Wis. 81; *Waterhouse v. Freeman*, 13 Wis. 339; *Smith v. Milwaukee*, 18 Wis. 63; *Tenney v. State Bank*, 20 Wis. 152.

B. O'Driscoll, for defendant in error, contended that the records in this case do not speak the whole truth, as the same were made up after term. There is no error in the judgment. The same was properly rendered the last day of the term, and after plaintiffs in error refused to verify their answer. *Douglas v. Rinehart*, 5 Kan. *392; *Luke v. Johnnycake*, 9 Kan. *511.

BREWER, J. This was an action brought by defendant in error to foreclose a mortgage. An answer was filed two days after time. It set up certain payments on the note. Thirteen days after the filing of the answer the plaintiffs, having first obtained the written consent of the defendant's attorney thereto, filed a reply. During the then

pending term judgment was taken by the plaintiffs as by default, and without any motion or other effort to rid the files of the answer and reply, or either of them. A motion was duly made to set aside this judgment, and reinstate the case for trial upon the pleadings, but the motion was overruled. It is insisted by counsel for defendant in error that the record is incorrect, and fails to state the truth. This may be unfortunate for him, but we must take the record as it is, and upon that dispose of the case. And upon that record we think the court erred in treating the case as in default. While the answer (filed, as it was, out of time) was improperly filed, and should, upon motion, have been stricken therefrom, yet, when the plaintiff elects to file a reply thereto, and particularly when he applies to and obtains from the defendant's counsel written consent therefor, he waives the irregularity in the filing, and consents that the case may be tried upon the issues raised by the pleadings, including the answer. *Luke v. Johnnycake*, 9 Kan. *518; *Osgood v. Haverty*, *McCahon*, 182; S. C. 1 Kan. (Dass. Ed.) 587. The error was material, for it prevented a trial of the allegation of partial payments.

The judgment must be reversed, and the case remanded for another trial.

(All the justices concurring.)

CHARLES TILTON v. W. H. KNAPP.

January Term, 1875.

1. **Supreme Court: Insufficient Record.** Where the answer and reply are not set out in full in the record, nor even the substance of the same given, the supreme court cannot tell what the issues in the case were in the court below; nor what evidence would be required to prove such issues, or to sustain the decision of the court below.
2. ———. Where the record does not purport to contain all the evidence, the supreme court cannot tell whether the evidence introduced on the trial sustains the decision of the court below.
3. ———: **Motion for New Trial: Presumption.** Where a statement is inserted in a motion for a new trial that no evidence was introduced on the trial except an affidavit for a continuance, and there is no evidence to sustain this statement, and the court below overrules the motion for a new trial, *held*, that it should be presumed by the supreme court that the statement was not true.

Error from Sumner district court.

Action by Tilton, as plaintiff, to foreclose a mechanic's lien, a statement for which had been duly filed. The account attached to said statement showed a balance in favor of plaintiff of \$149.31. At the

November term, 1872, the plaintiff moved for a continuance, and filed an affidavit showing what he expected to prove by one C. S., an absent witness. The record contains a skeleton "case made," signed by the district judge, in which are instructions to insert, in *311 their proper *places, the petition, answer, reply, affidavit, judgment, etc. This is followed by a duplicate of said "case made," made complete by the insertion of the pleadings, etc., as directed in the original. In this latter part of the record, next after the affidavit for a continuance, is the following: "And the defendant answering himself ready for trial, and consenting that the said affidavit might be received and treated as the deposition of said absent witness, the court thereupon ordered the trial of this cause to proceed. This cause was thereupon submitted to the court, without the intervention of a jury, upon the petition, answer, and reply, and exhibits on file; and the court, having heard the evidence, and the arguments of counsel thereon, and being sufficiently advised in the premises, * * * finds for the plaintiff in the sum of \$32.42. The court thereupon orders and adjudges that the plaintiff recover of the defendant the sum of thirty-two dollars and forty-two cents, and the costs herein, taxed at \$7.55."

Plaintiff moved for a new trial, which was overruled.

J. L. Abbott, for plaintiff.

Charles Wilson, for defendant.

VALENTINE, J. The grounds relied upon in this case for a reversal are as follows: *First*, the record does not show that there was any answer to the petition in the court below; *second*, the decision of the court below is not sustained by sufficient evidence.

In answer to these objections we would say—*First*, the record does show that there was an answer to the petition. Even that portion of the record which the plaintiff in error claims constitutes the whole of the record shows it. It shows that there was a petition, answer, and reply, and that the action was tried thereon; and the other portion of the record sets out the answer and reply in full.

In answer to the *second* proposition of the plaintiff in error, *312 we would say: If we should consider only that portion *of the record which the plaintiff in error claims to be the whole of the record, then we could not tell what the issues in the case were in the court below; for in that portion of the record the answer and reply are not set out in full, nor is even the substance of the answer or reply given; and therefore we could not tell what evidence would be required to prove such issues, or to sustain the decision of the court below. But even if we should examine the whole of the record, and ascertain what the issues were, still we could not tell whether the evidence introduced on the trial would sustain the decision of the court below, as the record does not purport to contain all the evidence, or even any material portion of the same. There certainly was evidence,

for the decision purports to have been rendered upon "the evidence in the cause, and the arguments of counsel thereon." It is true, the plaintiff states in his motion for a new trial that there was no evidence introduced, except the plaintiff's affidavit for a continuance; but there was no evidence to sustain this statement, and the statement itself is no evidence of the fact. The court overruled the motion, which is some evidence that the statement was not true. It should therefore be presumed by the supreme court that the statement was not true.

The judgment of the court below will be affirmed.
(All the justices concurring.)

CEMETERY ASS'N v. JOSEPH MENINGER.

January Term, 1875.

1. **Roads and Highways: Outlet.** A road opening at one end into a thoroughfare, but without outlet or egress at the other, and leading only to a farm and a cemetery, may nevertheless be a public highway.¹
2. ———: **Dedication: How Proven.** The dedication and acceptance by the public of such a highway may be proved in the same manner, and by the same character of testimony, as in the case of an ordinary thoroughfare.²
- *318 *8. ———: **Dedication: Acceptance.** Outside of cases of condemnation, and possibly prescription, to constitute a public road, two things are essential, a dedication by the owner of the soil, and an acceptance thereof by the public.
4. ———: **User: Intent of Owner.** A highway may be proved by long usage; but for this, the user must be such as to show that the public accommodation requires it to be a highway, and that it is the intention of the owner of the soil to dedicate the way to the public.
5. ———. Whether the user has been continued for such a length of time, and is of such a character, as to show these facts, is ordinarily a question for the jury.
6. ———: **Cemetery: Highway Established by User, with Owner's Knowledge.** A cemetery is ordinarily a public place. The accommodation of the public may require a highway to it; and the use of a way to it for funeral processions, and by parties going to and from the cemetery, with the knowledge of the owner of the soil, may be evidence sufficient to prove a highway.

Error from Wyandotte district court.

¹ See as to statutory notice in laying out roads, etc., *County of Leavenworth v. Epsen*, 12 Kan. *581, and note. See, also, *Willis v. Sproule*, 13 Kan. *257, and note.

² See the full notes to the following cases: *Brooks v. Topeka*, 8 Pac. Rep. 395; *Tucker v. Conrad*, 2 N. E. Rep. 807; *County of Franklin v. Lathrop*, 9 Kan. 309.

Meninger brought trespass against the City Cemetery Association, a corporation, to recover damages for breaking and entering plaintiff's close, and tearing down his fences, etc. The action was commenced before a justice of the peace. Defendant denied plaintiff's title to the premises, and the case was thereupon certified to the district court, where it was tried at the October term, 1878. Meninger had judgment for \$20 damages.

D. B. Hadley, for plaintiff in error, contended that the facts showed that the lands claimed by Meninger were a highway; that dedication by the land-owner, and acceptance by the public, were sufficiently shown, and the court erred in its instructions to the jury.

Scroggs & Bartlett, for the defendant in error, maintained that the instructions were right, and cited Ang. Highw. 1; *People v. Jackson*, 7 Mich. 449; *Hall v. McLeod*, 2 Mete. (Ky.) 98; *Onstott v. Murray*, 22 Iowa, 466; *Holdane v. Cold Spring*, 23 Barb. 103;

Mattoon v. Kidd, 7 Mass. 83; *State v. Nudd*, 23 N. H. 327.

*314 There must be two competent parties to constitute a valid dedication of lands to the public use; the grantee must accept the land dedicated, either in terms, or by treating it as public property by doing work upon it, by general and uninterrupted user by the whole public, or in some other manner signifying its acceptance. *Manderschid v. Dubuque*, 29 Iowa, 73; *Tillman v. People*, 12 Mich. 401; *Grube v. Nichols*, 36 Ill. 92. The public, and not merely a public corporation, must be the chief beneficiary in a dedication of land. *Todd v. Pittsburg, Ft. W. & C. R. Co.*, 19 Ohio St. 514; *Hobbs v. Lowell*, 19 Pick. 405; *Clements v. West Troy*, 16 Barb. 251; *Oswego v. Oswego Canal Co.*, 6 N. Y. 257.

BREWER, J. The question in this case is as to the existence of an alleged highway. The facts are these: In 1857 one Sophia Clement was the owner of a tract of about seventy acres, a little north of the city of Wyandotte. A portion of this, on the west side, was inclosed and occupied by her as a residence. Along the east of this inclosure was a traveled road which ran from the city of Wyandotte to a saw-mill. In 1857 or 1858 she sold ten acres east of her inclosure for a cemetery, and which in the latter year was fenced and platted into lots. Between the west cemetery fence and the fence on the east of her inclosure, was left a road of about thirty feet in width, and the same as the previously traveled road, none of which, however, was on the cemetery grounds. The two gates of the cemetery opened, and the two avenues of the cemetery led, into this road, and it was the regularly traveled road to and from the cemetery, without objection, and without obstruction, from that time until the spring of 1873, when defendant in error fenced the south end of it. Prior to this time, however, and in 1867 or 1868, the saw-mill lying north of these grounds having been abandoned, the owner of the land immediately north of the cemetery had fenced across the road, so that from that

time the travel thereon had been only by the occupant of the tract north, the occupant of the Clement field, and the parties visiting them, and of parties going to and from the cemetery. Mrs. Clement lived on the place until her death in 1864, with full knowledge of *315 the use of this road *by the public. After her death it was occupied by a tenant for a series of years, and until 1870, when defendant in error bought and moved onto it. There was other testimony tending to show an intention on the part of Mrs. Clement to dedicate this road to the use of the public, but it is unnecessary to notice it here. At the instance of the defendant in error the court gave this instruction: "If the jury find from the evidence that the land in question has not been traveled since 1860, except by the owner of the real estate, one of his neighbors, and persons attending funerals to the cemetery of said defendant, then the court instructs the jury that such travel is not sufficient to constitute said way a public highway by use, and they will find in favor of the plaintiff." The jury found against the existence of the highway.

It may be remarked that the fee of this cemetery is in the city of Wyandotte, and the association, plaintiff in error, holds simply a lease for ten years from 1870. What the terms and conditions of that lease are, we are not advised. But as the grounds belong to the city, and as they have been used as a cemetery since 1858, and for a dozen years before this association obtained any control over them, we must presume that they are public cemetery grounds, and not a mere private cemetery for a single family or organization. It is true that this road has not for years had an outlet on the north, and has therefore not been in the ordinary sense of the term a thoroughfare; and it is also true that it has been one of the disputed questions in the law of ways whether such a road could be legally held a public highway. See, on the one hand, *Austin's Case*, 1 Vent. 189; *Wood-
yer v. Hadden*, 5 Taunt. 126; *Wood v. Veal*, 5 Barn. & Ald. 454; *Simmons v. Mumford*, 2 R. I. 172; *Holdane v. Trustees Cold Spring*, 28 Barb. 103. And, on the other, *Rugby Charity v. Merryweather*, 11 East, 376; *Rex v. Lloyd*, 1 Camp. 260; *Bateman v. Bluck*, 14 Eng. Law & Eq. 69; *People v. Kingman*, 24 N. Y. 558; *Ferris v. Bramble*, 5 Ohio St. 109; *Sherman v. Buick*, 22 Cal. 241; *Bankhead v. Brown*, 25 Iowa, 540; *State v. Price*, 21 Md. 448. In this state the *316 question has *been before the courts, and it has been settled that such a road may be a public highway. *Masters v. Mc-
Holland*, 12 Kan. *17. It follows from this that the authorities may condemn land for such a road, that the owner may by dedication constitute such a road a public highway, and that the fact of such dedication may be proved in the same manner and by the same character of testimony as in case of a thoroughfare.

We say nothing now of the comparative amount of testimony necessary to establish the fact of a dedication in the two cases. In order to constitute a way a public road, outside of cases of condemna-

tion, and possibly of prescription, it is said that two things are essential: *First*, a dedication by the owner of the soil; and, *second*, an acceptance by the public. In the different cases reported stress is laid upon one or the other of these matters, according to the character of the questions involved. Thus, where the former owner is attempting to obstruct a way, the important matter is whether he has once actually made a dedication, and so estopped from obstructing it; and to that the testimony mainly runs. On the other hand, where the authorities are prosecuted for not repairing a highway, the important question often is whether the public have accepted the dedication, and upon that is most of the testimony. For the mere fact that a land-owner has dedicated certain land to the use of the public does not necessarily cast upon an unwilling public the duty of improving and keeping it in repair. No formal acceptance by any particular authorities is essential. The mere user by the public may be of such a character as to constitute an acceptance. Indeed, such user by the public with the knowledge of the owner may be sufficient evidence of both the dedication and the acceptance. We know this doctrine is denied by some courts, but it seems to us to rest upon the soundest principles. Of course no mere temporary or occasional use will be sufficient. It is said by RICHARDSON, C. J., in *Barker v. Clark*, 4 N.

H. 380, that "we entertain no doubt that a highway may be *317 proved by long usage; but a way, to *become public, must be used in such a manner as to show that the public accommodation requires it be a highway, and that it is the intention of the owner of the land to dedicate the way to the public." See, also, *Holdane v. Trustees Cold Spring*, 23 Barb. 103; *Clements v. West Troy*, 10 How. Pr. 199; *Onstott v. Murray*, 22 Iowa, 457; *Hanson v. Taylor*, 23 Wis. 547; (though in this case see a vigorous dissenting opinion of Dixon, C. J.,) *Buchanan v. Curtis*, 25 Wis. 99; Ang. Highw. § 161, and cases cited in note. It seems to us that the foregoing views are a fair statement of the rule applicable to these cases.

If a highway may be proved by usage, who is to determine whether the usage shown is sufficient? Does the usage prove an intention on the part of the owner to dedicate, and an acceptance by the public? These are questions of fact, and questions in their nature eminently appropriate for the consideration of a jury. *Drake v. Rogers*, 3 Hill, 604; *Trustees M. E. Church v. Council of Hoboken*, 33 N. J. 11. Both the intention and acceptance are evidenced by a series of acts. It is impossible, generally, to put the finger on a single circumstance and say that this is conclusive. It is true the user may be so temporary or occasional as to justify a court in stating as matter of law that it is not evidence sufficient to prove a highway; but we think this is not such a case. A cemetery is as public a place as a court-house, or a market. It may not be frequented as much, but visits to it are as necessary and as certain. The accommodation of the public requires a highway to it. Over that way all must travel. We may

keep away from the court-house, and avoid the market, but the place of the dead none may shun. Now, if the accommodation of the public requires a highway to the cemetery, the use of the public of a way to it may be evidence of the acceptance by the public, and, if with the consent of the owner, of the dedication by him; and, when continued, as it has been in this case, for years, it is error for the court to state as matter of law that it is not sufficient evidence.

*318 That is a question *which must be left to the jury. For the error in giving the instruction quoted, the judgment must be reversed and the case remanded for a new trial.

(All the justices concurring.)

STEPHEN RHEINHART and others v. STATE OF KANSAS.

January Term, 1875.

1. **Recognizance: Action on: Petition.** In a petition on a forfeited recognizance it is not necessary to insert a copy of the order of forfeiture, nor to allege that it was "duly made."¹
2. **Evidence: Objection.** An objection to testimony which does not specify the ground of objection is too general to be available. [Humphrey v. Collins, 23 Kan. 550; Long v. Kasebeer, 28 Kan. 240.]
3. ———: **Order of Presenting.** The order in which testimony is received upon the trial is largely within the discretion of the trial court, and, unless it appears that such discretion has been abused, is not ground for reversal. [Blake v. Powell, 26 Kan. 327.]
4. **Officers De Facto: Validity of Acts.** It is enough to sustain the proceedings of a justice of the peace and sheriff, in respect to the arrest, examination, and bail of alleged offenders, so far as the question of their power to act is concerned, that they are officers *de facto*.²
5. **Justice of Peace: When He Holds over.** A justice of the peace holds his office until a successor is qualified, and if a party has once been elected and qualified, and at a subsequent election is re-elected, but fails to qualify, he nevertheless remains a justice *de jure*, as well as *de facto*, until a successor is qualified.

Error from Washington district court.

Action upon a forfeited recognizance, brought by the county attorney in the name of the state. The recognizance was executed June 16, 1873, by Rheinhardt, as principal, and J. B. Snider and E. H. Prall, as sureties, to secure the personal appearance of Rheinhardt at

¹See Gay v. State, 7 Kan. 246, and note.

²See, also, County of Saline v. Anderson, 20 Kan. 298.

the then next term of the district court "to answer a charge of burglary and larceny." A demurrer to the petition was overruled, *319 answer was filed, *and trial had at the December term, 1873.

The defendants objected to the introduction of all the evidence offered. The commitment objected to did not commence "*The State of Kansas*, to the Sheriff," etc. The words in italic were omitted, but in the body of the writ, after the recitals, it reads: "Now, therefore, *in the name of the state of Kansas*, you are hereby commanded," etc.

The district court made the following findings: "(1) That defendant Stephen Reinhart was arrested on a charge of having committed the compound crime of burglary and larceny in a dwelling-house, on the second of April, 1873, in Washington county, and brought before H. C. SPRENGLE, a justice of the peace, for preliminary examination, upon a warrant duly issued by said justice. (2) That said SPRENGLE was a justice of the peace for said county, and had full authority to hold a preliminary examination in said cause. (3) That said defendant was legally arrested under said warrant by one Martin Patrie, who was at the time a legally appointed and constituted deputy-sheriff of said county. (4) That on the ninth of June, 1873, said Reinhart had his preliminary examination on said charge before said justice, and was by said justice required to give bail in the sum of \$1,000 for his appearance at the next term of the district court of said county to answer to said charge, and that said Reinhart failed to comply with said requirement. (5) That thereupon said justice issued a commitment directed to the sheriff of said county, commanding him to receive the said Reinhart into his custody, in the jail of said county, there to remain until discharged by due course of law. (6) That while said Reinhart was in the legal custody of said sheriff, in pursuance of said order of commitment, said Reinhart, as principal, and the other defendants, Snider and Prall, as sureties, by their certain recognizance or writing obligatory of date of June 16, 1873, a copy of which is attached to the petition herein, which recognizance was executed and delivered by said defendants personally to and in the presence of said Martin Patrie, the legally qualified and appointed deputy-sheriff of said Washington county, and was duly approved by said deputy-sheriff, acting on behalf of his principal, the sheriff *320 of said Washington county. * (7) By reason of the giving and taking of said recognizance as aforesaid the said Reinhart was then and there discharged from custody. (8) That said recognizance was duly certified by the said sheriff to the clerk of said district court, and was by said clerk duly filed and recorded. (9) That at said next term of the district court said cause of the state of Kansas against the said Reinhart came on for hearing, on the fourth of August, 1873, and was duly called; and said Reinhart, being three times solemnly called, came not, but wholly made default; and said recognizance was then and there, by the said court, declared forfeited, and the county attorney of said county was by the court ordered to

institute legal proceedings on said recognizance; and that no part of said sum of money has been paid. The court finds, as a conclusion of law, that said plaintiff is entitled to recover judgment against said defendants for the sum of one thousand dollars, and costs."

Judgment in favor of the state.

J. G. Lowe, for plaintiffs in error.

Section 118 of Civil Code plainly prescribes what shall constitute a good petition when the action is founded upon a "written instrument as evidence of indebtedness." The recognizance set out in the petition of itself does not constitute a "written instrument as evidence of indebtedness," upon which a party would be entitled to recover, any more than would the setting out of a promissory note without alleging a default in payment. Without the order of the court, declaring the recognizance forfeited, and ordering the county attorney to institute proceedings for the collection of the amount thereof, there could have been no action upon the recognizance. This order was a condition precedent, and became a part of the "written instrument as the foundation of the cause of action." It is as necessary to be set out in the pleadings as a part of the "written instrument" as the recognizance itself; for without it the written instrument, as evidence of indebtedness, is incomplete, and only in part set out. *Douglas v. Waddle*, 1 Ohio, 423; *State v. Caffee*, 6 Ohio, 150; *Gilliland v. Sellers' Adm'rs*, 2 Ohio St. 225.

*321 *Section 121, Civil Code, provides that, "in pleading a judgment or other determination of a court or officer of special jurisdiction, it shall be sufficient to state that such judgment or other determination *was duly given or made*;" and certainly as much would be required in pleading an order of a court of general jurisdiction. In vain we search the petition for this statutory requirement. It is clear the petition did not state such facts as would entitle the plaintiff to the relief demanded, and it was error of the court to overrule the demurrer.

It was error to admit as evidence on behalf of the plaintiff the order of commitment. Article 3, § 17, of the constitution says: "The style of all process shall be '*The State of Kansas*.'" Said commitment was introduced for the purpose of showing that Rheinhardt was in the legal custody of the officer to whom the order of commitment was directed. It was incompetent for that or any other purpose, inasmuch as it was irregular, and not in accordance with the law. Before a man can be in the legal custody of an officer under an order of commitment, the process of commitment must be regular upon its face, and of such particular certainty as to enable the officer holding the person to enforce its mandates.

The bond and oath of office of the sheriff could cut no figure in the case, as his authority was not in question; and had it so been, the evidence would have been original, and not competent as rebutting testimony. For the same reason the court erred in permitting to be

read in evidence, for the purpose of rebuttal, the proceedings of the board of county commissioners, and the bonds and oaths of office of Sprengle, to show that he had been regularly elected and qualified as a justice of the peace for the years 1870 and 1871. The bonds were irregular in not being signed by the requisite number of sureties, nor approved as is required by law. Section 108 of the Civil Code requires that, to raise an issue upon an "allegation of any appointment or authority," the answer shall be verified; otherwise the allegation will be taken as true. The verification of defendant's

*322 *answer raised the issue, and it became necessary for plaintiff to establish its case before defendant could be required to offer any evidence. The verification of the answer destroyed plaintiff's *prima facie* case, and barred it from introducing, as rebutting testimony, what was necessary as original evidence. If plaintiff rested upon its supposed *prima facie* case, it was at its peril, and cannot be taken advantage of on rebuttal, except for good cause shown, and then the evidence is put in part of the original case.

BREWER, J. This was an action on a forfeited recognizance, and the first question arises on the overruling of a demurrer to the petition. The petition alleged the arrest of the defendant Rheinhardt; his examination before a justice; the order requiring him to give bail; his failure to do so; the commitment; the giving of the recognizance to the officer; its acceptance by him; and the consequent release of the defendant from custody; his failure to appear at the district court for trial; and the forfeiture. It also gave a copy of the recognizance. The specific objection is that it does not contain a copy of the order of the court declaring a forfeiture, nor does it allege that such order was "duly made." Neither of these is necessary. Section 121 of the Civil Code, upon which the latter part of the objection is based, refers only to judgments and orders of courts and officers of special jurisdiction, and has no application to the orders and judgments of the district court, which is a court of general jurisdiction. Nor is the forfeiture, in any sense, "a part of the written instrument which is the foundation of the cause of action." The recognizance is a separate and complete instrument. The forfeiture is an independent matter, and the evidence that the condition of the recognizance has been broken. It may be necessary to establish a liability on the recognizance, as demand is necessary to establish a liability on a note payable on demand; but it is no part of the instrument. The demurrer was properly overruled.

*323 *The answer contained a general denial, and also a special denial under oath, that the justice before whom the preliminary examination was had, and the deputy-sheriff who took and approved the recognizance, were legal officers. Upon the trial certain testimony was admitted, over the objection of the plaintiff in error, defendant below. To most of the testimony thus admitted no specific

ground of objection was raised. Under those circumstances error cannot be affirmed. *Walker v. Armstrong*, 2 Kan. *199; *Wilson v. Fuller*, 9 Kan. *176; *Luke v. Johnnycake*, Id. *511; *Marshall v. Shibley*, 11 Kan. *114. Other testimony was objected to on the ground that, being part of the original case, it was admitted in rebuttal; and also because it was received after the testimony had once been closed. These are matters largely within the discretion of the trial court, and, unless it is apparent such discretion has been abused, are not grounds for reversal. There is here no evidence of any abuse. Laws 1872, p. 329, § 1. These cover all the matters of evidence noticed by counsel for plaintiff in error in his brief.

It may also be said that the motion for a new trial is based solely upon the ground that the findings of fact are not supported by the testimony, and that the conclusions of law are contrary to law. Under these circumstances, it is apparent that the rulings of the court in the admission of evidence must be taken to be correct. Notwithstanding this, we have carefully examined the testimony, and see no error in the admission of evidence. As to the finding of the court that the justice and deputy-sheriff were legal officers, it is abundantly sustained by the testimony. As to the justice, it appeared that he was elected and qualified in 1870, and had continued to act without objection ever since. It appeared also that he was re-elected in 1871, and again in 1873. The bond filed at this last election does not appear on the face of it to have been approved. Still, under his prior election, he held until his successor was qualified, (Const. art. 3, § 12,) and hence was still a justice *de jure* as well as *de facto*. As to

*324 the deputy-sheriff, it appeared that this was during the *second term of the sheriff that the written appointment of the deputy was made and filed at the commencement of the first term, and no other was on file in the office of the county clerk, though the deputy-sheriff testified that at the commencement of the second term he received a written appointment, and filed it in the county clerk's office; but it also appeared that this party had been regularly acting as deputy-sheriff during both the first and the second term. Under those circumstances, it is evident that he was at least an officer *de facto*, and as such his acts were binding.

We see no error in the proceedings, and the judgment must be affirmed.

(All the justices concurring.)

N. B. CANNON and another v. CONRAD KREIPE and others.

January Term, 1875.

1. **Pleading: Stating Same Defense Twice: Demurrer: Immaterial Error.** Where the same matter of defense is twice alleged in the answer, but is stated as two separate defenses, and a demurrer is sustained to one of said defenses, but the other left unchallenged by demurrer, and the matter inquired into upon the trial, the error, if any, is immaterial.
2. **Debtor and Creditor: Contract of Debtor with Stranger.** Where a debtor makes a contract with a third party, by which the latter agrees to pay the debt, the creditor is not bound by this contract, or under any obligations to sue upon it, but may proceed against the debtor the same as though no such contract had been made.
3. **Equity: Application of Securities.** While equity will sometimes decree the order in which two funds or securities shall be applied to the payment of indebtedness, it is essential that it clearly appear that such decree will in no manner trench upon or prejudice the rights or interests of third parties.
4. **Assignment of Debt: Transfer of Securities.** While the transfer of a debt ordinarily carries with it all the securities therefor, yet this is not necessarily so, and may be changed by stipulation.

*325 *Error from Shawnee district court.

Action by Conrad Kreipe, to foreclose a mortgage on twenty acres of land, given by Cannon and wife to secure a note for \$962.85, given by said Cannon to C. & G. Cooper in March, 1871, and by them transferred to said Kreipe. The answer of Cannon and wife set forth three defenses: *First*, a general denial; *second*, that plaintiff was not the real party in interest, and that George W. Spencer and Theodore Kreipe had "lifted and satisfied" said note "in pursuance of an agreement between said N. B. Cannon and said Spencer and T. K.;" *third*, that Cannon, at the time said real-estate mortgage was executed, had given to said C. & G. Cooper a chattel mortgage to further secure said note, which chattel mortgage was duly filed of record, and still owned and held by said C. & G. Cooper; that in May, 1872, said Cannon had sold and delivered a portable saw-mill to said Spencer and T. K., in part payment for which they agreed to pay off the note and mortgage mentioned in plaintiff's petition; that said Spencer and T. K., in July, 1872, "made arrangements with the plaintiff to purchase the note mentioned in plaintiff's petition, and to foreclose said real-estate mortgage for the benefit of said Spencer and T. K.," and that plaintiff "well knew at the time he sold said note that said Spencer and T. K. had purchased said saw-mill, and in part payment thereof had undertaken and promised to pay said note." Reply to second defense, general denial. Demurrer to third defense. Spencer and T. K. were joined as co-defendants, and they also demurred to said third defense. The district court, at the December term, 1873,

sustained said demurrers. Trial and judgment for plaintiff, and Cannon and wife bring the case here on error.

Thomas Ryan and J. P. Greer, for plaintiffs in error.

Martin & Case, for Conrad Kreipe, defendant in error.

W. P. Douthitt, for defendants G. W. Spencer and T. Kreipe.

*326 *BREWSTER, J. The question in this case arises on the ruling of the district court sustaining demurrers to the third defense in the answer of Cannon and wife, the plaintiffs in error. The petition was an ordinary petition on a note and mortgage, alleging the execution of the note and mortgage to C. & G. Cooper & Co., and an indorsement to plaintiff before maturity. The third defense in the answer alleged substantially that at the time of the execution of the note defendant N. B. Cannon executed a chattel mortgage on a portable saw-mill situate in the same county as the land as additional security therefor, the filing of the mortgage, and that the same was "still held and owned by C. & G. Cooper & Co." It also alleged that subsequently thereto Cannon sold and delivered said mill to George W. Spencer and Theodore Kreipe, who still have the possession thereof in the same county; that as part consideration therefor said purchasers agreed to pay this note; that thereafter said Spencer and Theodore Kreipe "made an arrangement with plaintiff to purchase the said note and foreclose the said mortgage for the benefit of the said Spencer and Kreipe;" that the plaintiff knew of the purchase of the mill by Spencer and Theodore Kreipe, and of their agreement to pay this note therefor. There was a prayer that said Spencer and Theodore Kreipe might be made parties, and brought into court, and that on decree the saw-mill be first sold to satisfy the note. To this defense plaintiff below, Conrad Kreipe, demurred. Spencer and Theodore Kreipe were made parties, and they also filed a demurrer to this third defense, in Cannon's answer. Both demurrers were sustained. Was there error in this?

The most that can be gathered from this defense is that it alleges the existence of two securities, or funds, for the payment of this debt, with an equity in favor of the exhaustion of the other before touching the land; *secondly*, that it alleges a contract, for a valid con-

*327 sideration, by Spencer and Theodore Kreipe to pay this debt; and possibly a third matter, that plaintiff was not the real party in interest. So far as this last matter is concerned, if it were fully and distinctly stated, the error in sustaining a demurrer to it would have been immaterial, for the second defense, which was unchallenged by demurrer, contained the same allegation, and it was a matter inquired into on the trial. So far as the allegation of a contract by Spencer and Theodore Kreipe to pay this debt is concerned, though it might disclose a contract for the benefit of plaintiff, and which he could enforce if he desired, yet it cast no obligation upon him to sue upon or pay any attention to it; nor did it release or affect

the security of the mortgage on the land, or the primary liability of Cannon for the debt. There remains, therefore, only the first of the matters suggested. It is unquestionably true that equity will oft-times interfere to direct the order in which two funds or securities for the same indebtedness shall be exhausted; as, for instance, where a mortgagor, having mortgaged for the same debt several tracts, thereafter sells some of them without any stipulation as to the debt, equity will direct a sale in the inverse order of the alienation. So, where a portion of mortgaged premises is sold, and the purchaser, as part of the consideration, assumes the payment of the mortgage debt, equity may direct the sale of the portion purchased before that unsold is offered. Yet in these cases it is necessary that it clearly appear that the rights and interests of third parties will in no manner be trenching upon or prejudiced by such order. But the allegation here is that this chattel mortgage was still held and owned by C. & G. Cooper & Co., not that it was held and owned by plaintiff, or by Spencer and Theodore Kreipe, in whose interest and for whose benefit plaintiff was charged to be acting.

Now, while the indorsement of a note carries with it ordinarily all the sureties therefor, yet this is not necessarily so, and may be changed by stipulation. *Noyes v. White*, 9 Kan. *640. Thus, Cooper & Co. may have held other indebtedness for which both the real estate and the chattel mortgage were securities, and on the sale of *328 the note to *plaintiff may have given him the real estate as security therefor, and kept the chattel mortgage to secure the unsold indebtedness. Or, if they held but the one note, they may have, by express agreement, withheld the chattel mortgage from plaintiff. Whatever may have been the reason, the allegation is clear that Cooper & Co. still held and owned it, and equally clear that plaintiff had purchased for himself or Spencer and Theodore Kreipe the note and mortgage sued upon. And it does not appear that the order asked would not trench upon the rights of Cooper & Co., but, on the contrary, it does appear that whatever rights and interests they had, and by the allegations they had some, would be materially affected thereby,—in fact, might be entirely destroyed. Hence, it was not error to refuse to order the sale of the saw-mill first, and the demurrer was properly sustained. The judgment will be affirmed.

(All the justices concurring.)

ROBERT H. WATSON and another v. JACOB R. VOORHEES and another.

January Term, 1875.

1. **Homestead: Mortgage to Secure Prior Debt.** Notwithstanding the provisions of section 4 of the homestead act (12 U. S. St. at Large, 393) "that no lands acquired under the provisions of this act shall, in any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor," if the owner of a tract acquired under that act execute a mortgage thereon, to secure a debt existing prior to the issue of the patent, such mortgage is valid, and may be enforced by a foreclosure and sale of the land.¹
2. **Defense: Laches: Omitting to Plead Defense before Judgment.** If a party with a perfect legal defense to a cause of action, of which he has full knowledge, omits, when sued upon such cause of action in a court in which the defense can be pleaded, to set it up, and suffers
*329 judgment *thereon to be entered by default, he cannot thereafter, without showing some valid excuse for such omission, avail himself of said defense to vacate or modify the judgment, or restrain its collection.

Error from Marshall district court.

Watson and wife brought injunction against Voorhees, as sheriff, and the St. Louis & Peoria Plow Company, to restrain the sale of certain real estate under an order of sale issued to Voorhees upon a foreclosure judgment rendered in favor of the plow company against the plaintiffs. The district judge, on the eighteenth of May, 1874, refused to grant a temporary injunction, and from such order of refusal the plaintiffs appeal.

J. D. Brumbaugh, for plaintiffs in error.

J. A. Broughton, for defendants in error.

BREWER, J. This is a proceeding to review an order of the judge of the Twelfth district, refusing to grant a preliminary injunction. The facts, as they appear in the petition, are that Robert H. Watson and wife, on the twenty-second of September, 1872, executed a mortgage upon a certain tract of land to secure a certain note of even date given for the purchase of a wagon. The land mortgaged was acquired by Watson under the homestead act. The application therefor was made September 18, 1866, and the final receipt given September 19, 1872, three days before the execution of the note and mortgage. The patent, however, was not dated or issued until the twentieth of March, 1873, some months thereafter. The note was not paid at maturity. Suit was commenced, personal service had, default made, decree entered, and order of sale issued to the sheriff, who was pro-

¹See *Randal v. Elder*, 12 Kan. *257, and note.

ceeding to sell the land. Was there error in refusing to restrain the sale? Section 4 of the homestead act (12 U. S. St. at Large, 393) provides "that no lands acquired under the provisions of this act shall,

in any event, become liable to the satisfaction of any debt or
 *330 debts *contracted prior to the issuing of the patent therefor;"

and it is argued that this debt was contracted before the issue of the patent, and that, therefore, the land could not be subjected to its payment. On the other hand, it is insisted that congress has not the power to attach any such condition to the title; that when the title passes from the general government it becomes wholly subjected to the laws of the state, which control, not only the manner and conditions of voluntary transfer, and the casting of descent, but also the conditions of judicial sale and forced alienation. *County of Miami v. Brackenridge*, 12 Kan. *117; *Miller v. Little*, 47 Cal. 348. In this last case the power of congress was affirmed, though by a divided court.

We deem it unnecessary to examine this question, for, conceding the power, it does not seem to us that congress intended by this act to place any restriction on the owner's control of the land. The limitation was on the *creditor*, and not upon the *debtor*. While the land might not be taken from him against his will, for the satisfaction of past indebtedness, yet he was not prohibited from appropriating it, if he desired, therefor. He might convey it as freely as any other land, and for such consideration as satisfied him. His deed passed a good title, and he could not thereafter avoid that deed by showing that the only consideration therefor was past indebtedness. And if he could convey absolutely, so he could conditionally. He could use the land as security. He was in nowise limited or restricted in his power of disposing of the property. Now, in this case, the land is not taken in execution because of the debt simply, but because the owners voluntarily appropriated it to the payment of such debt. Having once appropriated it for that purpose, they may not thereafter deny such appropriation. The supreme court of Iowa have had this question before them, and reached the same result. *Nycum v. McAllister*, 33 Iowa, 374. The California case above cited was a case of simple debt, and without any mortgage or voluntary appropriation of the land.

Probably another and entirely sufficient reason might also
 *331 *be given for affirming the ruling of the district judge. The

plaintiffs have had their day in court. They knew then of this defense as fully as they do now, yet they failed to set it up. No excuse is given—no reason shown—why they did not make their defense in the foreclosure suit. They probably had no defense to the note, but if their present claim in reference to the land, and its freedom from liability for this debt, is a good one, they could have set it up in that suit, and thereby prevented a decree of foreclosure. There is no reason why they should have two opportunities of interposing

the same defense, especially when it is one so utterly void of equity. *Elder v. Bank of Lawrence*, 12 Kan. *242.

The judgment will be affirmed.
(All the justices concurring.)

EMERA HIGBY and another v. AYRES and another.

January Term, 1875.

1. **Judge Pro Tem.: Authority to Sit, when to be Questioned.** Where an action is tried in the district court before a judge *pro tem.*, and no question is there raised as to the power or authority of such judge *pro tem.* to hear and determine the case, but all the parties consent thereto, *held*, that such question cannot be raised for the first time in the supreme court.¹
2. **Pleadings: Trial: Answer: Reply: Waiver.** Where two plaintiffs, having separate rights and interests, commence an action to set aside a deed of assignment made for the benefit of creditors, on the ground that the assignment was fraudulent and void; and the defendants answer that one of the plaintiffs, with a full knowledge of all the facts, acquiesced in and became a party to said assignment, and instructed and encouraged the assignee to proceed under the assignment, and sell the property, etc.; and neither of the plaintiffs replied to said answer; and the defendants on the trial objected to the introduction of evidence because of the condition of the pleadings, and asked for judgment in their favor on the papers in the case; and the court overruled the objection and *332 motion, and afterwards rendered judgment *against the defendants and in favor of both of the plaintiffs: *held*, that a reply was necessary as to the plaintiff, who, it was alleged, had acquiesced in said assignment, and that the defendants did not waive a reply by proceeding with the trial without one.
3. **Assignment for Benefit of Creditors: Fraud: Review of Testimony.** Where one of the issues of fact tried in the court below was whether a certain assignment in trust for the benefit of creditors was fraudulent or not; and there was some evidence tending to show that it was fraudulent, and sufficient, if uncontradicted and unexplained, to authorize a court to infer fraud; and the court below before whom the action was tried found that the assignment was fraudulent: *held*, in such a case, that the supreme court will not retry the case upon the facts, for the purpose of determining whether the district court erred in its find-

¹ The regular judge of the district court having been of counsel in several cases, and therefore disqualified to sit in the trial thereof, on motion of a member of the bar, a *pro tem.* judge was elected. Neither counsel nor client in his case appears by the record to have participated in such election, or to have been present or consented thereto. *Held*, that an application for a change of the place of trial to another district was not too late when made at the time the case was called for trial by the *pro tem.* judge. *Hegwer v. Kiff*, 31 Kan. 636; S. O. 3 Pac. Rep. 803. See, also, *In re Watson*, 30 Kan. 755; S. C. 1 Pac. Rep. 775.

ings of fact or not, but will examine the case merely for the purpose of determining whether the district court committed any error of law or not.¹

4. ———: **Badges of Fraud.** Certain acts and proceedings designated as evidence that the assignment was fraudulent.²

Error from Labette district court.

Higby, a grocer, doing business at the city of Chetopa, on the thirteenth of November, 1872, made assignment to D. J. Doolen of "all the lands, and all the personal property, of every name and nature whatsoever," belonging to said Higby. Said assignment was specified in the deed to be made "upon the following trust, viz.: To take possession of said lands and personal property, and sell the said lands and personal property upon such terms as in his judgment may appear best for all parties concerned; and hold the proceeds of all sales for distribution among all the creditors of the said party of the first part in accordance with such orders as may be given by all of the creditors, or the district court of the county of Labette; and shall, after final settlement and distribution be made, and all reasonable expenses, rents, taxes, assessments, commissions, and allowances are paid, return any surplus that may be of the proceeds of the sales of the assigned property to the party of the first part, or his assigns; and also reconvey and reassign to him or them any real or personal property remaining unsold."

Ayres and Martin, each claiming to be a judgment creditor of Higby, commenced an action against Higby and Doolen, "on *333 behalf of themselves and all of the judgment creditors *of said Higby," to set aside said deed of assignment, claiming that it was executed to hinder, delay, and defraud Higby's creditors, and was therefore void. The petition prayed that a receiver might be appointed, and that defendants be enjoined from selling or disposing of any of the assigned property, etc. The action was tried at the July term, 1873, of the district court.

The record shows that "the judge of said district court being engaged in the trial of a cause, and there being no statutory provisions disqualifying him from presiding at the trial of this cause, the parties consented to the trial of the issues joined herein before H. G. W., as *pro tem.* judge." The case was tried before said judge *pro tem.*, without a jury. The court found, as facts, that Ayres had recovered a judgment against Higby for \$243.39, and costs; that Martin had recovered a judgment against Higby for \$805.19, and costs; that said parties had issued writs of execution on said judgments before the

¹See the full notes of cases, on assignments for the benefit of creditors, to *Ex parte Hopkins*, 2 N. E. Rep. 590; *Auley v. Ostermann*, 25 N. W. Rep. 662; also *Kayser v. Heavenrich*, 5 Kan. 198, and note.

²As to fraudulent conveyances, see full notes to *Knight v. Kidder*, 1 Atl. Rep. 142; *Zoeller v. Riley*, 2 N. E. Rep. 392; *Lewin v. Hopping*, 8 Pac. Rep. 75; *State v. Wallace*, 24 N. W. Rep. 610.

thirteenth of November, 1872, and that said writs had been returned unsatisfied; that Higby, on said thirteenth of November, had assigned all his property, real and personal, to said Doolen by deed of assignment of that date; that Doolen had disposed of a large amount of the assigned property, "and now holds the net proceeds thereof, over and above all expenses, to the amount of \$1,100 in ready money, and also holds other assigned and real and personal property to the amount of \$500 or more;" that there was no actual and continued change of possession of the assigned property; that said deed of assignment is illegal, fraudulent, and void, etc.

Judgment was given in accordance with findings, and it was adjudged "that defendant Doolen holds the proceeds of such assigned property in trust for plaintiffs, as judgment creditors of said Higby, and that they have a lien in equity thereon for the satisfaction of their respective judgments, interest, and costs; and that the defendant Doolen, as such assignee as aforesaid, pay to plaintiff Alexander

H. Ayres the sum of \$243.34, and interest thereon at 12 per cent. per annum from the date of the recovery of his judgment against said Higby; and that said Doolen, as such assignee, pay to plaintiff Gilbert Martin the sum of \$805.19, and interest thereon at the rate of 10 per cent. per annum from the date of the recovery of his judgment against said Higby," etc.

From this decree defendants Higby and Doolen appeal.

F. A. Bettis, for plaintiffs in error.

Consent cannot give jurisdiction. The court must be constituted and authorized by law. *Dicks v. Hatch*, 10 Iowa, 380. The judge cannot delegate his powers, even though the parties consent. *Winchester v. Ayres*, 4 G. Greene, 104; *Petty v. Durall*, Id. 120; *State v. Cure*, 7 Iowa, 481. The record shows affirmatively that the district judge *de jure* was present, and in no manner disqualified to sit in the case. The constitution only requires the legislature to make provision for the election of a *pro tem.* judge in cases where the judge *de jure* is absent, or otherwise unable or disqualified to sit in any case; and the legislature has provided that a judge *pro tem.* may be selected when the judge is sick, absent, or interested; and in any such case (and such case only) the parties may agree on a *pro tem.* judge.

Judgment should have been given for defendants on the pleadings. The answer alleges that Martin, with a full knowledge of the facts, assented to the act of assignment. This is undenied, and is a good defense. *Eager v. Com.*, 4 Mass. 183; *Sebor v. Armstrong*, Id. 206; *Bond v. Farnham*, 5 Mass. 174. And the answer alleged that Ayres' judgment was against True as principal, and Higby as surety, and that True had ample property to satisfy the judgment within reach of the process of the court. This was neither denied nor avoided, and was a good defense. Civil Code, § 470. The evidence in this case indicates the whole transaction of bringing this suit to have been

a champertous speculation, as *vide* the testimony of Fox, which we quote entire: "I am the partner of A. H. Ayres. Martin sold us the Higby note, and ordered us to collect it in his name, and we were by agreement to pay him fifty per cent. of what was realized."

*335 The deed of assignment was not void upon its face. It *contains every element necessary to carry out the letter and spirit of the law, and not one word to indicate a fraudulent intent in the maker. Such an assignment is not *per se* void. *Case v. Ingersoll*, 7 Kan. *367. The deed from Higby to Doolen is without any of the objectionable features which were prominent in the assignment of Johnson to Case, and yet, with reference to the latter assignment, the supreme court held this language: "There was some evidence on the face of this instrument tending to show that it was executed for the purpose of defrauding Johnson's creditors, but probably not enough to prove said fact, or to render the instrument void for that reason." *Johnson v. Laughlin*, 7 Kan. *361.

The findings that there was no actual and continued change of possession, and that the assignment deed was fraudulent and void, are not sustained by the evidence.

Ayres & Fox, for defendants in error.

There does not seem to be any question as to the jurisdiction of the *pro tem.* judge, or the regularity of the judgment on his decision. The language of the statute is unequivocal, and there is no office for construction. "The parties in any case may select a judge to sit in such case." Gen. St. c. 28, § 5; *Brainard v. Jones*, 11 How. Pr. 569, 571. But if we should be mistaken in the meaning of the words "any case," still the person chosen was a judge *de facto*, and the judgment is free from error. In *re Boyle*, 9 Wis. 264; *Beach v. Beckwith*, 13 Wis. 21; *Dinsmore v. Smith*, 17 Wis. 20; *Bacon v. Bickwell*, Id. 524.

Plaintiffs in error "objected to the introduction of any testimony, and moved for judgment on the papers." Upon what grounds? None were assigned. True, the case recites, as matter of history, that no reply had been filed, but not that the objecting party called the attention of the court to the fact, or even then knew it. There was no *determination* of the court upon the lumped question whether the plaintiffs in error were entitled to a general judgment for lack of a reply. Had even that general question been raised, defendants in error might have obtained leave to reply, and it is now too

*336 *late to raise the question. *Wilson v. Fuller*, 9 Kan. *179; *Williams v. Hayes*, 20 N. Y. 58; 2 Till. & S. Pr. 502.

The objection that no reply was filed suggests the question, was a reply necessary? Proofs were entered into by the parties before the court, which shows that it was the understanding of all parties that no reply was necessary; and plaintiffs cannot now take the ground that there were material allegations in the answer that were admitted. It is, moreover, the duty of this court to construe the objection to be grounded on the claim that a reply is necessary in all cases, because

the allegation in the answer of assent by Martin to the assignment was proven to be unfounded, and was rightfully overthrown by the court below on the proofs. *Williams v. Hayes*, 20 N. Y. 58, 61.

But if it can be said that the lack of a reply was assigned as the ground of the motion, and that such ground was sufficiently specific, the ruling below was still proper, because the ground was too broad. It went to both defendants, while as to defendant Ayres, at least, the answer, on mere inspection, contains no new matter, well pleaded,—material,—but merely conclusions of law and of fact.

The finding that the assignment is illegal and void on its face as against the defendants is sound. The assignor did not declare and fix the uses to which the assignee should apply the fund, and no creditor could enforce any payment thereunder. By the clear effect of the assignment the assignee could keep the proceeds in perpetuity. The instrument did not devote the property to the payment of creditors "in proportion to their respective claims," but the assignment provides that any distribution may be made which all the creditors, or the district court, may choose to order, which may be neither fair nor equitable. Much less does it secure a *pro rata* distribution, the only one which is legal.

The assignment on its face must delay, hinder, and defraud the creditors; for the property was placed beyond their control until such time as all the creditors or the district court should order distribution and fix the sale. The lack of change of possession *337 of the property is evidence of such trust *reserved. *Christy v. Scott*, 14 How. 289; *Adams v. Davidson*, 10 N. Y. 309, 313. The finding of no actual change of possession, and bad faith, is not only sustained by clear evidence, but by the undisputed proof of the facts.

VALENTINE, J. The laws of Kansas provide for such an officer as a judge *pro tem.* of the district court. Const. art. 3, § 20; Gen. St. 304, §§ 4 to 8. And hence, whenever it appears from the record of a case that the action was tried before such a judge, it will be presumed, in the absence of anything to the contrary, that such judge had the requisite authority to hear and determine the case. The district court of Kansas being a court of general and superior jurisdiction, all presumptions, in the absence of anything to the contrary, must not only be that the court acted within the scope of its jurisdiction, but that it acted regularly and legally. And a judge *pro tem.* of such a court being as much a judge of the court for the time being as the regular judge, all presumptions, in the absence of anything to the contrary, must be in favor of his authority, and in favor of the regularity and validity of his proceedings. Whenever his authority has been duly recognized, as in this case, by the regular judge, the clerk, the sheriff, the attorneys, the parties to the suit, and others, it would hardly seem proper to allow his authority to be questioned for

the first time in this court. This case was tried before a judge *pro tem*. But whether such judge was duly elected and qualified does not appear. It does appear, however, that all the parties consented to try the case before him. It also appears that there were "no statutory provisions disqualifying the regular judge from presiding at the trial." From this we suppose that the regular judge was not sick, absent, interested, related to either of the parties, or otherwise disqualified from hearing and determining the case. But suppose the regular judge was present, and competent to hear and determine the case, still he did not do it, but allowed a judge *pro tem*. to do

*338 so. The *district court was in session. No question is raised as to the jurisdiction of the court over the subject-matter of the action and the parties to the suit. The case came regularly on for trial. A judge *pro tem*. tried it. The constitution and laws recognize such an officer; and whether this judge *pro tem*. was regularly and legally filling the office or not, still he did fill the office, and was therefore an officer *de facto*, and his acts are therefore not void, but, like the acts and proceedings of all other officers *de facto*, are valid and binding. Of course, his proceedings could not be attacked collaterally. But attempt is now made to attack them directly by petition in error. This may be done where the question was raised in the court below, and proper exceptions taken. But, unfortunately for the plaintiffs in error, the question was not raised in the court below. Neither party objected to trying this case before said *pro tem*. judge, but all the parties consented thereto. The question of whether said *pro tem*. judge could legally try this case is now raised for the first time in this court, and we think the question is raised too late. See Hunter's Adm'r v. Ferguson's Adm'r, 13 Kan. *462, *473, and cases there cited.

This was an action to set aside a deed of assignment, made for the benefit of creditors, on the ground that the assignment was fraudulent and void. The plaintiffs had separate rights and interests, and not joint interests. The defendants answered that the plaintiff Martin, with a full knowledge of all the facts, acquiesced in, and became a party to, said assignment, and instructed and encouraged the assignee to proceed under the assignment, and sell the property, etc. There was no reply filed to this answer, and there was nothing in the case which tended to show that the defendants waived a reply. On the contrary, it seems that they twice objected to the introduction of evidence because of the condition of the pleadings; and they also asked for a judgment in their favor upon the papers in the case. It is true, the objection to the evidence went to both of the plaintiffs,

*339 while it could properly apply to only *one of them. But still it shows that the defendants did not intend to waive a reply. Where a reply is necessary, as it was in this case, and none has been filed, it must appear affirmatively from the conduct of the defendants that the reply has been waived, or the court must take all the allega-

tions of new matter contained in the answer as true. Where the defendants go to trial, and proceed with the trial in all respects although a reply had been filed, such conduct on their part will authorize the court and the other party to consider that the defendants have waived a reply. But that is not the case. The evidence in this case failed to show that Martin acquiesced in said assignment with a full knowledge of all the facts. But still as such was so alleged by the defendants, and not denied by the plaintiffs, we must take it that such was the fact.

The answer does not allege, as is claimed by the plaintiffs in error, that the Ayres judgment was rendered against True as principal, and Higby as surety. The answer merely alleges that the judgment was rendered upon a promissory note, on which note True was principal and Higby was surety. The answer does not state or show how the judgment was rendered, and there was no evidence upon the subject. With reference to such judgments, see *Rose v. Madden*, 1 Kan. *445; *Points v. Jacobia*, 12 Kan. *50. No question of champerty was raised in the court below. Such question is not in this case. It is immaterial whether the court below erred or not as to the amount of money which Doolen had received from the sale of Higby's property. We must reverse the judgment as to Martin, and there was certainly more than enough to pay Ayres.

We hardly think that the deed of assignment was void upon its face, but, as we view the case, it is not necessary to decide that question now, and we therefore do not wish to be understood as deciding it. It is also claimed that the assignment was fraudulent in fact, and therefore void in law. It is claimed that the assignment was made *340 for the purpose of hindering, delaying, and defrauding Higby's creditors, and especially the plaintiffs, who were judgment creditors of Higby. The court below finds this to be true. And while it is at least doubtful whether this finding is correct, yet there was some evidence to sustain the finding, and enough, under the rules of practice to which this court has always adhered, to uphold the judgment rendered thereon. If the court below erred, as perhaps it did, in making this finding, the error was one of fact, and not one of law. And as this court cannot retry the case upon the facts, but can only decide such questions of law as may be involved in the case, we cannot reverse the decision of the court below merely because it erred in its findings of facts, provided, of course, that there was sufficient evidence introduced from which, if such evidence were uncontradicted and unexplained, a court might reasonably infer what is contained in its findings. If there had been no evidence to sustain the findings or any one of the findings, then we might reverse the judgment of the court below for that reason; for then the question would be purely one of law.

Some of the evidence which tends to show that said assignment was in fact fraudulent is as follows: (1) Under the provisions of

the deed of assignment the proceeds of the sale of the property assigned could be distributed among the creditors only, by and in accordance with the *orders of all the creditors* or the district court. This might cause delay and injustice. The assignee should allow all just and legal claims, and pay as much as he could on them, without waiting for the orders of *all the creditors or the district court*. See Gen. St. c. 6, §§ 21, 24, 35. One creditor has no right to determine how much is due to another creditor, or when it should be paid. (2) It would seem, from another provision of the deed of assignment, that the assignor contemplated that there would be a surplus of his estate left after paying all his debts, and there was no evidence introduced that would tend to show otherwise. Now, it is generally fraudulent

for a person who can pay all his debts to make an assignment. *341 Seibert v. Thompson, 8 Kan. *69; Burrill, *Assignm. 190. All assignments in trust for creditors tend to hinder and delay such creditors, and cannot, as a rule, be sustained unless the assignor is insolvent. (3) The assignor in this case was a grocer, and the business was carried on in the same place and in the same manner after the assignment that it was before. The assignor continued to reside in a part of the same house where the grocery was kept. He was sometimes in the grocery and behind the counter, and also sold goods. The same clerks remained in the store, one of whom seems to have been a sister of the assignor. The signs remained the same. The assignor's name still remained on all the boxes, casks, etc., and the name "E. Higby, Grocer," still remained on the delivery wagon. There was really no apparent change in the business. There was some evidence about two different inventories of the property which we do not precisely understand, but it is claimed by the defendants in error that such evidence indicated fraud.

There are some questions in this case which counsel have not chosen to raise, and therefore we have purposely avoided saying anything about them. We, however, desire that it be distinctly understood that we have decided no questions in this case except such as are mentioned in this opinion.

The judgment of the court below will be affirmed as to the defendant in error Alexander H. Ayres; and it will be reversed as to the other defendant in error, Gilbert Martin. The cause will be remanded for further proceedings as between the plaintiff in error and Gilbert Martin.

(All the justices concurring.)

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*JOHN BRANDON v. MARY ANN BRANDON.

January Term, 1875.

1. **Homestead: Divorce.** Upon granting a divorce, whether on account of the fault of the wife or the husband, the court has power to award to her the possession of the homestead.¹
2. **Divorce: Party in Fault: Custody of Children.** When the record shows that a divorce was granted on account of the habitual drunkenness of the wife, this court cannot hold that it was error to give to her the care and custody of two infant children, in the absence of any showing that the husband was a suitable person to have such care and custody.²

Error from Leavenworth district court.

The case is stated in the opinion.

F. P. Fitzwilliam, for plaintiff.

The court could not lawfully decree possession of the *homestead* to defendant during her natural life, and require plaintiff to vacate it. The marriage was dissolved, and all rights and obligations dependent on the existence of the marriage relation became extinguished. The parties are no longer husband and wife, but are permitted to marry at pleasure. The husband is released from all obligation to maintain the wife. Any inchoate right that she might otherwise possess is at end upon the dissolution of the marriage. In this case the legal title was in plaintiff, and was procured by his own means. Defendant had an interest in it, by operation of law, and which could not be defeated without her consent during the existence of the marriage relation; but as soon as a decree for a divorce *a vinculo matrimonii*, for the fault of the wife, was made, it annulled any right she had in the homestead. He still remained the head of the family, (having

*343 ing two *adopted children and his aged mother with him,) occupying the homestead at the time of the dissolution of the marriage. Hence the court could not defeat the right of plaintiff to occupy the premises, nor could it create for plaintiff a different estate from that he had under the marriage relations, or limit the right of occupancy. Defendant's right to occupy the homestead was subordinate to his right. On the dissolution of the matrimonial union, defendant became *civiliter mortuus*. Were this not the case, then plaintiff could not dispose of the premises without the consent of defendant, although he should deem it for the best interest of him-

¹ Upon granting a divorce to the husband by reason of the fault or aggression of the wife, the court has power to decree the sum allowed as alimony to the wife a lien upon the real estate of the husband; and under such a decree the premises occupied by such husband and wife as a homestead at the date of the decree of divorce may be sold in satisfaction of said lien. *Blankenship v. Blankenship*, 19 Kan. 159. As to effect of foreign divorce, see note to *Orsadal v. Orsadal*, 24 N. W. Rep. 580.

² As to custody of children, see *In re Bort*, 25 Kan. 308.

self and family to change his domicile. Were defendant to marry again, would not she and her second husband enjoy the occupancy of this homestead, under decree of the court, while plaintiff is driven by a new process of ejectment from the home the constitution of the state guaranties shall be exempt from forced sale on any process of law, and shall not be alienated without his consent? In case of plaintiff's death, what estate would his children inherit? In case of a second marriage of plaintiff, and of his death, what estate would his widow take? In case a judgment should be recovered against him, could this property be sold to satisfy the judgment? or, in the event he procured another home while the defendant was in occupancy of these premises, could the latter be sold under execution? Article 15, § 9, Const.; *Blue v. Blue*, 38 Ill. 10; *Redfern v. Redfern*, Id. 509; *Moore v. Titman*, 33 Ill. 368.

The statute declares that on the court granting a divorce for the fault of defendant it shall be a bar to any claim of such party in or to the property of the plaintiff. Civil Code, § 647. The statute governs the rights of the parties, if not in conflict with any constitutional provision, (*Crouse v. Holman*, 19 Ind. 37;) for the court possesses no powers, in actions for divorce, except such as are conferred by statute, (*Barker v. Dayton*, 28 Wis. 367.)

If the court possessed a "discretion" in the matter, was it the exercise of that "sound discretion," assured through an enlightened jurisprudence and advancing civilization, to give a life-estate to defendant in the homestead of plaintiff; to give the care, nurture, and *344 education of the children to her; *to require plaintiff to pay to her \$25 per month for her support, together with a requirement to surrender all the household property,—after adjudging that defendant was an *habitual drunkard*? It is not often that a court is called on to review a decree like this one. It is not often that a court will assume to bestow the care and education of two infants to a drunken wife or mother,—children whose little lives are as "chaste and pure as the unsunned snow," but who must, in a few short years, have their sunny childhood overshadowed by the withering influence of an inebriate mother. It is not often that the hopes and ambition of young manhood are forever darkened by the "demon cup" in the hands of one that was to be a wife to him, and a mother to his offspring. It is not often that the court is willing to say to the unoffending plaintiff, you are freed from the "accursed thing," but weary days of toil shall be your lot, to furnish the means to support defendant in debauchery.

BREWER, J. The facts in this case are as follows: The court below granted to plaintiff a divorce on account of the fault of defendant, on the charge of *habitual drunkenness*, but awarded the defendant the care, custody, nurture, and education of the two minor children of the said plaintiff and defendant; one, as appears by the allega-

tions of the petition, three and a half years old, and the other only one year old. The court further decreed that the defendant should have and retain the possession of the homestead of the plaintiff *during her natural life*, and that plaintiff should forthwith deliver possession of said premises to said defendant. The court further adjudged that plaintiff should pay as further alimony \$25 per month; and that there should be allowed, assigned, and set off to the defendant, to her own sole and separate property, all the clothing of herself and said two minor children, and *all the household and kitchen furniture* in said house, excepting two medium-sized bedsteads, and the bedding thereof, to be retained by the plaintiff; and then adjudged that the defendant have and recover of and from plaintiff the costs, taxed at \$204.97.

Upon this record two questions are presented. It is insisted, in the first place, that "the court could not lawfully decree possession of the homestead to defendant during her natural life, and require plaintiff to vacate it." It appears that the title to the homestead was in plaintiff; and the argument is that the defendant's interest in the homestead arises from her relation as wife to plaintiff; that when that relationship ceased, as it did by the decree of divorce, her right and interest therein ceased, and the property remained as the absolute property of the husband; that it was his homestead, he remaining the head of a family; and that, being his homestead, he could not, under the constitutional provisions, be in this way forced to surrender it to any one. The argument is ingenious, and forcibly put by counsel in his brief; but we are constrained to say is not sound. The divorce, and the adjustment of property interests, are not to be regarded as transpiring at different times, but as contemporaneous. The homestead of the plaintiff is not given to a stranger, destitute of all interest and right therein, but the homestead of the husband and wife (for it is equally the homestead of each) is, upon their separation, assigned to one of them. There would be manifest impropriety in attempting to continue it as the homestead of each after the divorce; and in awarding it to the wife the court is but choosing between conflicting interests. The fact that the title to the homestead property is in the husband does not give to him any greater interest in it as a homestead. His deed of it conveys no more than hers. He can no more encumber or alienate it by a direct proceeding than she. Perhaps, by contracting for improvements thereon, he may have more power than she to make it liable to judicial sale, though thus only indirectly does he affect it. That he has even this power greater than she, we do not now positively decide, leaving the question to be examined and decided whenever it is fairly before us. But whatever he may do, directly or indirectly, affecting the title

*346 in so far as it is a homestead it is the homestead of each and upon a divorce the court has power to assign it to either. The statute expressly gives to the court the power, in case of a di

orce, whether granted for the fault of the wife or the husband, to give to her such share of her husband's real or personal estate as shall be just and reasonable. Laws 1870, p. 180, § 27. The assignment of the homestead to the wife is within the terms of this power. And if it be said that the protection of the constitution is placed around a homestead, it may also be said that the power to grant divorces is also by the constitution expressly given to the district courts. Const. art. 2, § 18. And the constitutional grant of power to divorce is broad enough to include the power to determine the subordinate and dependent questions of the family property, and the care and custody of the children. In this case we have only the *question of power* to determine; for, as the testimony is not before us, we are unable to form any opinion as to the propriety of the assignment of the homestead to the wife.

As a second question in this case, it is asserted that it was error to award the custody of the children to one found to be an habitual drunkard. Here also we labor under the disadvantage of having none of the testimony bearing on this question before us. We cannot say that the court erred, because we do not know what facts were before it. The character of the husband, the associations by which he was surrounded, his constant absence from home, may all have been so shown in evidence as to make it apparent that it was unwise to give him the custody, and it may have been awarded to her as the least of two evils. We do not mean to say that any such testimony was introduced, for the record is silent thereon; but we do hold that unless it affirmatively appears in the record that there was none such, or similar, we cannot say that it was error to award the custody to the mother, rather than the father. The children were of tender years, and needed a mother's care, and if she was at all suitable she ought to have the care of them during their infancy. The court *347 reserved in the order, as it had the right to do, the *power to change the custody; and if, after the children pass that age which especially demands a mother's care, her habits of drunkenness should continue, and the father appear to be a proper person to have the charge of them, we cannot doubt that the court will modify its order, and give him the custody.

So far as the amount of alimony is concerned, we suppose it was intended for the benefit of the children rather than of the wife. The law does not intend that a woman unfit to remain the wife shall be supported in idleness by the toil of the husband. We, however, are not prepared to say that it was exorbitant, when the custody and care of the children are taken into the account.

The judgment will be affirmed.

(All the justices concurring.)

LUCY J. WEAVER v. WILLIAM GARDNER.

January Term, 1875.

1. **Default: Judgment on: Indorsement on Summons: Foreclosure**
In an action on a note and mortgage in which the summons is indorsed with the amount due on the note, and for which a personal judgment is asked, but without any statement of a claim for other relief, and such summons is personally served, it is not error to enter on default a decree for the sale of the mortgaged premises, as well as a judgment for the sum indorsed on the summons. Following *George v. Hatton*, 2 Kan. *333.
2. **Stare Decisis.** A mere matter of practice once settled by the decision of the supreme court, and unchallenged for years, ought not to be disturbed except in case of glaring and dangerous error.

Error from Greenwood district court.

The case is stated in the opinion.

- *348 **Almerin Gillett*, for plaintiff in error.
G. H. Lillie, for defendant in error.

BREWER, J. Defendant in error brought his action in the district court of Greenwood county against Barrett Weaver and Lucy J. Weaver. He set up in his petition two notes signed by Barrett Weaver, and alleged the execution of a mortgage on certain real estate by both the defendants to secure them. A summons was issued and duly served upon both the defendants. Neither of them made any appearance, and a judgment was taken against both for the amount of the notes, and a decree entered against both for the foreclosure of the mortgage. An order of sale was issued, the property sold, and purchased by the plaintiff. Lucy J. Weaver then appeared and filed her motion to set aside the judgment, decree, and sale. The personal judgment against her was set aside, but the motion otherwise was overruled. The grounds of the motion were as follows: The single summons which was issued was indorsed "Sum brought for the recovery of money. Amount claimed, \$1,312.83, with interest from the twenty-sixth of May, 1873, at the rate of 1 per cent. per annum. G. W. LILLIE, Attorney for Plaintiff." This it is claimed, was notice to the defendants that only a personal judgment was sought, and that it was error to take anything more. This is not an open question in this court. As long ago as the case of *George v. Hatton*, 2 Kan. *333, it was decided that in an action like this *no indorsement* was required on the summons, it not being an action for the recovery of money only, but that if an amount was indorsed, it was not error to take judgment for that amount together with a decree for the sale of the land. Counsel contends that the decision in that case properly rests on the other grounds, and that

¹*Knowles v. Armstrong*, 15 Kan. *371.

the comments of Chief Justice CROZIER upon this question are mere *obiter dicta*. We do not so understand it. It was made one of the points announced in the syllabus, and the decision may as
 *349 *fairly be said to rest upon this as upon any other ground.

We are aware of contrary rulings in Ohio. *Williams v. Hamlin*, 1 Handy, 95; 1 Nash, Pl. & Pr. (4th Ed.) 67. And if this was an open question we might be disposed to give considerable weight to these authorities. But being merely a question of practice, and having been once settled in this state, we deem it better to adhere to that ruling. Doubtless it has been accepted by the profession during the last ten years as the correct interpretation of the statute, and many rights founded upon it. *Stare decisis* is eminently appropriate in such cases. It may be remarked that there is no showing here of any actual prejudice, no allegation that plaintiff in error did not in fact sign such mortgage, or that no decree of foreclosure thereon ought in equity to have been made.

The order of the district court will be affirmed.

(All the justices concurring.)

MISSOURI, K. & T. RY. v. E. G. DAVIDSON.

January Term, 1875.

Firing Woods and Prairies: Unavoidable Casualty. Gen. St. 1122, c. 118, § 2, does not authorize a recovery against a railroad corporation for a prairie fire caused by a locomotive running on the track of the company, where there is no want of care and skill in the construction of the locomotive, or in operating it.¹

Error from Labette district court.

Davidson sued the railway company to recover damages for injuries sustained, alleging that "defendant, in October, 1872, did set fire to and burn up and destroy seven acres of young timber, the property of the plaintiff." The action was commenced before
 *350 a justice of the peace, was taken to *the district court by appeal, where it was tried at the March term, 1874. Verdict and judgment in favor of Davidson for \$40, and costs.

¹A railroad company, in the usual and ordinary performance of its business, is not liable for a purely accidental fire caused by fire escaping from one of its engines. *Leavenworth, L. & G. R. Co. v. Cook*, 18 Kan. 261. In an action under section 2, c. 118, *Dass. Comp. Laws 1879*, if it appear that defendant intentionally and directly set a prairie on fire, he is liable for damages caused thereby; and whether he did or did not start such fire is a question of fact for the jury. *Hunt v. Haines*, 25 Kan. 210. Liability of railroad companies for negligence in causing fires, see notes to *Butcher v. Vaca Val. R. Co.*, 8 Pac. Rep. 179; *Wolf v. Chicago, M. & St. P. Ry. Co.*, 25 N. W. Rep. 68. See, also, *Missouri Pac. Ry. Co. v. Kincaid*, 29 Kan. 654; *White v. Missouri Pac. Ry. Co.*, 31 Kan. 280; *S. C. 1 Pac. Rep. 611*; *Atchison, T. & S. F. R. Co. v. Riggs*, 31 Kan. 622; *S. C. 3 Pac. Rep. 305*. See note to *Emerson v. Gardiner*, 8 Kan. 808.

T. C. Sears and David Kelso, for plaintiff in error, submitted that there was neither allegation nor proof that the railway company was guilty of any negligence; that section 2 of the act against firing woods, prairies, and marshes (Gen. St. 1122) does not authorize a recovery where there is neither wrongful act nor neglect of any duty. If the fire was set by the railway company, it was unavoidable accident, and no liability therefor exists.

Davis & Tulbott, for defendant in error, urged that the action was commenced under section 2, c. 118, Gen. St. Under that statute it is sufficient for the plaintiff below to prove that his damage resulted directly from a fire set by defendant to "woods, marshes, or prairies," or set to either of them. Plaintiff below had the right to seek his remedy under the statute without regard to the common law. It was held in *Emerson v. Gardiner*, 8 Kan. *455, that a party was liable for damages resulting from fire set to his weeds and rubbish on his own lands, without regard to negligence. A railroad corporation cannot claim greater rights or greater exemption from liability than individuals. "Unavoidable accident" cuts no figure in the question at issue, for the reason that the statute is *absolute*, and makes the defendant liable without regard to how the fire was set out by defendant below, whether by sparks from the locomotive, or by fire dropped from the ash-pan of the locomotive, or thrown out by the engineer or some other employee of defendant below.

KINGMAN, C. J. The defendant in error brought his action against the plaintiff in error for damages caused by setting fire to and burning and destroying several acres of young timber, the property *351 of the defendant in error, and obtained *a verdict. There was no allegation of negligence or carelessness on the part of the corporation or its agents; neither is there any testimony tending to show negligence. The testimony is that there was no fire before the train arrived at a certain place, but just after it passed the fire was observed in the prairie-grass near the track, and it spread till it reached the land of Davidson, and burned his young timber. In the entire absence of allegation or proof of negligence there could be no recovery at common law. *Kansas Pac. Ry. v. Butts*, 7 Kan. *308. This seems to be conceded by the counsel for defendant in error, who relies on section 2, c. 118, Gen. St. 1122, as authorizing a recovery in this case. Does this statute, by its terms, cover the case presented? The company was in the performance of its duty; pursuing its lawful avocation; using its property, so far as is shown, with care and prudence; and, for aught that appears, either in allegation or proof, its engine was of the most approved construction, furnished with all the appliances and safeguards possible to be used to prevent the escape of sparks and cinders. The fire, then, must be considered as the result of unavoidable accident. If the corporation is liable, it is an insurer of other people's property not under its con-

trol. It must use its road. That is what it was created for. It has an absolute right to use it, as it is its own property; and in such use it cannot be responsible for the injury unless made so by statute, and we do think it is made so by the statute referred to.

The object of the law was to prevent those prairie fires so disastrous in this state, and make those who set the prairies on fire, whether on his own land or that of another, responsible for all damages done thereby, and such are the terms of the act. The first section punishes criminally a person who shall wantonly and willfully set on fire the woods, prairies, etc. This section contemplates some direct act, done wantonly and willfully. The second section uses the same terms, except that the words "wantonly and willfully" are omitted; but the direct act is as much to be done in the second as in the first. It must be a direct "setting on fire," not the result of accident

*352 that can not be avoided. If a tornado were to destroy a man's house, and the fire he had safely kindled in his stove should be scattered so as to fire the prairies, the unfortunate owner of the house could not be held as having set the prairies on fire. Yet he kindled the fire that finally did the injury. So in this case. The corporation kindled the fire in the furnace, and, as far as the pleadings and the evidence shows, it escaped by unavoidable accident that no care or skill could have prevented. We are clear that the statute does not cover such a case, either in its terms or in the objects sought to be accomplished by it.

The judgment must be reversed, and the case sent back for further proceedings not inconsistent with this opinion.

(All the justices concurring.)

LEONARD SMITH v. CHARLES BURKHALTER.

January Term, 1875.

Appeal from Justice of the Peace: Amount in Controversy. Where the only question is one of fact, whether the defendant in an action before a justice of the peace filed a bill of particulars claiming over twenty dollars, and upon that question the district court finds for the defendant, and dismisses the plaintiff's appeal, this court, unless in case of manifest error, will affirm such order of dismissal.

Error from Doniphan district court.

Smith sued Burkhalter before a justice of the peace. Trial before a jury, and verdict and judgment for defendant. Smith appealed, and the district court, at the March term, 1874, on motion of Burkhalter, dismissed the appeal on the ground that there had been a jury

trial, and that neither party claimed "in his bill of particulars a sum exceeding twenty dollars."

*353 **Price & Seaver*, for plaintiff in error.
W. D. Webb, for defendant in error.

BREWER, J. We are asked in this case to reverse the finding of the district court upon a question of fact. That question arose in this way: Plaintiff sued defendant before a justice. His bill of particulars filed, claimed twenty dollars. The case was tried by a jury, who brought in a verdict for defendant for one dollar. Plaintiff appealed to the district court, and there, upon motion of defendant, the appeal was dismissed upon the ground that it was an action tried by a jury in which neither party claimed in his bill of particulars more than twenty dollars. Plaintiff before the dismissal had moved for an order on the justice to correct his record by showing the filing of a bill of particulars by defendant. The motions were heard together, and the question was whether defendant did in fact file a bill of particulars. Several affidavits were read upon both sides. The district court found for the defendant, and, we think, correctly. Certain facts are undisputed, or proved beyond question: The docket of the justice shows the filing of plaintiff's bill, but does not show the filing of any bill for defendant. The justice is required to note thereon the filing of the bill of either party. Gen. St. 815, § 188. No bill of defendant was demanded before the trial. No bill or memorandum was presented or used by defendant until after the plaintiff had finished his case. No bill was actually marked "Filed" by the justice. During the examination by defendant's counsel of his witness a paper containing a statement of the matters claimed by defendant was produced and used by him. It was left on the table after the termination of the trial, was placed among the papers by the justice, and transmitted with them to the district court, where it was filed by the clerk as "Defendant's Bill of Particulars;" but afterwards returned to counsel as having been so left, transmitted, and filed by mis-

*354 **take*. These matters are disputed, and doubtful: Plaintiff claimed that after he had rested defendant offered his bill, and that plaintiff objected to its being filed as out of time, but that the justice overruled the objection, and ordered it filed. Defendant insisted that he did not offer to file it; that the objection made was to the introduction of testimony because no bill had been filed; and that this objection was overruled, the justice holding that the defendant was not bound to file any bill unless the same had been required by plaintiff under section 71 of the justice's act. Upon this point we think the preponderance of testimony was with the defendant, and that no application was in fact made to file the bill. Defendant insists that this statement was a mere private memorandum to assist counsel in trying the case; that it was not filed, was not offered, and was not intended for filing. While the matter is not perfectly clear,

we are inclined to think that the testimony sustains this claim. Referring to the matter in dispute, and it appears that plaintiff's claim was \$10 for rent of house and \$10 for damage to stable. It would seem that defendant's claim was that no damage had been done to stable; that a balance of rent of \$20, including the \$10 in plaintiff's bill, had been paid, by agreement, in building an outside cellar or root-house; and that defendant was entitled to recover of plaintiff \$7 or \$8 for the cost of building this cellar, over and above the amount due for rent. It would seem, also, though this is a matter not made clear by the testimony, that there was no dispute between the parties, but that \$10 of rent had been paid by the building of this cellar; and that the only matters in dispute were whether any damage had been done to the stable, and whether the \$17 or \$18 alleged cost of the cellar (over and above the rent conceded to have been paid) was applicable, so far as was necessary, to the rent not admitted to have been paid, and gave to defendant a claim against plaintiff for the excess. It is probably, however, unnecessary to determine the exact nature and extent of the controversy between the parties. Upon the whole case, we think there is not enough to justify us in reversing the order of the district court, and the same will be affirmed.

(All the justices concurring.)

W. J. BAWDEN v. W. C. STEWART.

January Term, 1875.

District Judge: Vacancy in Office: Removal from State. The removal of a district judge from the state, with an intention never to return here to reside, of itself creates a vacancy in the office; and where such vacancy exists more than thirty days before a general election, the vacancy is rightfully filled by an election. Section 11, art. 3, Const.

Original proceedings in *quo warranto*.

In December, 1874, Bawden filed in this court his petition in *quo warranto*, as follows: "Now comes W. J. Bawden, plaintiff, and informs the court, and avers, that at the general election held in and for the Sixth judicial district, in November, 1871, one M. V. Voss was duly elected judge of the said Sixth judicial district for the term of four years from the second Monday of January, 1872; that said M. V. Voss duly qualified as such judge of said district, and entered upon the duties of said office, and held said office of district judge from thence until the twenty-first day of October, 1874, when he died; that to fill the vacancy in said office occasioned by reason of the death of said M. V. Voss, the governor of the state of Kansas, on the seventh of November, 1874, duly appointed and commissioned this plaintiff as judge of said Sixth judicial district, and on the ninth of said No-

vember the plaintiff, being so as aforesaid duly appointed and commissioned, took the oath of office as district judge of said Sixth judicial district, and thereupon entered upon the duties of his office, and thenceforth acted as such district judge until the fourteenth of December, 1874, when the defendant, W. C. Stewart, without any warrant or authority of law, usurped and intruded himself into said office of *district judge of said Sixth judicial district, and wholly excluded plaintiff therefrom; that said W. C. Stewart, defendant herein, still excluding the plaintiff from his said office, and from the right and power to possess, use, and enjoy the same, doth still usurp and intrude into, and unlawfully hold and exercise, the same, to-wit, at the county of Bourbon, in the Sixth judicial district aforesaid, in contempt of the laws of the state of Kansas, and to the great damage of the plaintiff, to-wit, to his damage three thousand dollars. "Wherefore the plaintiff demands the judgment of this court, that the said defendant has usurped and unlawfully intruded into said office of district judge of said Sixth judicial district, and hath unlawfully held and possessed the same from and since his usurpation thereof on said fourteenth of December, 1874; and that he be absolutely ousted and excluded from the said office, its powers, privileges, and franchises, for the future; and that the plaintiff have and recover possession of his said office; and that he be restored to its powers, duties, privileges, and franchises; and that he have and recover of and from said defendant his said damages so as aforesaid sustained, together with the costs of this action."

To this petition defendant, Stewart, filed an answer as follows: "Now comes the defendant, and for answer to the petition of said plaintiff denies each and every allegation therein contained. (2) For further answer to the petition of said plaintiff said defendant alleges and avers that for more than thirty days prior to the last general election, on November 3, 1874, there was a vacancy in the office of judge of said Sixth judicial district; that said defendant, at said election, by the electors of said district, was duly elected to fill said vacancy, and on the twenty-eighth day of November, 1874, received from the state board of canvassers of said state his certificate of election therefor, and on the twelfth day of December, 1874, and before the fourteenth day of said month, duly qualified for said office, and entered upon his duties as such judge, and has ever since said time held and discharged the duties of said office, and does now; and said defendant avers that any pretended appointment or commission which the plaintiff may have as judge of said district was and is without authority of law."

Reply, a general denial, was filed to said second defense. The *357 action was tried at the January term, 1875, of this court. *Most of the testimony was in depositions. It was admitted that Judge Voss had been duly elected, and had duly qualified, for the term of four years, commencing on the second Monday of January,

1872; that shortly after the commencement of his term he became ill, and was unable to hold his courts¹; that courts had been held usually, for two years or more before his death, by *pro tem.* judges; that he had made several trips to other states, with a view to restore his health, and that he left Fort Scott, the place of his then residence, in May, 1874, for California, where he died October 21, 1874. It was also admitted that Bawden had been commissioned by the governor, and had qualified, and had entered upon the duties of his office; and that an election had been held, as alleged in Stewart's answer; and that Stewart had been duly elected, as claimed, if there was such vacancy as could then be filled by election; and that he had duly qualified, and had taken possession of the office. On the part of plaintiff, Bawden, it was claimed that no election was proper, as there were not thirty days between the date of Judge Voss' decease and the day of the general election; and that Judge Voss at the time of his death was only temporarily absent from the state, and proofs were taken to establish this theory.

A transcript from the records of the probate court of Bourbon county, "In the Matter of the Estate of M. V. Voss, Deceased," was produced, in which appears the affidavit of John T. Voss, brother of Judge Voss. This affidavit was made November 4, 1874, and reads as follows:

"The affidavit of John T. Voss respectfully sheweth that Martin V. Voss, late of the town of Fort Scott, county of Bourbon, and state of Kansas, departed this life *while temporarily absent from his residence in this county*, at San Francisco, in the state of California, on *358 the twenty-first of *October, 1874, having, as your affiant is informed and believes, duly made and published his last will and testament, in which your petitioner is named as executor, and which he now offers for probate as the law directs; that the said will relates to both real and personal estate; that the said Martin V. Voss was at the time of his death *an inhabitant* of the said county of Bourbon and state of Kansas," etc.

Andrew Voss, the father of Judge Voss, testified as a witness on behalf of plaintiff, as follows: "I reside in Fort Scott. Have lived there seven years. Judge M. V. Voss, late judge of this judicial district, was my son. During my residence in Fort Scott I have resided with my son ~~Martin~~ Voss. The house in which we lived belonged to

¹NOTE OF HON. W. C. WEBB, STATE REPORTER.

When Judge Voss was elected, the Sixth district comprised Bourbon and Linn counties. Judge Voss resided in Bourbon. Owing to his illness, and consequent inability to hold courts, Linn county, after doing without courts for a year or more, was detached from the district. In Bourbon county, two terms in 1872, four terms in 1873, and two terms in 1874 were held by *pro tem.* judges. In August, 1874, a majority of the bar concluded to treat the office of district judge as vacant; so at the time fixed for holding the September term such majority elected a *pro tem.* judge, who at once continued the whole docket until the December term, and adjourned *sine die*.

M. V. Voss. Judge Voss' health began to fail about three years ago, and since that time his health has been gradually failing, more or less. About the first of the year 1874 his health began to show signs of failure much faster than before. During the year 1873 he took a notion to travel to find that health which he could not find here. His doctors had told him that it was necessary for him to have a change of climate. This country did not agree with him. He was advised here to go to Colorado, and he went to Denver near the close of the year 1872. He went from Denver to the mountains, to Colorado Springs. He returned home, and he then went to northern New York in the spring of 1873. After remaining in New York several months he came home, having found no relief. He then went to the Hot Springs, in Arkansas. He returned home again. After some deliberation, he concluded to go to Santa Barbara, California. He and four or five others started for Santa Barbara on the twelfth day of May last, 1874. That was the last trip he made. We had several conversations on the subject of where he was going before he left. He told me this: that he couldn't get the health here that he desired; that he wished to have health so that he could go on and do business; that that was denied him here,—the climate forbid it. * * * He said he would not stay in this climate; that he would leave it this time for good; that he never expected to live in Fort Scott again. He said this: 'I may come back and pay you a visit in November, but not to exceed four days, at any rate.' * * * I think one very strong idea that prompted him to come back here was *his salary*. I think he would like to have retained his salary.

This conversation was about one week before he left. *I received letters from Judge Voss at different periods, and from different places,—from Fort Steele, from Sacramento, and from Santa Barbara,—up as late as August, that *he would be home in November*. He said, in a kind of round-about way, that he might hold court; that he might stay four days. He said he didn't know whether he would be able to hold the court on account of bodily infirmities. He observed that he never intended to put his foot in Fort Scott again, if he could avoid it, because his health and strength would not permit him to continue here. He said that nothing could induce him to make a permanent residence in Fort Scott, but he might return in November and spend three or four days. He said he would like to have his salary continue, and would like to hold court, but he was not able to do it. Judge Voss died at San Francisco, California, on the twenty-first day of October, 1874. *He was on his way home to Fort Scott*. He wanted to come home to die. His object was to come home to die."

Several other witnesses for plaintiff were called, who testified to conversations with Judge Voss shortly before he left in May, 1874, and that Judge V. in such conversations spoke of his going to California as a trip for his health only, and talked of coming back in

the fall in time to hold the December term of court. One witness, C. H. M., produced a letter written by Judge V. to the witness, dated "SANTA BARBARA, September 15, 1874," in which Judge V. said "I would like to write up California to you, but as I will be at home in November, by the 20th, when I can tell you so much better, I will omit it. * * * When I left home last spring I told my friends I did not expect to make Fort Scott a permanent residence; that I was going to look up a climate where I could live; that in November I would return, and then sell my property and home, and remove. I have not yet found anything to suit me. * * * I shall determine sometime this fall, after I return home, what I shall do." Another witness, B. J. W., produced a letter from Judge V. to witness, dated September 17, 1874, in which Judge V. says: "I shall go to the north part of the state, [California,] and travel there some, and arrive at home in November, and then we will see who
 *390 is judge. If traveling around the country to *cure sickness is to abandon one's residence, I am anxious to know it."

On the part of defendant, Stewart, it was claimed that Judge Voss had left the state permanently, and had abandoned his office. Several witnesses testified to different conversations with Judge Voss shortly before he left home, in which Judge V. stated that he was going away, and "not coming back;" that he would "never be seen back here again," etc. The principal witness for defendant was John T. Voss, who testified as follows:

"I am a brother of the late Judge Voss. I reside at Girard, Kansas. I am forty-four years old. The first I knew of Judge Voss' sickness was in the winter of 1871-72. When he was here in Fort Scott I was frequently with him, from the time of his sickness until he left Fort Scott. He was for a portion of the time in New York and in Colorado. During this time I was not with him. He made two trips out on the plains, and I did not see him while he was gone out on these trips. He was accustomed to consult with me in relation to his private and official business during the period of which I have spoken. I had frequent conversations with him on the subject of his health during his sickness, from 1871 up to August 20th last, [1874,] at which last-mentioned date I left him at Santa Barbara, California. I know that he left the state of Kansas for the west sometime in May, 1874,—between the tenth and fifteenth of May, is my recollection. I had conversations with him shortly before his departure on that trip. In those conversations he spoke with reference to his residing in this state in the then future. He said that he was satisfied that the climate of Kansas would kill him, if he remained in it, and he was not going to lie down here and die; but that he would take a trip overland with a team,—himself and others,—and would go to Santa Barbara or Los Angeles, and there, from what he had learned and studied of the climate, he would recover his health

entirely. Then he would select him some location on the Pacific coast. Then, when he found some place where he could have his health, he would like to have me come, and go into partnership with him in the practice of the law. He said he didn't want anything said about it; that he was dependent on his salary as judge for his *361 support during his *sickness. He said he was poor, and if it was known that he had left the state with the intention of staying away that he would lose his salary; and that he desired me to see the members of the Fort Scott bar, and ascertain who they would like to hold the court as *pro tem.* judge, and, when I ascertained that fact, to make an effort to procure that party to hold the court as *pro tem.* judge. He said he very much regretted the situation of things, but his condition of health, as well as his financial condition, seemed to demand that course, and if he had means he would resign before he left.

"This conversation took place shortly before he left for California, —from one month to six weeks before,—and up to within one week before he started. I was not here the day he left Fort Scott. I didn't see him for about one week before he left here. I was absent in Franklin county. In the conversations I had with him shortly before he left he said he was going to California to look out a situation; that he didn't intend to live here any more; that he wanted me to sell his property, but not advertise it. He said he didn't want it publicly known that he designed leaving the state permanently. That was one reason he gave why he didn't want the property advertised. He said he wanted money from the sale of his property, as his health might linger along bad for years, and that was the only resource he had to get money, if his salary failed him. He said he was telling the people of Fort Scott generally that he would return in the fall, when inquiry or conversation was had on that subject, but that he didn't intend to come back; that he might die if he went, but he was satisfied he would if he remained here; that the reason he didn't want it known was that his salary was his only available means of support, and he said it was a question of life and death with him, both financially and physically, and that if he could get through so as to obtain his November salary, he hoped by that time to be able to make a living by his own labors.

"I saw Judge Voss on the twenty-seventh of July, and was with him up to the twenty-third of August, when I left him at Santa Barbara. I was with him constantly during all this time. I had correspondence with him from that time up to the fifteenth of October. The last letter I had from him is here, and is as follows:

"SANTA BARBARA, October 15, 1874.

"John T. Voss: I have this day drawn for \$100 on Merchants' National Bank, Fort Scott. See that it is honored for me. I start

for home to day. Am worse. Let nobody know I am worse, and they will think I come back according to promise.

"M. V. Voss."

*362 *Witness being asked what he understood by the last sentence of said letter, said: "I was aware of the fact that he did not design to return, and also of the fact that he had said to many that he expected to return in the fall. I then understood from that sentence that he had made up his mind that he could not live, and that he preferred to return home, to die among his friends."

On cross-examination witness testified as follows: "From May, 1865, until the time of his death, in 1874, Judge Voss did not have any other home than Fort Scott, that I am aware of. Before I left him in Santa Barbara, in August, 1874, he did not state to me that he would be home to hold the December term of court; but he said this to me, just before I left, that it was impossible for him to come home, but that he wanted me to say that he would come back in the fall,—to say that to the folks here. He said he wanted me to say that I heard him say that he was coming back in the fall. I think I did tell different persons, substantially, that Judge Voss would be home in the fall to hold the term of court, in September last, after my return from California. I am an attorney at law. Have practiced law more or less for ten years and upwards. From my conversation with Judge Voss before he left Kansas for California, and while in California, and from all the communications I had from him, I am in doubt as to whether he did or did not become a non-resident of Kansas, and of the Sixth judicial district. I am the duly-appointed and qualified executor of my brother, Judge Voss. I am acting as such. As such executor, on or about the fourth day of November, 1874, before the probate judge of Bourbon county, I filed an affidavit in making application for letters testamentary as such executor." Witness is here shown said affidavit, above quoted, and his attention called to the statements showing Judge V. to be a resident of Bourbon county at the time of his death; concerning which he testifies: "I meant by those words that Judge Voss owned a dwelling-house at that time in the city of Fort Scott, and that he was absent from it at that time; and that he was the owner of property in this county; and this fact I assumed determined the question. For myself, I regarded it as immaterial, as I regarded the fact alone of his having *property here* sufficient for the purpose of letters testamentary. I did not regard the question of *residence*, on the occasion of making the affidavit, material to proving the will. I do not know whether I am

*363 right or wrong in my decision on that *question. As to these words in said affidavit, 'that the said Martin V. Voss was at the time of his death an inhabitant of the county of Bourbon, in the state of Kansas,' I meant that he had been such inhabitant previous to that time,—that he was when he made the will; and my recollection

tion is that those words were in the blank form furnished me by the probate judge, and that I copied them, and did not regard them as of very great importance for the purpose of proving the will, and was in doubt as to the fact, and determined it according to my own notion of it. I drew his salary as district judge, as his executor, up to the twenty-first day of October, 1874. Auditor Wilder wrote to me that there was \$116 due up to the twenty-first of October, and upon furnishing him with a certified copy of my letters testamentary, he would pay me."

The testimony is voluminous, and somewhat conflicting. The case was argued orally.

W. C. Webb, for plaintiff.

J. E. McKeighan and *E. M. Hulett*, for defendant.

KINGMAN, C. J. This is a contest, by original proceedings in this court, as to who is entitled to the office of district judge of the Sixth judicial district. The plaintiff claims by virtue of an executive appointment; the defendant by virtue of an election in November, 1874. The sole question presented in the case is this: Did a vacancy exist in the office more than thirty days before the last general election? If such vacancy did exist more than thirty days before such election, then it is conceded by plaintiff that the defendant was rightfully elected, and is entitled to retain possession of the office. On the other hand, if such vacancy did not exist more than thirty days before the election, then there could be no lawful election, and the appointment of the plaintiff entitles him to the office. Section 11, art. 3, Const. M. V. Voss was elected judge of said district at the November election, 1871, and continued to hold the office until the twelfth day of May, 1874, and, as is claimed by plaintiff, until his death, on the twenty-first day of October, 1874. The defendant *364 claims that *in May, 1874, the office became vacant by reason of the removal of the incumbent from the state. There is no doubt that if he did so remove, with a fixed determination to remain away from the state, that such a removal of itself constituted a vacancy. Judge Voss had been in feeble health for two years or more, and a portion of the time was absent from the state, and sometimes was unable to perform the duties of the office when at home. In May, 1874, he finally left this state, and on the twenty-first of October died in California. Thus, all the difficulty that arises in the case is to know with what intent he left the state,—whether with the purpose of returning or not. On this point there was much testimony which it is not our purpose to repeat. A very considerable part of it was what was said by Voss about the time of his departure, and after he was gone; and these statements were so contradictory that the mind would become perplexed by their consideration. To some he said he never would come back; to others he said he would be back in November. Sometimes he said he was done with official

action; to others he said he would be back and hold the court in November, if his health would permit. These statements, so conflicting, cannot be reconciled. They may readily be explained, and they are, by the testimony of his brother, and this is the substance of the explanation: He testifies that his brother when he left never intended to return to reside, but his purpose was to find a climate that would agree with his health, and there remain; but as he was poor, and needed his salary, he would say, and instructed his brother to say, that he would return in the fall, and hold the November term of the court, thus holding out the idea that he intended to return, so that no step would be taken to fill the vacancy, and deprive him of his salary. With this explanation it is not difficult to weigh and value those expressions of Judge Voss which indicated his purpose to return. They were made with an object other than to show his real intentions. With the morality of this course we have nothing to do. Our object is to ascertain his intentions, so far as we can do so from his own declarations and his acts.

*365 *It may be asked why he was not consistent in his declarations that he would return. This may be answered by stating that in most of the instances where he spoke otherwise, save to his relatives, who might be relied upon to keep silence, there was some motive to induce a statement of his intentions, or something in his relations to the witness that would naturally lead him to trust him to keep silence. The plaintiff's explanation of these contradictory statements is that Voss sometimes felt certain that he would not live to return, and at those times would make the statements that he never would return here, or "*never expected to return.*" There is some reason in the suggestion, and it is entitled to consideration; but it does not explain many of the statements,—such, for instance, as those made to the companion of his journey of his purposes in life when he found a climate favorable to his health, and those declarations made to his father and brother. Again, there is no testimony that these declarations were made while he was in a desponding mood. We must assume that as a fact without proof, and, were there no other possible explanation, might be compelled to do so; but cannot, in the face of the full and satisfactory explanation offered by the testimony of his brother and of his father. Judge Voss left his district and the state in May, 1874, never to return. So far as we can judge from the testimony in this case, it was his intention when he left never to return to the state to reside. The removal, with such an intention, of itself created a vacancy in the office; and such vacancy having existed for more than thirty days before the election, the defendant was rightfully elected to the office, and is entitled to hold it.

This conclusion renders it unnecessary to discuss another point raised by the defendant, and on which no opinion is expressed.

(All the justices concurring.)

*366 *JOHN W. RUSSELL v. ORSON SMITH and another.

January Term, 1875.

1. **Pleading: Replevin: Reply.** The case of *Wilson v. Fuller*, 9 Kan. *177, *189, *et seq.*, with reference to the necessity for a reply to a certain answer in an action of replevin, and waiver of reply, referred to and followed. [*Wright v. Bacheller*, 16 Kan. 266; *Netcott v. Porter*, 19 Kan. 134.
2. **Attachment: Interest of Attachment Debtor: Possession of Copartner.** Where two copartnership firms own cattle, one firm composed of O. S. and R. S., and owning 419 head of cattle, and the other firm composed of O. S. and T., and owning three head of cattle, all of said cattle being in the possession and under the control and management of O. S., and being herded together in one herd; and the firm of O. S. & T. owes the firm of O. S. & R. S. for keeping said three head of cattle, and other cattle belonging to O. S. & T.; and O. S., by agreement with T., and with certain creditors of T., assumes the payment of certain debts owing by T. to said creditors; and O. S. is to receive his pay from the proceeds of the sales of said cattle belonging to the firm of O. S. & T.: *held*, that neither the three head of cattle, nor the 419 head, are liable to be taken from the possession of O. S. by the sheriff of the county under an attachment against T., and in favor of another creditor of T.
3. ———: **Refusal of One Partner to Designate Interest of Another Partner.** And although O. S., who was eight miles away from the cattle, was applied to by the sheriff to point out the interest of T. in said cattle, and O. S. refused, yet this refusal did not give the sheriff any right to take the cattle from the possession of O. S.
4. ———. Nor did the firm of O. S. & R. S. forfeit all their right to said 419 head of cattle because of said refusal of O. S.
5. **Damages: Replevin: Decrease in Value of Property.** It is not error for the district court, in an action of replevin, where the plaintiff owns the property replevied, and judgment is rendered in his favor, to allow the plaintiff to recover damages for the decrease in the market value of the property during the time that the defendant wrongfully detained the property from the plaintiff.¹

Error from Saline district court.

Replevin, by Orson Smith and Rodney Smith, for 422 head of cattle. Russell, as sheriff of Saline county, received an order of attachment issued to him in an action then pending in Leavenworth district court, wherein Charles F. Tracy & Co. were plaintiffs and *367 John E. Tappan was defendant, and *he levied said order of attachment on the cattle in question, and took them into his possession. Smith Bros. claimed ownership and right of possession,

¹As to the action of replevin generally, consult the notes to *Westenberger v. Wheaton*, 8 Kan. 121; *Town of Leroy v. McConnell*, Id. 188; *Marix v. Franke*, 9 Kan. 91.

and brought this action of replevin to recover possession. Russell answered by general denial; and that he was sheriff of Saline county; and that the cattle were the property of said Tappan; and that he (the sheriff) had taken them into his possession by virtue of said order of attachment, etc. There was no reply. Trial at the April term, 1872. The court found the issuing of the attachment; that the defendant, as sheriff, had taken the cattle into his possession by virtue thereof, and held the same by virtue of said attachment at the time of the replevin; that the cattle had been replevied and delivered to plaintiffs; that the average value of the cattle at the time of the levy by the sheriff was \$39 per head; that at the time the cattle were returned to the plaintiffs under the order of replevin they were worth \$30 per head; that the plaintiffs owned all of the cattle except three head, which three head belonged to said Tappan, and O. Smith, one of the plaintiffs; that at the time of the levy of the attachment and the replevin the cattle replevied were all one herd; that said Tappan and O. Smith owned a lot of cattle, which were then, except three head, in Ottawa county; that the sheriff requested said Orson Smith, before the levy of the attachment, to designate his own cattle, assuring him that none of his (Smith's) cattle would be disturbed if he (Smith) would inform said sheriff which they were. Judgment in favor of the plaintiffs for the possession of the cattle, and for \$3,000 damages, the amount claimed in the petition.

Stillings & Fenlon, for plaintiff in error.

We contend, first, that, on the pleadings, the defendant below was entitled to judgment; that Russel was, on the findings, entitled to a judgment for the return of the three head of cattle, and costs.

When Smith was requested to designate Tappan's interest in *368 the cattle, and used language to induce the sheriff to believe that Tappan had an interest in the cattle, but failed and refused to point out what that interest was, the sheriff was justified in taking possession of all the cattle; and that the Smiths could not consider or treat him as a wrong-doer, at least until they had pointed out to him their property, so as to enable him to separate the property, and deliver to them their own. *Tufts v. McClintock*, 28 Me. 424; *Wilson v. Lane*, 33 N. H. 466; *Willard v. Rice*, 11 Metc. 493; *Carlton v. Davis*, 8 Allen, 94; *Drake, Attachm.* § 199. It was the right and duty of the sheriff to seize the property in which Tappan had a partnership interest. 2 Lead. Cas. Eq. 336, 339; *Drake, Attachm.* § 248. The fact of that interest being only a partnership interest in three of the cattle can make no difference, any more than if but three of the cattle had been owned by Smith, and the balance had all belonged to Smith and Tappan. The declarations of Smith to the sheriff that Tappan had an interest would justify the levy, although there had been no interest in Tappan, and estop Smith from claiming damages for seizing property in which they thus led the sheriff to believe Tappan had an interest subject to levy.

Smiths at no time offered to designate their cattle to the sheriff, nor demanded a delivery of their cattle, and yet claimed and recovered judgment in the court below for the difference in the value of their cattle, caused by a decline in the general cattle market, while they had thus held out to the sheriff that Tappan had an interest in the cattle, and neglected and refused to designate what share or portion of the cattle belonged to them. If this is the law of the case, it will hardly be claimed in future that law is the perfection of reason.

The pleadings admit the ownership of the cattle in Tappan at the time of the levy, and of course all evidence was improperly received, and the evidence as to damages was objected to. The damages assessed were merely *imaginary*,—such as *might have* been suffered; but that they were *actual* damages, flowing necessarily and legitimately from the detention, is not shown by the testimony; and, on the finding of the ownership of the three head of cattle to be *369 in Tappan *and Smith, we were entitled to a judgment for their return, or the value, and the court erred in refusing it.

Riggs, Nevison & Simpson, for defendants in error.

The pleadings do not admit the ownership of the cattle attached to have been in Tappan. Under the Code a reply was not necessary unless the answer contained matter that was both new and material. Section 128. A material allegation is one essential to the defense, which could not be stricken from the pleading without leaving it insufficient. Code, § 129. In replevin in *detinet*, under a general denial, property in the defendant can be shown. *Coverlee v. Warner*, 19 Ohio, 29; *Snook v. Davis*, 6 Mich. 156; *Dickinson v. Lovell*, 35 N. H. 9; *Oaks v. Wyatt*, 10 Ohio, 344. Besides, this objection comes too late. Had it been made in the court below it could have been obviated by an amendment of the pleadings. A point cannot be insisted upon *here* which was waived *there*.

The sheriff had no right to take possession of Smith & Tappan's partnership property on attachment for an individual debt of Tappan's. The copartner Smith had a lien upon the stock until the settlement of the partnership debts, and he was entitled to the possession of it. *Pars. Copart.* 350; *Pars. Mer. Law*, 188; *Pars. Cont.* 107; *Treadwell v. Brown*, 43 N. H. 290; *Deal v. Bogue*, 20 Pa. St. 228; *Smith v. Emerson*, 43 Pa. St. 456; *In re Smith*, 16 Johns. 102. It is undoubtedly true that where property belongs to joint owners, not partners, the sheriff may take possession of it in payment of an individual debt. *Drake, Attachm.* (8d Ed.) § 248. But Drake refused to apply this rule to partnership property, "concerning which," he says, "there is much diversity of decision." We are not disposed to deny that there are some decisions of respectable courts in which a contrary rule is adopted, but these decisions were given, it is believed, in states where the chattels of the debtor cannot be reached by garnishment. In this state the person in possession of chattels may be required to disclose the debtor's interest therein, and the no-

tice of garnishment makes him liable to the plaintiff for the value of the chattels belonging to the debtor. Code, § 206. There is *370 therefore, in *this state, no occasion to seize the *corpus* of the partnership property. In the present case it is in evidence that Tappan was owner of a partnership interest in *three head* of the 422 head attached, subject to the lien of a mortgagee in possession, and subject also to the lien of the agister. We submit that such an interest is a mere "shadow of a shade," and too minute to be reached by a levy, and concerning which the maxim of "*de minimis*" fully applies.

The sheriff did not ask Smith to designate the cattle that belonged to the Smiths. He asked Smith to point out what interest Tappan had in the herd of cattle. This Smith declined to do until he could examine his books. This was a reasonable refusal. Smith only asked for time to examine the complicated account relating to these Smith & Tappan cattle. He could not answer without the examination. The sheriff should have given time for this investigation. Instead of this, he levied at once on the cattle as Tappan's property. This action of the sheriff was indefensible on every ground. Smith's answer acquainted the sheriff with the fact that the Smiths had an interest in that herd.

Smith was under no obligation to point out the cattle belonging to defendants in error, even if he had been requested to do so by the sheriff, *which he was not*. A man does not hold his property by such a frail tenure that he forfeits it whenever he refuses to answer every impertinent question that a sheriff may propose. In the present instance no confusion of property was possible, and Smith was under no obligation to enlighten the ignorance of the sheriff. But there is another important fact: The cattle were separately branded. This was a brand known to many. It should have been known to the sheriff. It was known to the herdsman, Clark, who was afterwards made the sheriff's bailiff to keep the attached property. Clark says he could have easily pointed out to the sheriff the Tappan cattle, but that he was not asked to do so.

*371 It was in evidence, and found by the court, that the *cattle belonging to Smith & Tappan had been wintered by the defendants, Smith & Smith, and that no settlement had been had for the costs of keeping and tending. Under such circumstances the Smiths, under the law of Kansas, had a lien on these cattle. Gen. St. c. 56, § 2. It was not, therefore, subject to attachment. Drake, Attchm. § 245. The Smiths owned 419 head of the cattle in entirety. Orson Smith had a partnership interest in the other three head, and also held them as mortgagee; and besides, the Smiths held them under an agister's lien, and were entitled to the right of possession of the three head as well as of the 419 head. But even if the court should be of the opinion that the defendant below was entitled to a return of the three head of cattle in which Tappan had a *shadow* of an interest, it

will not be necessary to remand the case. The court can render such judgment as the inferior court should have rendered.

In actions of replevin against a sheriff, if the plaintiff succeeds and recovers the chattels, he is also entitled to damages for the depreciation in the market value of the property while in the hands of the sheriff, and for interest on the value of the personal property for the time in which the plaintiff was deprived of its possession. 8 Bosw. 486; Sedgw. Dam. 587, 593; Beveridge v. Welch, 7 Wis. 465; Morris, Repl'n, 139; Gordon v. Jenney, 16 Mass. 465; Rowley v. Gibbs, 14 Johns. 385. The evidence and findings would have justified a larger judgment for damages. The court finds (and this was supported by the evidence) a depreciation in the value of the cattle of nine dollars per head during the time the sheriff had possession of the stock. To this should be added interest on the value of the herd, and necessary expenses incurred in recovering possession of the property. The plaintiffs below are entitled, therefore, to a judgment for \$4,000, had the court not been restricted to \$3,000, by the *ad damnum* clause of the complaint.

VALENTINE, J. This was an action of replevin for 422 head *372 of cattle. Judgment was rendered in favor of the *plaintiffs below, defendants in error. The plaintiff in error claims that on the pleadings, with or without a trial, the judgment below should have been rendered in his favor; and this he does on the ground that he set up new matter in his answer constituting a complete defense to the plaintiffs' action, to which answer the plaintiffs did not reply. No such question as this was raised in the court below, but the trial there proceeded in all respects as though the new matter set up in the defendants' answer was duly controverted. Two questions are really involved in this question: *First*, was a reply necessary? *Second*, if so, did not the defendant waive the reply by going to trial without it, and by not in any manner raising the question of its necessity in the court below? Both of these questions have been answered in the case of Wilson v. Fuller, 9 Kan. *177, *189, *et seq.* We adhere to that decision. A reply was not necessary in this case; and, if it had been, the defendant below waived it.

All of said cattle except three head belonged to the plaintiffs below as copartners. These three head belonged to another copartnership, consisting of Orson Smith (one of the plaintiffs below) and one Tappan. The only interest that the defendant below ever had in any of said cattle was an interest which he obtained as sheriff of Saline county by attaching said cattle as the property of said Tappan. If Tappan had owned said cattle, and there had been no liens in favor of the plaintiffs, or either of them, existing against the cattle, the judgment in this case should have been in favor of the defendant below. But as Tappan had no interest in any of the cattle except said three head, the defendant below, as plaintiff in error, now sets up

other grounds than that of ownership or the right of possession on the part of Tappan as a foundation for his (plaintiff in error's) supposed right of recovery. He claims that he should recover judgment for the whole of said cattle. He claims that he may recover upon the following grounds: As Tappan had an interest in said three head of cattle, he claimed that he, as sheriff of said county, had a right to attach them, and hold them for the satisfaction of *373 Tappan's debts; and as these *three head of cattle were kept and herded with the other 419 head which belonged to the plaintiffs below, and as said Orson Smith neglected and refused to point out the interest of Tappan in said cattle, he claims that he, as sheriff, had a right to attach the whole of said herd, and hold them for the satisfaction of Tappan's debts. Had the sheriff, by virtue of the writ of attachment which he held against the property of Tappan, a right to take possession of said three head of cattle, and to hold them for the payment of Tappan's debts? We think not. Orson Smith not only had his partnership interest in said three head of cattle, but he and his brother (the other plaintiff below) had other interests in said cattle. The firm of Smith & Tappan owed the firm of Smith Bros. for keeping said three head of cattle, and other cattle belonging to Smith & Tappan, during the fall, winter, and spring, before said attachment was levied upon said cattle. And for thus keeping said cattle said Smith Bros. had a lien upon the cattle, (Gen. St. 548, § 2,) which lien neither Tappan, nor Tappan's creditors, could divest, except by paying the amount due for keeping said cattle. See Drake, Attachm. § 245.

Also, Orson Smith, by agreement with Tappan, and with certain of Tappan's creditors, assumed the payment of certain debts which Tappan owed to said creditors, and Smith was to retain enough out of the proceeds of the sale of said cattle to pay himself therefor. This constituted another lien on said cattle. Orson Smith had the actual custody, care, and control of said cattle. His possession, however, we suppose was the possession of the Smith Bros., and neither Tappan, nor Tappan's creditors, nor the sheriff acting for Tappan's creditors, had any right to disturb that possession until all of said claims against Tappan were paid. Whether either would then have any right to disturb Orson Smith's possession we do not decide. There would still be the partnership interest of Orson Smith. This partnership interest alone might be sufficient to prevent the sheriff *374 from taking possession of the cattle. The above *claims were really charges upon said cattle in favor of Orson Smith, and of the Smith Bros. When the sheriff inquired of Orson Smith what interest Tappan had in said cattle, the cattle were eight miles away, and of course Smith could not point them out or designate them. And Smith told the sheriff that he could not tell what interest Tappan had in the cattle without consulting his books; and there is nothing in the case which tends to show that this was not true. It does

not appear from the record what precise interest Tappan had in said cattle, nor does it appear that Smith then knew, or has at any time since known, Tappan's precise interest in the cattle. It appears that Smith could have known what said interest was by examining his books, but he refused to do so, or to tell what the interest was. We do not think that this refusal authorized the sheriff to attach said cattle, and take them from the custody of Smith. In this connection, see *Treat v. Barber*, 7 Conn. 275; *Holbrook v. Hyde*, 1 Vt. 286; *Moore v. Bowman*, 47 N. H. 502; *Tufts v. McClintock*, 28 Me. 429. The creditors of Tappan had another and an ample remedy by a proceeding of garnishment. Gen. St. 666, § 200 *et seq.*

We suppose it is hardly necessary for us to say that if the sheriff had no right to take possession of said three head of cattle under his writ of attachment, he had no right to consider that the Smith Bros. forfeited their whole herd simply because Orson Smith refused to point out to the sheriff Tappan's interest in said three head of cattle. The three head were differently branded from the others, and could easily have been pointed out to the sheriff by the herder, if the sheriff had inquired of the herder.

The damages allowed by the court were not excessive, nor speculative. The court allowed damages for a decrease in the market value of the cattle during the time that they were wrongfully detained by the defendant from the plaintiffs. This was right. *Young v. Willet*, 8 Bosw. 486; *Rowley v. Gibbs*, 14 Johns. 385; *Allen v. Fox*, 51 N. Y. 565; *Beveridge v. Welch*, 7 Wis. 465; *Gordon v. Jenney*,

*375 16 Mass. 470. *There was evidence, however, tending to show that the damage was much more than the court allowed.

The judgment of court below is affirmed.

(All the justices concurring.)

STATE OF KANSAS v. J. C. WALTER.

January Term, 1875.

Venue: Criminal Law. Where an offense is charged to have been done in a specific house on a certain lot and block "in the city of Ottawa, and county of Franklin," and against the peace and dignity of the state of Kansas, the venue is sufficiently alleged, although it is not alleged in any other way that the offense was committed in the state of Kansas. [*State v. Bybee*, 17 Kan. 462.]

Appeal from Franklin district court.

The case is stated in the opinion.

A. W. Benson, Co. Atty., for the State.

Mason & Parkinson, for defendant.

KINGMAN, C. J. This was a prosecution for an alleged violation of the statute in selling intoxicating liquors on Sunday. The complaint was made and the case tried before a justice of the peace of Franklin county, and the defendant convicted. From this conviction he appealed to the district court, when, on a trial by a jury, he was again convicted. A motion was then made in arrest of judgment, which

*376 motion was sustained. From this decision an appeal is taken by the *state. A defeat in the allegation as to venue is the only ground on which the motion was sustained. The venue is laid thus in the margin: "*State of Kansas, County of Franklin, City of Ottawa—ss.*" In the body of the complaint the particular lot, block, and house, in the city of Ottawa, and county of Franklin, where the offense was alleged to have been committed, are stated, but not the state, nor is there a reference to the venue laid in the margin; but the complaint alleges that the offense was committed "against the peace and dignity of the state of Kansas." Was this a defect, and, if so, was it a fatal one, on motion in arrest of judgment? If so, it must be because of some absolute rule of law; for it is obvious that the accused could not have been misled or injured by it. From the complaint he must have known the exact location in the city of Ottawa and county of Franklin where the offense was alleged to have been committed. He could not have been more certain of the exact locality had the name of the state been added to the venue in the body of the complaint. What, then, is the rule of law? Mr. Bishop lays it down thus: "It is customary in the United States to write the name of the state in the margin, in connection with the name of the county; but there is no need that the name of the state should appear, either in the margin or in any other part of the indictment." 1 Crim. Pr. § 106. The rule as thus stated is supported by the following cases: *State v. Jordan*, 12 Tex. 205; *State v. Lane*, 4 Ired. 113; *Com. v. Shaw*, 7 Metc. 52; *Com. v. Quin*, 5 Gray, 478. In this case we need not go as far as these authorities justify, for the offense is alleged as against the peace and dignity of the state of Kansas, which could not well be true unless the offense was committed within the state. This court, and all courts, must judicially know that the county of Franklin is in the state of Kansas, because it is established by statute, and its boundaries fixed by law. If it be said that there may be other counties of the same name in other states, then the answer is, an offense committed in one of them is not against the peace and

*377 dignity of this *state. We think the venue sufficiently appears, and the complaint is not defective on that ground.

The order of the district court arresting judgment is reversed, and the cause remanded for further proceedings.

(All the justices concurring.)

REUBEN M. BROWN v. DAVID JOHNSON.

January Term, 1875.

1. **Continuance: What Application Should Show.** An application for a continuance on the ground of the absence of testimony must show what the absent testimony is, that the opposite party may, if he desire, prevent a continuance by consenting to the admission of such testimony.¹
2. **Supreme Court: Review: Demurrer to Evidence.** This court cannot affirm that there was error in a ruling of the district court sustaining a demurrer to the evidence, unless all the evidence upon which that court acted is before us, or unless it is apparent from the portion presented, not only that it tends to prove the plaintiff's claim, but also that it could not be conclusively overthrown by any other testimony.² VAL-
ENTINE, J., dissenting.
3. **Case Made: What it Imports.** The signature of the judge to a case made, or a bill of exceptions, imports the truthfulness of the preceding statements in such case or bill,—nothing more; and we must look to those statements to see whether all of the testimony is preserved or not.

Error from Wilson district court.

Brown, as plaintiff, brought his action to establish a trust, and to compel a conveyance to himself of the trust property. The land in controversy was the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 15, township 29 south, range 14 east, and a part of the "Osage Trust Lands," so called. Brown alleged that he was in the occupancy of, and had improvements upon, said tract at and before the time when said Osage trust lands were open for settlement and purchase, and ever
*378 since, claiming the right *to purchase the same; that defendant, Johnson, was occupying the west half of said quarter section, but never improving or occupying said east half, or any part thereof; but in the year 1869 said Johnson, by fraud and deceit, and by means of false, fraudulent, and corrupt representations and testimony before the officers of the land-office, at Humboldt, made entry and purchase in his own name of said east half of said section. Plaintiff further shows his efforts to procure a reversal of said decision and an entry in his own name, and a tender of and readiness and willingness to pay the proper entrance money for the eighty acres occupied and claimed by him, and he prays that Johnson be adjudged to hold the title to said tract in trust, and decreed to convey the same

¹ See *Swenson v. Aultman*, *ante*, *278.

² Where an action is tried by the court without a jury, and the defendant interposes a demurrer to the evidence after the plaintiff closes his case, the court cannot weigh conflicting testimony; and if in such a case the testimony presented in the record supports the plaintiff's cause of action, and it can only be answered by contradictory or conflicting evidence, the supreme court will declare the law upon the testimony presented in the record, although it does not affirmatively appear therein that all of the evidence upon which the district court acted is before it. *Merket v. Smith*, 33 Kan. 66; S. C. 5 Pac. Rep. 394.

to plaintiff. Answer, a general denial. The action was tried at the May term, 1873, of the district court. A demurrer to plaintiff's evidence was sustained, and judgment was given for the defendant.

Chas. Swecney and J. L. Russell, for plaintiff.

Hudson & Chase, for defendant.

BREWSTER, J. Two errors are alleged in this case: *First*, in overruling a motion for a continuance; and, *second*, in sustaining a demurrer to the evidence.

The motion for a continuance was supported by a single affidavit of one of plaintiff's attorneys. Several objections may be noticed to the sufficiency of this affidavit. It alleges failure to obtain a copy of certain testimony given on a hearing of a contested claim before the officers of a land-office; that the proper custodian had made diligent search, and was unable to find such testimony; and that it must have been stolen or removed from his possession without his knowledge; that there had not been time enough to procure a copy of the duplicate of this testimony from the general land-office, at Washington. But it fails to disclose what that testimony was. The court could not, therefore, see that it was material, nor was there anything for the opposite party to admit, as provided in section 317 of the Code. The theory of our law of continuance is that if one is sought upon the ground of absent testimony, the opposing party may defeat the application therefor by consenting that such absent testimony may be considered in evidence. It is essential, therefore, that the testimony be disclosed as a basis for this consent. It may also be stated that the affidavit alleged, upon information, that a copy of this testimony was in possession of defendant's attorney, and that they had been served with a subpoena *duces tecum* to produce it. The court properly overruled the motion for a continuance.

In reference to the other question, the record discloses these facts: The action was brought by one who had unsuccessfully contested before the department the right to enter a certain tract, against the successful contestant and holder of the title from the government, and the plaintiff contends that, notwithstanding the decision of the department, the matter is still open for judicial inquiry, and that, upon the facts as disclosed by the plaintiff's evidence, clear and prior equity to this land was shown in him, and that it was error then to withdraw the case from the jury. The first claim of the plaintiff is undoubtedly good; for whatever doubts may have heretofore existed thereon, they have been put at rest by the decision of the supreme court of the United States in the case of *Johnson v. Towsley*, 13 Wall. 72, where it is held that "if it appears that the party claiming has established his right to the land to the satisfaction of the land department in the true construction of the acts of congress, but that by an erroneous construction the patent has been issued to another, the

court will correct the mistake." This was as far as it was necessary for the court to go in that case, but it unquestionably fails to state the full limits of judicial inquiry. They extend to the full bounds of equity jurisdiction. But the other part of the plaintiff's claim cannot be sustained for this reason: it does not appear that we have all the testimony before us upon which the district court acted.

*380 The only authentication of the evidence is that it is signed by the plaintiff's attorneys without any preceding statement whatever, and that then follow these words: "The above record of evidence is substantially correct as far as given, but is incomplete in several instances, and does not give all the evidence in the case.

"HUDSON & CHASE, Defendant's Attorneys.

"Signed, settled, and allowed, as and for a case made, this twelfth day of August, 1873.

JOHN R. GOODIN, Judge."

Now, whatever other questions may be raised upon such a record, whenever we are asked to reverse the decision of the district court upon the weight and effect of evidence we must have all the evidence upon which that court based its decision; or if only a part is presented, it must be of such a character as under no circumstances can be overthrown by other evidence,—something which is, of itself, and despite of all antagonistic facts, conclusive. We cannot say that a district court erred unless we know upon what it ruled. Though a mass of testimony may be presented, *non constat* but that the pivotal facts upon which the decision turned—a fact conclusive in support of the finding—is omitted. The same principle controls, though perhaps applied in a different manner, whether a ruling upon a demurrer to the plaintiff's evidence, or a finding of fact based upon the testimony of both parties, is challenged. All the presumptions, in the absence of a complete record, are in favor of the ruling already made. This is familiar law, and needs no citation of authorities to support it. Such is this case. We are not advised by the record that all the testimony upon which the court acted is before us. The signature of the judge imports the truthfulness of the preceding statements of the record; nothing more. Turning to those statements, we find nothing which, even by implication, asserts the presence of the entire testimony. Certain testimony appears, but it is introduced by no statement, and followed by only such as has been quoted. And this, if it implies anything, implies that a portion of the testimony is omitted. And while it may be conceded that the testimony as

*381 stated tends to support the plaintiff's case, yet it is easy to perceive that many things might have entirely overthrown it. We cannot, therefore, affirm that there was error in this ruling of the court.

The judgment must be affirmed.

KINGMAN, C. J., concurring.

VALENTINE, J. The decision of this case is perhaps correct, as this was an action in which the court below had the power to send any or all the issues to a jury to be tried, or to try them itself, at its option; but I dissent from the proposition stated so broadly as it is in the second paragraph of the syllabus. A judge ordinarily has no right, upon demurrer to evidence, to weigh conflicting testimony, or to take a case from the jury where there is any evidence to support each and all the issues in the case.

F. M. CONLEY v. JEFFERSON FLEMING and others.

January Term, 1875.

1. **Injunction: Preliminary: Refusal: Doubtful Cases: Discretion of Court.** Though the allegations of a petition may be such as to entitle the plaintiff, if proved, to a perpetual injunction on a final hearing, and though the testimony on an application for a preliminary injunction preponderates in favor of all those allegations, yet if it appear doubtful what may be the facts established on the final hearing, and the right of the plaintiff is not likely to suffer serious injury unless immediately enforced, it is often the duty of the court, in the exercise of a sound discretion, to refuse any preliminary injunction, and leave the rights of the parties to be determined upon the final hearing.¹
2. ———. The probable results of the final hearing, and the probable effects of a temporary restraining order, upon the respective rights of the opposing parties, are proper considerations in determining the question of issuing an order.
3. **County-Seat Petition: False, Forged, and Spurious Names: Pleading.** Where application is made for a temporary restraining order restraining the county officers from removing their offices to a place declared by the commissioners, as the result of an election therefor, the duly-chosen county-seat; and the ground of the application is the presence of forged names, names of minors, non-residents, etc., upon the petition for an election; and said petition is not presented to the court, nor a single name given as forged or improperly on said petition; and the only evidence of the fact is the general statement in plaintiff's verified petition that the petition contained the names of two hundred non-residents, of fifty minors, of one hundred dead men, etc.; and the plaintiff had had ample time to obtain more specific and direct testimony; and there is no showing of any special injury resulting from the removal: *held*, that it could not be affirmed that the court erred in refusing such temporary restraining order.
4. **County-Seat Election: Second Election: Time.** Where two elections are necessary to determine the question of the county-seat, it is not essential that the last election be held within fifty days of the presentation of the petition therefor.

¹ See *Stoddart v. Vanlaningham*, *ante*, *18; *Olmstead v. Koester*, *post*, *463; *Davis v. Stark*, 30 Kan. 565; S. C. 2 Pac. Rep. 637.

5. ———: **Place Selected.** In the selection of a county-seat the electors are not limited to existing cities and towns, but may choose a site for a new town, and locate the county-seat thereon.
6. ———: **Name or Description of Place.** If a certain tract of land is popularly and generally known by a specific name, the use of that name is a sufficient description; and a ballot with that name is not vitiated by the fact that in addition to the name there is an imperfect (but not contradictory) description of the land.

Error from Linn district court.

In February, 1871, the county-seat of Linn county was removed from Mound City, and relocated at La Cygne. On the first of February, 1873, the board of county commissioners, on petition therefor, ordered an election "to relocate the county-seat" of said county. An election was held on the eleventh of March, 1873, at which 2,757¹ votes were cast, of which 1,093 were given for Pleasanton, 684 for Mound City, 972 for Farmer City, 7 for La Cygne, and 1 for Prescott. No choice. A second election was held March 25th, at which there were 2,435 votes cast, of which 1,183 were given for Pleasanton, and 1,252 were given for Farmer City. The commissioners *383 having declared that Farmer City had been duly *elected as the county-seat, the county officers were ordered and directed to remove their respective county offices from La Cygne to Farmer City; whereupon Conley, a citizen and tax-payer at La Cygne, filed his petition for an injunction against Fleming and the other county commissioners, and all the county officers of said county, to restrain such officers from so removing their offices, and the books and records thereof, to Farmer City. A restraining order was granted by the district judge, Hon. M. V. Voss, on the first of April, 1873, which order was by said judge, on the twenty-second of April, vacated and discharged.

James D. Snoddy, for plaintiff.

W. R. Biddle, Co. Atty., for defendants.

BREWER, J. Two errors are alleged: *First*, in refusing a continuance; and, *second*, in discharging a temporary restraining order.

The case itself was one involving that question of frequent occurrence: the validity of a county-seat election. The application was for an order restraining the county officers from moving their offices to the place declared by the commissioners, as the result of the election, the newly-chosen county-seat. On the first of April the petition for an injunction was presented to the judge of the district court. The twenty-second of April was by him fixed for the hearing, and a temporary

¹NOTE OF HON. W. C. WEBB, STATE REPORTER.

At the general election of 1872, the total vote cast in Linn county, for presidential electors, was 2,879; for representatives, 2,414. At the general election in November, 1878, the total vote in said county, for representatives, was 1,868. See Wilder's Annals of Kansas.

restraining order granted, to remain in force until the application could be heard. On the twenty-second of April the plaintiff moved for a postponement of the hearing, and a continuance of the restraining order, which motion was overruled, and of this plaintiff complains. It is well settled that these matters of continuance are largely within the discretion of the trial court. Here no abuse of discretion is apparent, but, on the contrary, the ruling was evidently correct. The petition alleged that several hundred of the names on the petition for *an election were improperly there,—some forged, some the names of non-residents, minors, etc. The affidavit for a continuance, which referred solely to this matter, alleged that application had been made to parties to give voluntary information by affidavits as to these matters, but that these parties refused, and the testimony could only be obtained by deposition, and enforced attendance; but it did not show that any effort had been made to take a single deposition, nor did it give a single name improperly on the petition. It was, moreover, simply a statement upon information and belief. We think the court very properly overruled the application. *Brown v. Johnson, ante, *377.*

The other error alleged was in discharging the temporary restraining order. Here, too, we see no error, or, at least, nothing to justify a reversal. The grounds for holding the election illegal, presented in the petition, which was verified, were—*First*, that the petition for the election did not contain the names of three-fifths of the legal electors, several hundred of them being forged, those of minors, etc., as heretofore stated; *second*, that the two elections (for no place received a majority at the first election) were not held within fifty days after the presentation of the petition; *third*, that the two places declared to have received the highest number of votes at the first, and therefore the sole competitors at the second, election did not in fact receive the highest number, and were erroneously so declared; and, *finally*, that there was no such place as that declared the chosen county-seat. In reference to these restraining orders *in limine*, it is to be borne in mind that it is not to be expected that the whole case will then be fully tried; so that the court may properly require that a clear showing be made of a right in the plaintiff to relief, and a right which may be seriously impaired unless immediately protected. Where it is doubtful what upon the final hearing may be ascertained to be the real facts of the case, and where the rights of the plaintiff are such as will suffer no serious injury if not enforced until the facts are finally and definitely determined, it oftentimes is the duty of the court, *385 in the exercise of a sound discretion, to refuse an injunction *in limine*. Otherwise a defendant might be unnecessarily and improperly restrained from doing that which he has a right to do, and through such restraint suffer an injury for which no adequate compensation is afforded. *Stoddart v. Vanlaningham, ante, *18; Akin v. Davis, ante, *144.* Now, in this case, while the petition (which,

being verified, was the principal evidence for the plaintiff) alleges that there were several hundred forged names, and names of minors, etc., the paper containing these names is not presented, nor is there a single name given. More than that, the verified answer of the county commissioners denies this allegation of the petition. Whatever may be said upon the sufficiency of the petition as a pleading, as evidence it is not specific nor definite. Not only does it fail to give any names, but also, by the even numbers used, it is evident the pleader does not mean to be considered as stating the facts exactly. Thus, he says there were the names of "two hundred non-residents," of "fifty minors," of "one hundred dead persons;" that there were "three hundred forged names," "two hundred fictitious names," etc. It is evident from this that he did not have in his mind any specific names, or any exact numbers, but was making his allegations large enough to cover the expected proof, and to meet the necessities of his case. It may be remarked, too, that there is no showing of any special injury that would result to the plaintiff from the removal, or any grievous wrong to other parties.

So far as the matter of time is concerned, the petition was presented February 1st, and the elections held on the eleventh and twenty-fifth of March, respectively. The first election was within the fifty days. This, we think, is all the statute requires. Gen. St. 297, § 5.

The two remaining allegations of the petition may be considered together. The place declared the newly-chosen county-seat is thus described in the proclamation of the result: "Farmer City, situated as follows: 40 acres, in S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of sec. 14; 30 acres off the S. W. qr. of the N. E. qr. of sec. 14,—all in town 21 of *386 range 23, in Linn county, "Kansas." Now, it is alleged that at the time of said elections there was no such place as "Farmer City," and no city, town, or village anywhere within the limits of said "section 14;" and that at the first election some of the ballots counted as for this place contained the very words of the description in the proclamation, while others added on the word "and" between the words "sec. 14" and "30 acres;" and that, classing these ballots as for separate places, neither of them stood first or second on the list of candidates. On the other hand, it is alleged that prior to the first election the place designated and known as "Farmer City" was selected upon actual view, and placed in nomination as one of the places to be voted for, by a convention of five delegates from each of six townships, and that such selection was witnessed by two hundred or more persons from different parts of the county; and that the place so selected and named "Farmer City" became and was quite notorious, and at each of said elections was generally known and understood by the legal electors voting at said election. There seems to have been no dispute as to the facts thus alleged on the respective sides. If the majority of the electors of a county are unwilling to se-

lect any of the existing towns for the county-seat, but prefer to choose a new place, and start a new town therefor, we know of nothing to prevent them from so doing. Each elector is to give "the name of the place" for which he votes. This "place" may be an incorporated city, a village, or an unoccupied quarter section; and if a majority choose a tract of unimproved prairie, the courts have no power to interfere and set aside their selection. The wisdom of such a choice may be questioned, but the power to make it is beyond dispute. Again, if a given tract of land is known by a specific name, the use of that name is a sufficient description. If a certain definite seventy-acre tract was generally known as and by the name of "Farmer City," the use of that term in a ballot was a sufficient description, and the ballot was not vitiated by a mere imperfection in a further description therein of the land. No greater precision or definiteness *387 is necessary in a ballot than "in a deed. There was in these facts nothing to justify the court in continuing the restraining order. Upon the whole case, therefore, we cannot see that the court, in the exercise of a sound discretion, erred in discharging the temporary restraining order, and the judgment will be affirmed.

Probably the only matter affected by this decision is the question of costs; as, if the public press be reliable, subsequent elections have relocated the county-seat.

The order of the district judge is affirmed.

(All the justices concurring.)

SAMUEL O. SWENSON and another v. MOLINE PLOW Co. and another.

January Term, 1875.

Parties: Misjoinder: Separate Interests. Where S. executed to A. two promissory notes, and a mortgage on real estate to secure the payment of the notes, and A. afterwards assigned one of the notes to M., *held*, that A. and M. cannot sue *jointly* as plaintiffs on the notes and mortgage, but each has his separate action.¹

Error from Cloud district court.

The case is stated in the opinion.

James Ketner and C. W. McDonald, for plaintiffs in error.

¹Where two or more persons have separate causes of action against the same defendant, arising from the obstruction of a natural water-course, and the injury of their lands and crops thereby, they cannot unite in the same petition to recover damages for such injuries, which are plainly distinct and unconnected. *Palmer v. Waddell*, 22 Kan. 352. Under section 85 of the Code, in order that parties may properly unite as plaintiffs they should each have, not only an interest in the subject of the action, but also in obtaining the relief demanded. *Jeffers v. Forbes*, 28 Kan. 174. Upon pleadings, held that several causes of action were stated. See

Strain & Wells, for defendants in error.

*388 *VALENTINE, J. This was an action on two promissory notes and a mortgage. The facts in the case are substantially as follows: The plaintiffs in error, Samuli O. Swenson and John P. Swenson, executed to the defendant in error C. M. Albinson two promissory notes, and a mortgage on real estate to secure the payment of the notes. Afterwards, Albinson assigned one of said notes to the other defendant in error, the Moline Plow Company. The notes were not paid at maturity, and this action was commenced by Albinson and the Moline Plow Company *jointly* against the Swensons to recover the amounts which they respectively claimed on said notes and mortgage. The only question which we are asked to decide is whether a *joint action* may be maintained by the two plaintiffs below, or whether each had his separate action. In this state the debt secured by a mortgage is the real subject of the action. The note given therefor is the principal evidence thereof, and the mortgage is merely ancillary thereto. The mortgage follows the note. Whoever owns the note owns the mortgage. When the note is paid the mortgage is paid. When the action on the note is barred by the statute of limitations the action on the mortgage is also barred. Indeed, any defense that may be set up against the note may be set up against the mortgage. But there is no separate action on the mortgage. The action must always be on the note, and it may be on the note either with or without the mortgage. And the action on the note, whether with or without the mortgage, is, so far as the note is concerned, substantially an action at law. The action is tried, so far as the note is concerned, in the same manner as any other action on a promissory note. Either party has a right to a jury, and the judgment is a personal judgment against the defendant, substantially the same as any other personal judgment. The judgment is much like a judgment in an ordinary attachment case. The judgment is for the amount due on the note, with an order that the mortgage property be first sold to satisfy the judgment, and that if it does not satisfy the judgment, then that a general execution be issued against the property of the defendant. Where more than one note is given, there are as many causes of action as there are notes; and if any of the notes are assigned, then each owner of a note has a separate cause of action, and each has a right to have the mortgaged property sold to satisfy his claim.

Ambrose v. Parrott, 28 Kan. 698. Only such parties as are united in interest should be made plaintiffs in any action. *McGrath v. Newton*, 29 Kan. 371. Under section 16, c. 128, Laws 1881, (Dass. Comp. Laws 1885, § 2801,) an action cannot be maintained jointly by the infant children who have been injured in their means of support on account of the intoxication of their father, against the persons who sold, bartered, or furnished the liquor. *Durein v. Pontious*, 8 Pac. Rep. 428. As to several causes of action in one petition, see note to *Carr v. Catlin*, 18 Kan. *398.

The mortgage is a security for each note. It is substantially the same as several mortgages for the several notes. The mortgage liens in favor of all the notes may be equal, or the lien in favor of one note may be prior to that in favor of another note. In the present case, when Albinson assigned one of said notes to the Moline Plow Company the company became the owner thereof, with the right to a separate action thereon. Each plaintiff then had a separate action, and a separate right to have the mortgaged property sold to satisfy his or its own note. Although the two notes were secured by one mortgage, yet the rights of the parties were the same as though the two notes had been secured by two different mortgages on the same piece of land. The notes are the principal thing, and the mortgage is ancillary. And as the notes are separate, the mortgage must be considered as a separate mortgage for each note. In the present case, Albinson wanted a judgment in his favor for the amount due on his note, and the mortgaged property sold to satisfy his judgment. The Moline Plow Company wanted a judgment in its favor for the amount due on its note, and the mortgaged property sold to satisfy its judgment. Now, where is there any community of interest in this? It is true, both want the property sold, but each wants it sold for a different purpose. What interest has Albinson in having the property sold to satisfy the Moline Plow Company's claim? And what interest has the Moline Plow Company in having the property sold to satisfy Albinson's claim? Each really wants the property sold to satisfy his or its own claim, and not to satisfy that of the other. Instead of there being a community of interest there is really an antagonism of interest between the

*390 plaintiffs. Either might *have sued on his or its own note, and made the other a defendant, so as to have the priority of their liens on the mortgaged property determined, for in this there is a conflict of interest; but they cannot sue jointly as plaintiffs, for they have no interest in common. As to joinder and misjoinder of parties plaintiff, see *Harsh v. Morgan*, 1 Kan. *293; *Winfield T. Co. v. Maris*, 11 Kan. *148 *et seq.*; *Hudson v. County of Atchison*, 12 Kan. *140; *Newcomb v. Horton*, 18 Wis. 566; *Barnes v. City of Beloit*, 19 Wis. 93; *Howland v. Supervisors*, Id. 247.

The judgment of the court below is reversed, and cause remanded for further proceedings.

(All the justices concurring.)

T. K. JOHNSTON and others v. WINFIELD TOWN Co.

January Term, 1875.

1. **Pleading and Proof: Execution of Deed: Admissions of Petition not to be Contradicted.** Where a plaintiff's petition admits the execution and delivery of a deed, the plaintiff cannot, under such petition, introduce evidence for the purpose of showing that the deed was never in fact executed or delivered.
2. **Conveyances: Consideration: Impeaching.** The grantor in a deed cannot, in the absence of fraud in its execution, introduce evidence on the trial tending to impeach, contradict, or vary the consideration expressed in the deed, for the purpose of invalidating the deed, or of setting it aside.¹

Error from Cowley district court.

Action by Johnston and four others to set aside and annul a certain quitclaim deed. The petition was as follows: "The plaintiffs complain of the said defendant, and aver that the said defendant, on the twelfth of February, 1870, was a corporation, duly incorporated under the laws of said state; that said defendant, on said twelfth *391 of February, pre*tended and fraudulently claimed to be the owner of a certain portion of the town-site of Winfield, in said county, to-wit, the N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 28, in township 32 south, range 4 east; that on the tenth of July, 1871, the probate judge of said county entered the said described portion of the said town-site at the United States land-office, at Augusta, Kansas, for the several use and benefit of the occupants and inhabitants thereof, under the act of congress in such case made and provided; that at the time of said entry the plaintiffs respectively, each for himself, was an occupant and inhabitant of said town-site, within the meaning of said act of congress, and was then, and ever since has been, possessed of a *bona fide* interest therein. The plaintiffs further aver that said pretended ownership of the defendant to said described portion of said town-site of Winfield at said date, tenth of July, 1871, was disputed by a great number of persons claiming an interest in said town-site as occupants thereof at the time of said entry, and among whom was each of the plaintiffs. The plaintiffs further aver that between the time of said entry and the twenty-first of September, 1871, attempts were made by many of said occupants, and by said defendant, to compromise and settle said disputed title, which finally resulted in a verbal agreement between the said plaintiffs respectively

¹ Actual consideration of a deed different from that recited therein may be shown by parol. *Kumler v. Ferguson*, 7 Minn. 442, (Gil. 851.) Where no fraud or mistake is alleged, the grantor in a deed of conveyance cannot aver that the conveyance was intended to convey to any one other than the grantee named therein. *Gray v. Stockton*, 8 Minn. 529, (Gil. 472.) Recital of amount of consideration held not conclusive. *Strohauer v. Voltz*, 4 N. W. Rep. 161.

and the said defendant, which was, in substance, as follows: The said plaintiffs respectively, each for himself, agreed to make a quitclaim deed to said defendant, and for said defendant's use and benefit, of all his interest in the said town-site, in consideration that the said defendant would pay to him the sum of one dollar in money, and also procure the quitclaim of each and every occupant of said town-site, within the meaning of said act of congress, of his respective interest, so that the said disputed question of title might be permanently settled, and the property of the town enhanced thereby; to all of which agreement on the part of the plaintiffs respectively the defendant agreed. The plaintiffs aver that in pursuance of said described agreement they did, on said twenty-first of September, 1871, each respectively, make to the defendant his quitclaim deed of his respective interest in and to the said town-site, the names of said plaintiffs, together with some other names of said occupants of said town-site, quitclaiming as aforesaid, being attached to the same deed; that is, each of the plaintiffs, together with others as aforesaid, attached his signature to the same deed, a copy of which is hereto attached marked 'Exhibit A,' and made a part of this petition.

*392 *The said plaintiffs further aver that the said defendant did not fulfill its part of the said agreement in this: that it did not pay to either of the plaintiffs the said sum of one dollar; and, further, that it did not procure the quitclaim deeds of all the said occupants of the said town-site of their respective interests in the same, as it had agreed to do, nor nearly all of them, so that the said plaintiffs were left, and are still left, in no better condition than before they respectively executed the said deed. The plaintiffs further aver that the defendant, well knowing that a large number of the occupants of the said town-site had not quitclaimed their respective interests in the same to the defendant, and with a design to cheat and defraud each of the plaintiffs out of his respective interests in said town-site, did wickedly procure a false acknowledgment of the plaintiffs respectively to said quitclaim deed; and did, on the twenty-third of September, 1871, cause the same to be recorded in the registry of deeds in said county, in Book A, pages 87, 88, and 89." Here follow three averments, alike except as to names, each stating that one of the plaintiffs, "at the time of his executing the said quitclaim, was a married man, having a wife with whom he was then and is still living, and who did not sign said quitclaim deed." The demand for judgment was as follows: "The said plaintiffs, each respectively, therefore prays that the said quitclaim deed from the plaintiffs, respectively, to the defendant, may be declared null and void, and be wholly set aside; and that the plaintiffs may have judgment against the defendant for the costs of this action."

Annexed to this petition, as Exhibit A, was the quitclaim deed, which was signed by the plaintiffs and 80 other persons. It appeared to have been acknowledged and certified on the day of its date,

and duly recorded. The answer admitted that the Winfield Town Company was a corporation; that the plaintiffs executed the deed as stated in the petition; that the town-site of Winfield was entered by the probate judge as averred; and, except as to the matters so admitted, denied "each and every allegation in said petition." Trial at the October term, 1873, of the district court. The plaintiffs called one of their number as a witness. After testifying to the usual preliminary matters, and that he had "signed the quitclaim deed *398 set out in the petition," he was asked the *following questions, to each of which defendant objected, which objections were sustained by the court. The questions were as follows: "Were there any conditions, or was there any agreement, between yourself and the defendant, containing any conditions not named in the deed, which caused you to sign it? State if you signed the deed by reason of any agreement made with you by the defendant that said deed should not operate as a conveyance until the terms of that agreement should be fulfilled. State if you ever received any consideration for signing said deed. State whether the defendant had agreed to do or perform anything which was to be the consideration for your signing the deed, and which was not done and performed. What was the real consideration for which you signed the deed? State if you ever delivered the deed to the defendant. State if you ever acknowledged the execution of the deed. State whether or not that deed contained the names of all, or nearly all, of the inhabitants and occupants of the town-site of Winfield, or who were such inhabitants or occupants on the tenth of July, 1871, or on the twenty-first of September 1871. State whether or not, previous to the twenty-first of September, 1871, the question of title to the town-site of Winfield was in dispute between a portion of the inhabitants and occupants thereof and the defendant."

These questions were held incompetent and immaterial. Plaintiffs thereupon rested, and defendant demurred to the evidence. The court sustained the demurrer, and gave judgment in favor of the defendants.

Alexander & Saffold, for plaintiffs.

That parol testimony may be adduced to show fraud, or want, failure, or illegality of consideration, in a written instrument, or a different consideration from that expressed, is well settled. *Booth v. Hynes*, 54 Ill. 363; *Waymack v. Heilman*, 26 Ark. 449; *McCulloch v. McKee*, 16 Pa. St. 269; *Laudman v. Ingram*, 49 Mo. 212.

Martins v. Berens, 67 Pa. St. 459; *Westbrooks v. Jeffers*, 33 *394 *Tex.* 86; *Mallory v. Leach*, 35 Vt. 156; *Ellis v. Crawford*, *39 *Cal.* 523; *Bowman v. Torr*, 3 Iowa, 571; *Williams v. Donaldson*, 8 Iowa, 109; *Corbin v. Sistrunk*, 19 Ala. 208; *Baldwin v. Carter*, 17 Conn. 201; *Drury v. Trembut Imp. Co.*, 13 Allen, 168. The plaintiffs insist that in making the deed, or as explained in the language of their petition, "that each of the said plaintiffs, together with

others as aforesaid, attached his signature to the same deed," their intent was not to deliver the deed, or to pass any interest, until certain others had signed the deed, and the consideration of their signing fully effected. And parol evidence is admissible to show that a written instrument was not intended to operate and take effect until certain stipulations not named therein had been complied with, or to show that an attempt had been made to use such instrument in violation of some verbal agreement accompanying it. *Rearich v. Swinehart*, 11 Pa. St. 233; *Pym v. Campbell*, 36 Eng. Law & Eq. 91; *Black v. Shreve*, 18 N. J. Eq. 455. And also to show the circumstances under which deed was made. *Foster v. McGraw*, 64 Pa. St. 464; *Wurzburger v. Meric*, 20 La. Ann. 415; *Brown v. Pitney*, 39 Ill. 468; *Bonney v. Morrill*, 57 Me. 368; *Gatlin v. Newell*, 9 Ind. 572. We have not sought to use parol evidence to establish a new contract, or to conflict with the terms expressed in any written instrument. We should be allowed such testimony for the purpose of showing that the deed in question is void, and never had any binding force, under the conditions by which it was signed, and also "for want of due delivery."

The plaintiffs sought to show, by parol evidence, that they never delivered the deed. Without delivery, it will be conceded the deed could not take effect. It is true, the petition does not allege, in so many words, that the deed was not delivered; but it does state that which, if true, shows there was neither a delivery, nor an intended one. We readily grant that a deed, *duly* executed and delivered to the grantee with the intention to pass a title, could not be questioned, unless induced by fraud. But we think that this averment in the petition, viz.: "That the defendant, well knowing that a large number of the occupants of said town-site had not quitclaimed their respective interests in the same to the defendant, and with a design to cheat and defraud each of the plaintiffs out of his respective *395 interest in said town-site, did wickedly procure a false acknowledgment of the plaintiffs respectively to said quitclaim deed," etc.,—is sufficient to charge the defendant with fraud from the making of the deed, and to admit of the evidence offered. *Reed v. Noron*, 48 Ill. 323; *Bullock v. Narrott*, 49 Ill. 62; *Waddingham v. Loker*, 44 Mo. 132; *Childress v. Ford*, 20 N. J. Eq. 463; 10 *Smedes & M.* 25. The possession of the deed by the grantee is presumptive evidence of delivery only, and may be controverted by parol evidence. *Brackett v. Barney*, 28 N. Y. 333; *Black v. Thornton*, 31 Geo. 641; *Gregory v. Walker*, 38 Ala. 26. To constitute a legal delivery of a deed, it must have been delivered and accepted with the intention of delivery; and if such delivery depends on a contingency, the contingency must happen before delivery is complete. *Comer v. Baldwin*, 16 Minn. 172, (Gil. 151;); *Walker v. Walker*, 42 Ill. 311; *Hathaway v. Payne*, 34 N. Y. 92; *Berry v. Anderson*, 22 Ind. 36; *Graves v. Dudley*, 20 N. Y. 76. The plaintiffs say that the defendant "did

wickedly procure a false acknowledgment of the plaintiffs respectively to said quitclaim deed;" in other words, forged the said acknowledgment. We submit, further, that it was *competent* for plaintiffs to show by parol evidence that they had never acknowledged the deed. To shut out evidence of this nature would give to fraud, trickery, and forgery too ample a scope.

A. H. Green and Leland J. Webb, for defendant.

VALENTINE, J. This was an action brought by T. K. Johnston, S. C. Smith, J. D. Cochran, W. Q. Mansfield, and J. P. Short, against the Winfield Town Company, to have a certain quitclaim deed set aside and declared null and void. At the trial of the case the court below excluded certain evidence offered by the plaintiffs; and whether the court erred therein or not is the only question now presented for our consideration. The petition in the court below alleges, among other things, as follows: The N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of sec. 28, in township 32 south, of range 4 east, constituted a portion of the town-site of the town of Winfield, Cowley county. The probate judge of said *396 county entered this portion of said *town-site at the United States land-office "in trust for the several use and benefit of the occupants thereof, according to their respective interests, but whether the probate judge ever entered any other portion of said town-site or not is not shown or stated in the petition. The defendant, a corporation, claimed to own said portion of said town-site entered by the probate judge, but their ownership was disputed by the plaintiffs and others. The plaintiffs were occupants and inhabitants of said town-site, and had and still have an interest therein; but whether any one of them ever was an occupant or inhabitant of that portion of said town-site claimed by the defendant, or ever had any interest therein, is not shown or stated in the petition. The plaintiffs and thirty other persons, in pursuance of a verbal agreement, made a quitclaim deed to said defendant for that portion of said town-site claimed by said defendant. The consideration expressed in the deed was one dollar paid to each of the grantors, the receipt of which they each acknowledged in the deed. According to said verbal agreement the defendant was to pay each grantor one dollar, and obtain a quitclaim deed from each occupant of said town-site. This was not done, and the plaintiffs now complain. But how such a quitclaim deed from each occupant of the town-site to the defendant could be a consideration for the quitclaim deed from the plaintiffs to the defendant, or how it could be of any benefit to the plaintiffs, is not disclosed, and cannot easily be imagined. Whether such a quitclaim deed would be a benefit to any one is not stated in terms. But if it should be a benefit to any one, it would certainly appear most strongly to be a benefit only to the defendant. The petition also alleges that the acknowledgment of said quitclaim deed was procured fraudulently.

We do not think that said petition states facts sufficient to consti-

tute a cause of action. The deed which the petition asks to have set aside appears upon its face to have been regularly executed and acknowledged. It is found in the possession of the grantee, and has been duly recorded. All this appears from the petition and *397 exhibits; and this, at least, is **prima facie* evidence that the deed was duly executed and delivered. The petition nowhere alleges that it was not duly executed or delivered. (Perhaps a *denial contained in a petition*, of the execution of a written instrument set forth in the petition, need not be verified by affidavit, as is required to be done of a *denial contained in a subsequent pleading* putting in issue an allegation of the execution of a written instrument.) But the petition not only fails to deny that the deed was duly executed, but it even admits and alleges that it was so done. With reference to the execution, the petition uses the word "make" twice; the word "executed" once; the word "executing" three times. The petition does not pretend that there was any fraud in the execution of said deed. It states, however, that there was fraud in the *acknowledgment* of the execution of the same, and in recording it. But it does not state in what the fraud consists. No facts showing fraud are stated. But even if there was fraud in the acknowledgment of the execution of the deed, or in recording the same, still that would not invalidate the deed. Even if the execution of the deed had never been acknowledged before any officer, and even if the deed had never been recorded, it would still be valid, if it had been in fact executed. There is no breach of said verbal contract, nor of any contract, nor any default on the part of the defendant, alleged in said petition, except that it is therein alleged that the defendant did not pay said plaintiffs each one dollar, and did not procure a quitclaim deed from all the occupants of said town-site. These two things, which it is claimed should have been done, it will be remembered are what the plaintiffs alleged in their petition constituted the consideration for their executing said quitclaim deed. As to the consideration: We suppose that, in the absence of fraud, the consideration expressed in the deed cannot be impeached, contradicted, or varied, for the purpose of invalidating the deed. The consideration expressed in the deed, we suppose, may be contradicted or varied by evidence *aliunde*, where fraud is alleged, or where the grantor sues for the con-

*398 sideration, or where the *grantee sues for a breach of some covenant contained in the deed. But we do not think that such a thing can ever be done, in the absence of fraud, merely for the purpose of setting aside the deed. The consideration expressed in the present deed was one dollar, and the plaintiffs each in the deed acknowledged the receipt of the same. And this is conclusive in a case of this kind. The evidence offered to be introduced by the plaintiffs, and excluded by the court, was evidence tending to show that the deed was not fully executed, and a want or failure of consideration; that is, the plaintiffs desired to show that the deed was

not to be considered a deed until all the occupants of said town-site had executed quitclaim deeds to the defendant, and until the defendant had paid each grantor one dollar, and that none of the conditions had been fulfilled. We do not think that such evidence was admissible under the state of the pleadings. It would all tend to contradict either the plaintiffs' petition, or their said deed, and without any sufficient allegations of either fraud or mistake. We might further say, although we think under the pleadings the question is not in this case, that a deed apparently fully executed and acknowledged, and delivered to the grantee, to become an absolute deed upon some condition, is not an escrow, but is immediately a deed absolute. **McKean v. Massey**, 6 Kan. *122.

The judgment of the court below is affirmed.
(All the justices concurring.)

GEORGE J. CLARK and others v. WILLIAM H. SPENCER.

January Term, 1875.

1. **Pleadings: Filing Supplemental: Discretion of Court.** The filing of amended or supplemental pleadings is a matter within the sound discretion of the trial court, and, unless it appears that such discretion has been abused, a refusal to permit either to be filed is no ground for reversal. [*Simpson v. Vass*, 31 Kan. 227; S. C. 1 Pac. Rep. 601.]
- *399 *2. **Usury: Withdrawing Plea: Public Policy.** An agreement to withdraw the plea of usury is against public policy, and cannot be sustained.
3. **Answer: Additional Defense: Showing.** Ordinarily, when leave is asked to file an amended answer containing an additional defense, it is expected that some sufficient reason will be shown for not presenting such defense before.
4. ———. Hence, when a party, with full knowledge of a defense, intentionally omits to plead it, or having once pleaded it intentionally withdraws it, as a rule, he ought not to be permitted to replead it; and especially is this so where he reaps some benefit from such omission or withdrawal, and makes the omission or withdrawal by agreement with his adversary, and for the purpose of receiving such benefit.
5. **Usury: As a Defense.** The defense of usury is to be treated as any other defense, and has no especial claims on the favor or indulgence of the court. *Quere*, is the defense of usury so far a personal one that the wife of the debtor cannot plead it where the homestead is mortgaged to secure the usurious debt, and such also that a subsequent mortgagee cannot plead it?¹

¹See *Jenkins v. Lewis*, 25 Kan. 479; *Ayres v. Probasco*, *ante*, *175; the plea of usury is a personal privilege, *Pritchett v. Mitchell*, 17 Kan. 355; interference of equity, *Waite v. Ballou*, 19 Kan. 601; burden of proof is upon defendant, *Lathrop v. Davenport*, 20 Kan. 285; defense cannot be set up against an innocent indorsee

Error from Bourbon district court.

The case is stated in the opinion.

Hulett & McCleverty, for plaintiffs in error.

The several points made, and errors raised, can best be explained by first discussing the force and effect of the agreement to withdraw the defendant Clark's answer, and continue the case. If this be viewed in the light of a contract for forbearance, then it must be admitted that such contracts are valid, and of binding obligation, (1 Para. Cont. 440-444,) provided the consideration therefor be legal. A contract, to be valid and binding, must have both a *legal* consideration, and a *legal* subject-matter or object. Hence a subject-matter prohibited by law could not be the object of a contract, since *malum* *400 *prohibitum* is equally as effectual as *malum in se*. *Story, Prom. Notes, § 189. So, where law prohibits usury, no contract can be made or enforced concerning it, being *malum prohibitum*;

of note, *Gross v. Fank*, 20 Kan. 655; taking full legal interest in advance is not usurious, *Tholen v. Duffy*, 7 Kan. 263; interest upon interest not paid when due will not be allowed, *Dyar v. Slingerland*, 24 Minn. 287; usurious interest, voluntarily paid, cannot be recovered back, *Woolfolk v. Bird*, 23 Minn. 341; *Nutting v. McCutcheon*, 5 Minn. 382, (Gil. 310); *Cornell v. Smith*, 27 Minn. 132; S. C. 6 N. W. Rep. 460; agreement for usurious interest void, *Brown v. Nagel*, 21 Minn. 415; contract to pay for past use of money, *Daniels v. Wilson*, 21 Minn. 530; the taint of usury of an original security infects a new security substituted for it, *Jordan v. Humphrey*, 31 Minn. 495; S. C. 18 N. W. Rep. 450; in what cases a bonus taken from the borrower by the lenders' agent will not make the loan usurious, *Id.*; *Acheson v. Chase*, 28 Minn. 211; S. C. 9 N. W. Rep. 734; when a defense to negotiable paper, *First Nat. Bank v. Bentley*, 27 Minn. 87; S. C. 6 N. W. Rep. 422; right to defend on the ground of usury is personal to the debtor or his privies, *Ready v. Koebke*, 1 N. W. Rep. 344; *Burlington Ass'n v. Heider*, 5 N. W. Rep. 578; S. C. 7 N. W. Rep. 686; if one loaning money exacts in any shape more than legal interest, he is guilty of usury, *Cheney v. Eberhardt*, 1 N. W. Rep. 197; bonus for loan, taken by agent, does not affect principal, *Bingham v. Myers*, 1 N. W. Rep. 613; *bona fide* purchaser of negotiable note protected, *Wortendyke v. Meshan*, 2 N. W. Rep. 339; *Savings Bank v. Scott*, 4 N. W. Rep. 814; *bona fide* purchase of securities is not a contrivance to evade the usury law, *Armstrong v. Freeman*, 2 N. W. Rep. 353; note dated and signed in another state, *Hart v. Wills*, 2 N. W. Rep. 619; defense in state court against national bank, *National Bank v. Eyre*, 2 N. W. Rep. 995; subsequent agreement to pay usurious interest will not affect original loan, *Dell v. Oppenheimer*, 4 N. W. Rep. 51; once paid, cannot be recovered back, *Phillips v. Gephart*, 5 N. W. Rep. 633; effect of new contract on usurious loan, *German Bank v. Griffin*, 6 N. W. Rep. 156; taking of commission for loan by agent of borrower is not usurious, *Dickey v. Brown*, 9 N. W. Rep. 347; *Acheson v. Chase*, *Id.* 734; borrowing money at a legal rate, to pay usurious debt, does not make the new debt usurious, *Mason v. Searles*, 9 N. W. Rep. 370; taint of usury follows every subsequent security given for a loan originally usurious, *Nelson v. Harford*, 9 N. W. Rep. 648; payment by borrower of expenses for viewing the premises will not render loan usurious, *Smith v. Wolf*, 8 N. W. Rep. 429; guarantor of note may set up defense, *Congor v. Babbett*, 24 N. W. Rep. 569; innocent purchaser, burden of proof, *Darst v. Backus*, 24 N. W. Rep. 631; separate notes given for interest on notes, *Wood v. Cuthbertson*, 21 N. W. Rep. 3; bank cannot evade law by charging so much in money for loan and an additional sum for services, the aggregate exceeding the lawful rate of interest, *New England M. S. Co. v. Harris*, 14 N. W. Rep. 471; a provision that interest coupons attached to a note bearing 10 per cent. interest shall, after they are due, bear 10 per cent. interest, will not render such a contract usurious, *Hawley v. Howell*, 14 N. W. Rep. 199; nature of proof required, *Poppleton v. Nelson*, 7 Pac. Rep. 492; parties estopped to set up, when, *Beals v. Lewis*, 1 N. E. Rep. 641; sufficiency of evidence to establish usury, *Hough v. Hamlin*, 10 N. W. Rep. 630.

and no contract can be made or enforced concerning anything immoral or criminal, being *malum in se*. The court below evidently viewed this contract as analogous and equivalent to a covenant for forbearance,—not to sue. A covenant not to sue, if perpetual, is held to be a release, and, to avoid circuitry of action, may be pleaded in bar, if action be brought. But a covenant not to sue for a *limited time* cannot be pleaded in bar to the action if brought before the expiration of the time, and the only redress is upon the covenant itself. *Guard v. Whiteside*, 13 Ill. 7; *Chandler v. Herrick*, 19 Johns. 129; *Winans v. Huston*, 6 Wend. 471. So, in that view, if Clark, the defendant below, instead of complying with the contract, had refused to withdraw his answer, the court could not have disregarded it, and Spencer's only remedy would have been an action upon the contract for damages against Clark. And this brings us to the consideration of the contract itself. Suppose Clark had refused to withdraw his answer, and Spencer had brought suit upon the contract against Clark, what would have been the measure of damages? Manifestly, it would have been the amount of the usury. The usury was illegal under the law of 1868, when the note was executed, and the court could only have given judgment for an amount which was illegal, which no court will do. Then, very clearly, the subject-matter or object of this contract, upon Spencer's part, was illegal, and hence the contract void. If any portion of a contract is void, for any reason, a court will not undertake to separate the good from the bad, but will declare the whole void. *Widoe v. Webb*, 20 Ohio St. 431. This contract, then, being void, because of illegality of consideration, the case should be viewed as if none had been attempted to be made, and even if good is not entitled to consideration until action is brought for breach of it. The agreement of September 19th is simply a second promise to pay the original usury, and no more binding or valid than the first. *Ferrier v. Scott*, 17 Iowa, 578.

The court erred also in denying the motions to file supplemental answers. The Code, § 184, has provided for *pleading, by way of supplemental pleadings, any new matter occurring after the filing of former pleadings. The answers filed with these motions came clearly within the rule laid down in section 144, and parties have the same rights under the Code in a plea of usury that they have in any other case. *Catlin v. Gunter*, 11 N. Y. 368. On the sixteenth of December, the day before the motions were filed, each of the defendants made a tender of an amount which they claimed and alleged to be the full amount due the plaintiff. Certainly a tender made on the sixteenth of December is new matter occurring after September 19th. It makes no manner of difference whether the defendants should be able to sustain the allegations by evidence or not. The allegations were made, and, for the purposes of pleading, are true, at least until denied, and come within section 144. If section 144 has any force or effect, does it not confer *absolute rights*?

If anything new has in fact occurred, is it not the *right* rather than the *privilege* of a party to plead it? Suppose the defendants, instead of tendering \$2,985, had actually paid that amount to the plaintiff, would not section 144 allow them to plead that fact? Yet, according to the ruling and reasoning of the district judge, they could not even plead a release, or an accord and satisfaction, after having agreed to pay the plaintiff his usury, by pleading a general denial only. As to the truthfulness of the answers, if that is of any importance under our Code, it will be noticed that Marston's answer is verified by affidavit, and the record contains the statement that the court considered the answers of the other defendants as verified. Voorhies, Code, (3d Ed.) 199; Seney, Code, 184, and notes. It will be noticed that the supplemental answer asked to be filed by Antoinette E. Clark complies in every particular, since it contains the allegation "that the facts above set forth did not come to the knowledge of this defendant until the fifteenth of December, 1873." Unless, then, section 144 is a surplusage in the law, without meaning and without purpose, her answer should have been admitted as an *absolute right*.

*402 *Blair & Hill*, for Marston.

Marston is a subsequent mortgagee; and suppose, as is the fact, that the mortgaged premises are not a sufficient security to pay Spencer the full amount due him, if the usury be included, and leave anything to apply upon Marston's mortgage, which is admitted by Clark and Clark, and contains no element of usury and illegality, is it not then an absolute right of Marston that the Clarks be permitted to file answers which very plainly, if sustained, would so reduce the amount of Spencer's judgment as to save to Marston the amount of a just and lawful debt? The case then presents this anomalous condition: If Spencer's judgment, a large portion of which is usurious and unlawful, be sustained, it must be at the expense of Marston's judgment, no part of which is unlawful; that is, the illegal shall be sustained at the expense of the legal and the just, instead of the converse, which would seem more in consonance with justice.

Harris & Spencer, for defendant in error.

BREWER, J. This was an action to foreclose a mortgage given by George J. Clark and wife to the defendant in error. John J. Marston, a subsequent mortgagee, was also made a party defendant. The pleadings were completed by answers and reply. In the answer of George J. Clark the defense of usury was set up. After this, and on September 19, 1873, there was filed among the papers in said case an agreement upon which this case turned entirely in the court below. It was as follows, after title of cause: "It is agreed and stipulated by and between said parties that said case shall be continued until the next term. In consideration of said continuance, the defendant George J. Clark agrees to withdraw his answer from the files, and

file a general denial only, and not to place, or ask to be placed, on file any further answer; and also agrees that in case of sale *403 *of the property described herein, that the plaintiff shall have the right to remain in said premises until the first of March, 1874, by paying \$20 per month after such sale." This stipulation was signed, "WM. H. SPENCER, GEORGE J. CLARK, ANTOINETTE E. CLARK." Marston's attorney indorsed the following upon said agreement: "I agree that this cause shall be continued till December term, 1873," which was signed, "C. W. BLAIR, Attorney for Defendant Marston." The case was thereupon continued to the December term, 1873, and the terms of the stipulation complied with as to withdrawing answer, and filing only a general denial. On December 17, 1873, the defendants George J. and Antoinette E. Clark filed a joint and several motion for leave to file separate, amended, and supplemental answers, setting up usury, and a tender to the plaintiff of the amount due after deducting the usurious payments. The tender had been made December 16th, and since the filing of the then existing answer. The motion was overruled, and the filing of supplemental answer refused by the court. On the next day, December 18th, defendant Marston filed a motion for leave to file a similar supplemental answer, which was also denied. On December 29th, George J. Clark filed another motion for leave to file supplemental answer, which was also denied, the answer setting up the tender only. Also, on said December 29th, defendants Clark and Clark filed a motion to strike from the files the agreement above quoted, which was also overruled.

The principal question in this case is on the refusal of the court to permit the filing of any new pleadings. It is insisted that the stipulation is void because of illegality of consideration, viz., an abandonment of a plea of usury, and an agreement not to make such plea thereafter, and that, therefore, the case is to be treated as though no such stipulation was in it; also that upon the happening of any new matter, amounting to a substantial defense, since the filing of the existing answer, it is a right of the defendant to be allowed to file a supplemental answer setting up such new matter, the *404 refusal of which right is sufficient ground for *reversal of the judgment; and finally, if it be not a right of defendant to be allowed to file a supplemental answer in all cases of the happening of new matter, it was, under the circumstances of this case, an abuse of discretion for the court to refuse to allow one to be filed, such as should compel a reversal. It may be remarked that the only object in the various answers and motions offered and made was to renew the once-abandoned plea of usury; for though the tender was a subsequent fact, yet the tender without the usury amounted to nothing. The note was a note of \$3,500. The amount of the alleged tender was \$2,985; so that if the plea of the tender had been allowed to be filed, and the tender proved as alleged, it would have constituted no defense, except in conjunction with a plea of payment or one of usury.

The subsequent matter was therefore of itself immaterial. And on the other hand, if the plea of usury had been permitted, and sustained by the evidence, the amount of the judgment would have been no greater than the amount due at the time of the tender, for the usury law in force at the time of the contract forfeited all interest. The only difference would have been in the matter of a few dollars' costs.

The agreement to withdraw the plea of usury cannot be sustained. It is no better than an agreement not to plead it; and surely, if such an agreement could be sustained, a usurious loan would always be accompanied by an agreement not to plead the usury,—a very simple, if not effectual, way of evading the law. In short, this case seems to resolve itself into this: If, after pleadings have once been filed, the district court refuses leave to file an amended answer setting up the plea of usury, under what circumstances will this court hold such refusal error, and reverse the judgment? Neither party has the right, after pleadings have once been filed, issue joined, and the case ready for trial, to change the issues by filing either an amended or supplemental pleading.

This can be done only by leave of the court, *405 and the granting of leave is within the discretion of the *court.

Error will lie only when an abuse of that discretion is shown. This, so far as amendments are concerned, is familiar law: Taylor v. Clendening, 4 Kan. *524; Davis v. Wilson, 11 Kan. *74; Douglas v. Rinehart, 5 Kan. *392; Spratly v. Insurance Co., 5 Kan. *155. It is also true of supplemental pleadings. Medbury v. Swan, 46 N. Y. 200; Voorhies, Code, (3d Ed.) 357, § 177, and cases cited. It may be that, as supplemental pleadings embrace only subsequent facts, there can be fewer reasons for refusing to permit them to be filed; but still, like amended pleadings, they are within the control, and subject to the discretion, of the court.

Was there any abuse of discretion on the part of the district court in this case? Leave was asked to file amended and supplemental answers. What grounds therefor were presented? It will ordinarily be expected, in such cases, where additional defenses are sought to be interposed, that some reason will be shown for not presenting them before,—either that the party was ignorant of the facts, or that such facts constituted a legal defense, or that he was in some way prevented from setting them up. He is asking to change the issues, and some reason other than his own pleasure or convenience should be given. If this be the general rule, *a fortiori*, where a party with full knowledge of a defense intentionally omits to plead it, or having once pleaded it intentionally withdraws it, he ought not thereafter to be permitted to change the issues by pleading it. Especially is this true when he reaps some benefit from such omission or withdrawal, and more especially when such omission or withdrawal not only inures to his benefit, but also works injury to his adversary, and is the result of an express and separate agreement therefor with such adversary. This covers the case of the principal debtor. He knew of the defense

of usury, he pleaded it, and then intentionally withdrew the plea. By such withdrawal he obtained the benefit of a delay in judicial proceedings to compel payment by him of a debt, and to the same extent postponed any collection thereof by his creditor; and he made
*406 this *withdrawal in consequence of an express and separate agreement therefor with such creditor. It is unnecessary to affirm the validity of the agreement, or assent that it was one which it was the right of the creditor, and the duty of the court, to enforce. It is enough that such an agreement was made, and that its consequent benefits and injuries were received by both debtor and creditor. True, the injury resulting from a loss of this defense may have more than counterbalanced the benefits of delay, though no positive assertion can be made on this point without a fuller knowledge of the circumstances and conditions of the respective parties; but he elected to take the latter, and cannot complain if he is compelled to abide by his choice.

Again, the plea itself which he seeks to make has no especial claims upon the favor of the court. Many very respectable courts have declared it an odious and unconscionable plea,—one which, though tolerated, ought always to be discountenanced. On granting to defendants leave to amend their answers, it has often been only upon their stipulating not to set it up, (*Fulton Bank v. Beach*, 1 Paige, 429; *Utica Ins. Co. v. Scott*, 6 Cow. 606; *Lovett v. Cowman*, 6 Hill, 223;) and while the better opinion is against such discrimination and denunciation, (*Catlin v. Gunter*, 11 N. Y. 368,) yet it is undoubtedly true that it has no especial claims upon the indulgence and favor of the court. All applications concerning it should be disposed of upon the same principles, and in the same manner, as those concerning other defenses. So far, therefore, from seeing any abuse of discretion in this ruling, as to the principal debtor, it seems to us to have been just what it ought to have been.

So far as concerns Mrs. Clark, and the subsequent mortgagee, the same considerations do not apply. Neither of them had once interposed, and then withdrawn, this defense. Mrs. Clark also states, in the answer she tendered, which was verified by affidavit, that she did not know of the usury until after the stipulation, and just before the tender, and that the mortgaged premises were the homestead
*407 of the husband and *herself. Counsel for defendant in error insists very strenuously that this plea of usury is a strictly personal one, and that, therefore, it was entirely unavailable to either Mrs. Clark, or the subsequent mortgagee. If this were correct, there was of course no error in refusing to permit them to plead it. It is undoubtedly true, as a general proposition, that the plea is a personal one, but we are inclined to doubt the correctness of the claim of counsel, at least so far as Mrs. Clark is concerned. See, upon her right to avail herself of the plea, *Lyon v. Welsh*, 20 Iowa, 578; and upon the general proposition, *Shufelt v. Shufelt*, 9 Paige, 137; *Green v.*

Morse, 4 Barb. 332; Reading v. Weston, 7 Conn. 413; De Wolf v. Johnson, 10 Wheat. 367; Sands v. Church, 6 N. Y. 347.

Without, however, definitely deciding these questions, we think the ruling of the court must be sustained for these reasons: Though Mrs. Clark avers ignorance of the usury, she is not wholly without laches. She signed the stipulation to withdraw the answer of her husband. This was notice to her that some defense interposed by her husband was to be withdrawn, and fairly put her upon inquiry to ascertain what it was before consenting to its withdrawal. The circumstances attending the signing of the stipulation are nowhere disclosed in the record, and no excuse given for her signing it, and no reason given for her ignorance of the usury. Did her husband misrepresent the facts to her, or was she so indifferent to the preservation of her homestead as to make no inquiry? In the absence of a full showing upon these matters, and in a case where the court properly refused to permit the principal debtor to interpose a once-abandoned plea of usury, we cannot say that the court abused its discretion in also refusing to permit her to interpose this defense. The subsequent mortgagee cannot urge even these considerations. He had no homestead claim, and he avers no ignorance. He seeks to amend his answer, but he gives no reason for not alleging the usury before. He places great stress upon the tender as a subsequent fact, but the tender alone, as we have seen, could avail none of the defendants anything.

*408 *It is hardly necessary, since the case of Stevens v. Thompson, 5 Kan. *305, to say that, under a general denial to a petition which alleges the making and delivery of a note, of which it gives a copy, that no part has been paid, and that the whole amount is still due, proof of payment is inadmissible.

Upon the whole case we see no error, and the judgment must be affirmed.

(All the justices concurring.)

LELAND A. BABCOCK v. D. DEFORD and others.

January Term, 1875.

1. **Evidence: Parol, to Prove Contemporaneous Agreement.** While parol testimony is inadmissible to contradict the terms of a written agreement, yet it is admissible to prove an independent parol agreement made contemporaneous with the written contract; and where the written contract is fairly susceptible of two constructions, parol testimony of the surrounding circumstances, including the conversations between the parties, is admissible to show which construction should obtain.¹

¹ While parol testimony is inadmissible to change or contradict the terms of a written contract, yet a parol contract may be made between the parties contem-

2. ———. Thus, where D. signed a written order to B. to send certain goods, "at \$10 each, on six months' time," *held*, that it was competent to show a parol agreement, made at the same time, that if D. was unable to resell any of those goods during the six months, B. would take them back, and cancel the sale.
3. **Principal and Agent: Agent's Authority: Sale by Agent: Conditions.** Where an agent, the actual extent of whose authority is unknown, makes a sale of his principal's goods upon certain conditions within the ordinary scope of such an agent's authority, the principal cannot thereafter affirm the sale, and reject the conditions, without the consent of the purchaser, even though such conditions may be outside of the actual authority of the agent.¹

Error from Franklin district court.

The case is stated in the opinion.

*409 **J. O. W. Paine*, for plaintiff.

As the action is based upon a contract in writing, parol testimony is not admissible to contradict, add to, subtract from, or in any way vary, its terms. 1 Greenl. Ev. § 275; 2 Phil. Ev. 636; *Drake v. Dodsworth*, 4 Kan. *159; *Halliday v. Hart*, 30 N. Y. 474; *Burhaus v. Johnson*, 15 Wis. 286. Again, the evidence, even if admissible, does not show such an agency on the part of Ross as would bind the plaintiff in any verbal contract outside, and in variance of, the written one for the absolute purchase of plaintiff's goods.

John W. Deford, for defendants.

Oral evidence cannot be given to control, vary, or contradict a written agreement, applies to those contracts only which have been wholly reduced to writing, while to those which rest wholly or partly in parol it has no application. 2 Pars. Cont. pt. 2. c. 1, § 10, and note; 1 Greenl. Ev. §§ 284, 284a, 304; 2 Phil. Ev. 772; 2 Stark. Ev. 573. And this doctrine is recognized by this court in *Drake v. Dodsworth*, 4 Kan. *170, and by authorities too numerous to cite. A machine manufacturer's "agent and commercial traveler" has full power to do and perform all the commercial business of his principal, and is to be regarded as the general agent of his principal, and clothed apparently with the power of fixing the price, and the time and mode of delivery of the goods, and the payment of the price. Ross had ap-

poraneously with the execution of the written agreement, providing it is separate and independent, and its terms in no way conflicting with, or contradictory of, the written stipulations. Thus, when A. sold to B. a sewing-machine, at a stipulated price, and received a negotiable note in payment therefor, held, that it was competent for B. to prove a contemporaneous parol agreement that A. would furnish him work for said machine at a stipulated price, and within a stipulated time, and a breach of said contract by A.; and B. can set off the damages sustained by said breach against the money due on the note. *Weeks v. Medler*, 20 Kan. 57. To show that a conditional sale or mortgage, *McNamara v. Culver*, 23 Kan. 661; parol evidence as to consideration of promissory note, *Dodge v. Oatis*, 27 Kan. 762. See *Shepard v. Haas*, *post*, *448, and note. See, also, note to *Morrall v. Waterson*, 7 Kan. 128.

¹ Company held bound by declarations of agent, upon facts of case, see *Victor S. M. Co. v. Rheinschild*, 25 Kan. 534.

parent authority, from the nature of his agency and dealings, to make the parol contract. His knowledge was the knowledge of his principal, and the principal is bound by the conditions agreed upon.

BREWER, J. Plaintiff in error claims that the district court *410 erred in permitting parol testimony to vary the terms *of a written contract. The facts are these: On the third of February, 1873, the defendants signed and handed to the agent of the plaintiff the following order:

*"Leland A. Babcock, M. D., Freeport, Illinois—*DEAR SIR: Please send us six of your pure solid silver uterine supporters, as follows, to-wit: * * * at ten dollars each, on six months' time, with printed matter.

"Very truly yours,

D. DEFORD & Co.

"Ottawa, Kansas, February, 3, 1873."

This order was on a printed blank, only the words in italic being in writing. The supporters were sent, and at the end of six months a draft drawn for the \$60, which was protested for non-payment. Suit was immediately commenced, and on the trial one of the defendants, over the objection of plaintiff, testified that this order did not show the entire contract between the parties; that the contract was, in substance, that defendant should take the supporters conditionally, and if at the end of six months they had not been able to sell any, the plaintiff would take them back; that they had tried, but had been unable to sell a single one, and had notified the plaintiff to take them back, and held them subject to his order. It is not disputed but that, if this testimony was competent, and the contract as thus stated, the defendants were not liable. It is undisputed law that parol testimony is inadmissible to contradict the terms of a written contract; but it is also settled that, notwithstanding the written agreement, proof may be made of a contemporaneous parol agreement, and that where the written agreement is fairly susceptible of two constructions parol testimony is admissible of the surrounding circumstances, including the conversations between the parties, for the purpose of determining which construction should obtain. And these rules, we think, justified the admission of the parol testimony. There is no contradiction between the parol and written agreement. Both may have been made. The writing orders the goods to be sent, specifies the number, the price, and the time. The parol testimony does not dispute either. It concedes all to be as stated in the *411 writing, but *asserts that the vendor also agreed to receive the goods back if the vendee, during the six months, should be unable to resell any. Though the writing in terms asserted an absolute purchase, and contained an express promise to pay, it would still be consistent with an agreement to repurchase. Both might have been made at the same time, and both expressed in writing, or one in

writing, and the other in parol. But the writing does not, in terms, assert an absolute purchase, or contain an express promise to pay. True, the law will, in the absence of other testimony, upon a receipt of the goods, imply a promise to pay; but this is not a necessary inference from the language, and might be changed by extrinsic circumstances. Thus, if the defendants were only commission merchants seeking consignments, known to be such by plaintiff, the course of business might be such between the parties as to justify the inference that this was but an application for a consignment, with limit as to price and time. If, then, under any circumstances, this language will permit a construction consistent with a conditional purchase, testimony is admissible to show that such was really the intention of the parties in the transaction, and such, therefore, the proper construction. Reverse the condition, and suppose that it was orally agreed between the parties that, upon delivery of the goods, security should be given as a condition of the time: could not the plaintiff show this fact, and, upon failure to receive security, commence suit at once? The contract is silent as to security: does it prove that there was no agreement concerning it? It is silent as to agreement to repurchase: does it follow that there was none?

This agreement was made between the defendants and one Ross, who was the agent and commercial traveler of plaintiff; and it is objected that there is no proof that Ross had power to bind the plaintiff by such an agreement. The defendants had no personal acquaintance,—no negotiations directly with plaintiff. The entire trade was made between this agent and them. They had no knowledge *412 of the extent or limitations of his authority. If *the plaintiff accepted the contract of his agent, he must accept it as a whole, and cannot accept that which suits him, and reject the balance. The principal is bound by the representations of his agent,—bound by the contracts he makes within the apparent scope of his authority. Ross was the agent of plaintiff,—agent to make sales,—and the plaintiff is bound by the conditions he attaches to such sales. At least, he cannot enforce the sales, and reject the conditions.

We see no error, and the judgment will be affirmed.

(All the justices concurring.)

SAMUEL C. LONG v. CHARLES C. CULP.

January Term, 1875.

1. **Taxation: Homestead Lands, before Issuance of Patent.** Lands taken under the homestead act are not liable to taxation until the right to a patent exists; and *quære*, are they liable until the issue of the patent?
2. **Government Homestead Patent: When Due.** No right to a patent under the homestead act exists until after five years of continuous possession.
3. **Taxation: When Lands Subject to.** Lands must be subject to taxation on the first of March, or they are not taxable for that year.
4. **Statutory Construction.** Where one section of a statute treats solely and specially of a matter, it will prevail as to that matter over other sections in which only incidental reference is made thereto.

Error from Saline district court.

Action by Long to quiet title to certain lands acquired by him under the homestead act, the patent for which was issued March 12, 1872. Culp answered, admitting that he had and claimed an interest in the lands in controversy, and alleging that said lands were subject to taxation in 1871, were duly assessed, that the taxes levied thereon were not paid, and that said lands were duly sold for said unpaid taxes, and that he was the owner and holder of the tax-sale *413 certificate *issued under such sale. Reply denying the taxability of the lands. The action was tried at the May term, 1874. The district court held that the lands were subject to taxation in 1871, and gave judgment in favor of the defendant.

D. R. Wagstaff, for plaintiff.

E. W. Hodgkinson, for defendant.

BREWER, J. The question in this case is whether a certain tract of land was subject to taxation for the year 1871. The facts, as agreed, are as follows: Title to the land was obtained under the homestead act. 12 U. S. St. at Large, 393. On the first of March, 1871, title was still in the government. On the twelfth of June, 1871, the owner made final proof and entry, and on the twelfth of March, 1872, the patent issued. The land was not returned by the assessor, but was placed upon the tax-roll by the county clerk under the provisions of section 36 of the tax law, (Gen. St. 1033,) as amended in 1870, (Laws 1870, p. 245, § 1.)

The first of March is the time at which the taxability of property is determined. This is true, as a general rule, of both personal and real property. Gen. St. 1023, § 8; Id. 1024, § 11; Id. 1027, § 19; Id. 1029, §§ 25, 27; Id. 1032, § 35. The last section provides that "lands entered on or before the first day of March in each year shall be subject to taxation for that year." Was this land subject to taxa-

tion on the first of March, 1871? Clearly not. The title still remained in the government. Nor does it appear that a right to a patent then existed. Under the second section of the homestead act five years' continuous possession is essential to secure the right of final entry. If possession ceases before the lapse of the five years, all rights under the act fail, and the title remains with the government. No such possession is here shown, and final proof was not made till the June following. There was therefore then no *414 patent, and *no right to a patent. It was government land, and therefore free from taxation. It is unnecessary to consider what difference it would make if the final proof had been made prior to March 1st. It is insisted that section 4 of the homestead act would have prevented taxation until after the issue of the patent. It will be time enough to determine that question when it is fairly before us; for while it is contended that under section 36 of the tax law, as amended in 1870, (Laws 1870, p. 245, § 1,) lands entered between the first of March and first of July are taxable for that year, (which would bring the question above noticed before us,) we are of the opinion that such claim cannot be sustained. That section, or at least the portion applicable here, reads thus: "It shall be the duty of the county commissioners to direct the county clerk to procure from the land officers of the proper district or districts an abstract or abstracts of all lands entered subsequently to the first day of July of the previous year, and all such lands, as shown by said abstract, not appearing on the tax-roll, shall be entered upon said roll by the county clerk as soon as the abstract shall be received."

So far as this portion of the section is concerned the amendment makes no change, and the law was the same in 1868 as in 1870. We do not think this changes, as to these lands, the taxable point from the first of March. There is nothing to indicate positively up to what time the abstract is to extend. The roll is to be returned to the clerk on the twentieth of June. Should the abstract be made up to that day? It dates from the first of July. Shall it run to the same date? Shall it run only to the first of March, the time otherwise fixed to determine the question of taxability? Shall it run up to the time it may be transmitted to the county clerk, whatever that time may be? These are questions unanswered by the statute. It would seem, if the legislature intended to change by this section the time of taxability, the time of the termination of the abstract should have been clearly given. It is a rule of construction to seek to give effect to each expression of the legislative purpose, and to harmonize, if possible, any seemingly antagonistic expressions. It is also a rule of construction *415 *tion that when one section of a statute treats specially and solely of a matter, that section prevails in reference to that matter over other sections in which only incidental reference is made thereto; not because one section has more force as a legislative enactment than another, but because the legislative mind, having been

in the one section directed to this matter, must be presumed to have there expressed its intention thereon rather than in other sections, where its attention was turned to other things. *Griffith v. Carter*, 8 Kan. *565. Now, in the one section the sole matter is the time at which lands shall become taxable; in the other, the addition to the tax-roll of lands overlooked by the assessor. Of course, therefore, the former should control the latter in this matter of the time of taxability. This would be true if the time to which the abstract was to be made up was definitely stated. Much more so when it is left so uncertain and indefinite. Effect also is thus given to both sections. By the first, the time of taxability is definitely fixed; by the second, one means is provided of ascertaining additions to the taxable lands of the prior year. It is true, a fuller list of additions would be obtained if the abstract extended to the first of March of such year; but the legislature may have thought that by this abstract the county clerk would reach all the lands that the assessor had overlooked. At any rate, if each abstract was extended from July 1st to July 1st, the county clerk would be in a position to ascertain the total additions. However that may be, we are clear in our opinion that the first of March remains unchanged as the time to which the taxability of lands must be referred.

The district court erred in its judgment; and as the case was tried upon an agreed statement, it must be remanded, with instructions to enter judgment in favor of the plaintiff, decreeing the tax sale and certificate thereon null and void.

(All the justices concurring.)

*416 *In re Application of EVALINA CLARA CUNNINGHAM to Compel the Issuance of a Patent.*

January Term, 1875.

1. **Public Lands: Right to Patent: Receipt of Treasurer.** Neither the act of the legislature of Kansas entitled "An act providing for the sale of public lands to aid in the construction of certain railroads," approved February 28, 1866, (Laws 1866, p. 142,) nor any other act, makes it the duty of the governor to issue a patent for land sold under said act of 1866 until "a receipt of the state treasurer for full payment" for the land has been presented to him.
2. **Mandamus: To Compel Issuance of Patent.** A writ of *mandamus* can be issued against a public officer only in a case where the officer has neglected or refused to perform some official duty; and therefore, where no "receipt of the state treasurer for full payment" for land sold under

said act of 1866 has been presented to the governor, nor even issued, a writ of *mandamus* will not be issued against the governor to compel him to issue a patent for land sold under said act.¹

Original proceedings for *mandamus*.

A verified petition for a *mandamus* was filed in this court on the sixteenth of March, 1875, which alleged the following facts: "That on the eighth of June, 1868, one H. S. Cunningham purchased from George W. Veale, who was then the duly appointed, authorized, and acting agent of the state for the sale of the same, the S. E. $\frac{1}{4}$ of section 6, in township 6, of range 5 east,—said land being a part of the 500,000 acres granted to the state of Kansas by the act of congress approved September 4, 1841, and by the state of Kansas ordered to be sold by virtue of an act of the legislature approved February 23, 1866; and at the time of said purchase said Cunningham paid one-half of the purchase money, to-wit, the sum of \$160, and gave his note for the balance, to-wit, \$160, payable two years after date, and thereupon he obtained from said agent a certificate stating the facts heretofore set out, and stating further that, on payment of said note, and presentation of said certificate to the governor of said state, he, or his assigns, should be immediately entitled to a patent for said land, which said certificate is now produced for the inspection and order of this court; that on the nineteenth of April, 1869, the said

H. S. Cunningham duly, and for a valuable consideration,
 *417 *assigned said certificate to the relator, which assignment, duly acknowledged, is here presented to the court for inspection; that after the note hereinbefore referred to became due, to-wit, January 9, 1874, the relator paid the same, principal and interest, to one R. D. Mobley, (who was then the duly-appointed and acting agent of the state to sell the lands hereinbefore mentioned, and to take pay for the same,) and took up said note, and received from said Mobley a certificate that the payments in full had been made on said lands, which note and certificate are now shown to the court. By reason of which facts your relator became and is entitled to a patent for said land, and accordingly, on the tenth day of March 1875, she exhibited the papers hereinbefore referred to to Thomas A. Osborn, who was then and still is the governor of the state of Kansas, and demanded that he issue to her a patent for said lands, but the said Thomas A. Osborn, disregarding his duty in the premises, refused and still refuses to issue a patent, admitting that all that is set forth in this petition is true, but alleging that the relator has not produced a receipt from the treasurer of state for the money so paid. The relator admits that she has not and cannot produce such a receipt, for the reason that the treasurer refuses to give one. The relator is informed and believes it to be true that the said R. D. Mobley, disre-

¹ When *mandamus* will or will not lie, see notes to *Hussey v. Hamilton*, 5 Kan. 278; *State v. Stockwell*, 7 Kan. 64.

garding his duty, has not paid said money into the state treasury, but is wholly insolvent, and has converted said money to his own use. The relator has no plain and adequate remedy in the ordinary course of the law, and therefore prays that a peremptory writ of *mandamus* may issue, at the cost of the relator, Thomas A. Osborn, commanding him forthwith, as governor of the state of Kansas, to issue to relator a patent for the lands hereinbefore described."

A. L. Williams and *Ross Burns* appeared for the relator, and made oral arguments in support of their motion for a *mandamus*. No appearance in opposition.

VALENTINE, J. This is an application for a writ of *mandamus* to compel Thomas A. Osborn, governor of the state of Kansas, to issue a patent to the relator for some land claimed by her under a *418 purchase made under an act of the *legislature entitled "An act providing for the sale of public lands to aid in the construction of certain railroads," approved February 23, 1866. Laws 1866, p. 142. The governor refuses to issue the patent on the ground that the relator has not presented to him "a receipt of the state treasurer for full payment" for the land, as provided by section 3 of said act. It not only appears from the proofs presented to us that the relator has not presented such receipt to the governor, but it also appears that no such receipt has ever been issued; nor has full payment, even, ever been made to the treasurer for the land. It is alleged, however, by the relator that full payment has been made to the state agent, and that it is the agent who has failed to make the proper payment to the treasurer. Under these facts, can a writ of *mandamus* be issued against the governor? We think not. There is no law that requires him to issue a patent in a case like the one at bar, except upon presentation to him of said receipt. That receipt has not been presented. Then what official duty has he neglected or refused to perform? None has been pointed out to us, and we know of none. We suppose it is clear beyond all doubt that the writ of *mandamus* can be issued against a public officer only in a case where such officer has neglected or refused to perform some official duty. No such neglect or refusal is charged against the governor in this case. The writ of *mandamus* prayed for will therefore be refused.

(All the justices concurring.)

v.14k.—21

STATE *ex rel.* JAMES GRIFFITH and others v. OSAWKEE TOWNSHIP and others.

January Term, 1875.

Municipal Bonds: Public Purposes: Constitutional Law: Act Held Void. The act of the legislature of 1875, entitled "An act authorizing townships to issue bonds for relief purposes," in that it provides for the issue of bonds and the levy of taxes for other than public purposes, is unconstitutional and void.¹

*419 *Error from Jefferson district court.

Chapter 42, Laws 1875, entitled "An act authorizing townships to issue bonds for relief purposes," was passed and approved February 20th, and was published February 23d. On the eighth of March the electors of the township of Osawkee, Jefferson county, at an election called and held for that purpose, voted for the issuance of "relief bonds" to the amount of \$6,000, to be issued under said act of twentieth February. On the eleventh of March James Griffith and William Armistead, resident citizens and tax-payers in said Osawkee township, as relators, commenced an action in the district court in the name of The State of Kansas, as plaintiff, against said Osawkee Township, and against the trustee, clerk, and treasurer of said township, as defendants, to restrain and perpetually enjoin the defendants from executing, signing, issuing, or selling said "relief bonds" so as aforesaid voted to be issued, or any of them. A temporary injunction was granted. The defendants appeared, and moved to dissolve said temporary injunction, and said motion to dissolve was heard before the district judge, at chambers, on the twenty-second of March. It was admitted on the hearing that the election was duly and legally held, that all acts and proceedings of the township board were regular, and that there was a majority of 37 votes at said election in favor of issuing said bonds. The district judge dissolved the injunction. The case was argued orally in the supreme court.

D. H. Morse, J. H. Bennett, and Williams & Burns, for relators.

H. Keeler and Martin & Case, for defendants.

BREWER, J. But a single question is presented in this case for
*420 our consideration, and that is the constitutionality of *the act of the last legislature entitled "An act authorizing townships to issue bonds for relief purposes." Laws 1875, p. 53, c. 42. The matter has been pressed upon our early attention and decision for

¹ As to municipal bonds generally, see cases in note to Whelen's Appeal, 1 Atl. Rep. 109. See, also, *Lewis v. County of Bourbon*, 13 Kan. *186; *County of Leavenworth v. Miller*, 7 Kan. 298, and cases cited.

these reasons: The time within which these bonds may be issued is limited. The purposes sought to be accomplished thereby must be speedily accomplished. An impression widely prevails, supported by an official opinion of the attorney general, that the act is beyond the scope of the legislative authority, and that the bonds provided for in said act would, if issued, be destitute of legal obligation. Hence it is said, and with great propriety, that an authoritative decision is of public importance; that if the act be constitutional such townships as desire may avail themselves of its benefits, and negotiate more easily, and at higher figures, the bonds they may issue; and that, on the other hand, if the act be unconstitutional, no steps may be taken under it, the evil of repudiation be avoided, and other measures of relief be resorted to. Impressed with the force of these considerations, we have given the matter our early attention, and proceed now to state briefly the conclusions we have reached.

Two propositions may be considered settled: *First*, that taxation, to be sustained, must be for a public purpose; and, *second*, that where municipal bonds are issued, whose payment is provided for solely by taxation, their validity depends upon the question whether the purposes to which the proceeds of such bonds are to be applied are public purposes. *County of Leavenworth v. Miller*, 7 Kan. *479; *Citizens' Sav. & L. Ass'n v. City of Topeka*, (recently decided by the supreme court of the United States,) 20 Wall. 655. It is also conceded by counsel that the entire purpose, or, if there are several, and no rule of apportionment as to the application of the proceeds, that all the purposes, must be public. In other words, that the legislature cannot validate bonds for private purposes by declaring that the authorities may apply an indefinite portion of the proceeds to some public

purpose. With these preliminary remarks let us turn to the *421 act in *question, and see to what purposes the proceeds of the bonds authorized by it are to be applied. The first four sections provide for the amount of bonds that may be issued, their form, title, time, rate of interest, the limit of the price for which they may be sold, and the placing of the proceeds to the credit of the relief fund. The last clause of section 4 then reads: "Provided, that no part of such fund shall be used except for the specific objects hereinafter named." Section 5 is as follows:

"Sec. 5. The trustee, clerk, and treasurer of such township, or a majority of them, shall, as soon as practicable, sell and dispose of the bonds issued by them under the authority of this act to the best possible advantage, and invest the proceeds, or so much thereof as in the judgment of said officers may be necessary, for the purpose of providing the destitute citizens of such townships with provisions and with grain for seed and feed; and the officers aforesaid shall distribute such articles of necessity amongst the destitute citizens of such township in proportion to their several necessities, under such rules and regulations as may be prescribed, in accordance with the provisions

of the fourth section of this act: provided, that no family shall receive more than seventy-five dollars in value."

The relief of the poor—the care of those who are unable to care for themselves—is among the unquestioned objects of public duty. In obedience to the impulses of common humanity, it is everywhere so recognized. Our own constitution but gives utterance to the universal voice when it says: "The respective counties of the state shall provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity, or other misfortune, may have claims upon sympathy and aid of society." Article 7, § 4. It must be borne in mind, however, that the term "poor" is used in two senses. We use it in one sense simply as opposed to the term "rich." Thus we speak of the ordinary laborers, mechanics, and artisans as poor people, without a thought of describing persons who are other than self-supporting. Indeed, the large majority of our people are poor people, and yet they would feel insulted to be told that they are objects of *492 public charity. *We use the term also to describe that class who are entirely destitute and helpless, and therefore dependent upon public charity. The dictionaries recognize this twofold sense. Thus, Webster gives these definitions: "1. Destitute of property; wanting in material, riches, or goods; needy; indigent. It is often synonymous with 'indigent,' and with 'necessitous,' denoting extreme want. It is also applied to persons who are not entirely destitute of property, but who are not rich; as, a poor man or woman; poor people. 2. (*Law.*) So completely destitute of property as to be entitled to maintenance from the public." Now, when we speak of the relief of the poor as a public duty, and one which may justify taxation, we use the term only in the latter sense. We have no thought of asserting that because a man is not rich, or even because he has nothing but the proceeds of his daily labor, therefore taxation may be upheld in his behalf. Such taxation would be simply an attempt on the part of the state to equalize the property of its citizens. Something more than "poverty," in that sense of the term, is essential to charge the state with the duty of support. It is, strictly speaking, the pauper, and not the poor man, who has claims on public charity. It is not one who is in want merely, but one who, being in want, is unable to prevent or remove such want. There is the idea of helplessness as well as of destitution. We speak of those whom society must aid as the dependent classes, not simply because they do depend on society, but because they cannot do otherwise than thus depend. Cold and harsh as the statement may seem, it is nevertheless true that the obligation of the state to help is limited to those who are *unable* to help themselves. It matters not through what the inability arises,—whether from age, physical infirmity, or other misfortune,—it is enough that it exists. It is doubtless true that, in the actual administration of the poor-laws, many who are not properly entitled thereto receive public support; but failures in the adminis-

tration of laws do not change the principles upon which they must rest. It is important to bear this distinction in mind, for, as *423 will appear *hereafter, it is really the former, and not the latter, class which is sought to be relieved under this law. It may be remarked, in passing, that it was claimed by counsel as one of the objections to this act that, under the rule, "*expressio unius, exclusio alterius*," inasmuch as the constitution casts upon the respective counties the care of the destitute, there was an implied prohibition upon casting it elsewhere. Much might be said, and with great force, in support of this objection; but we do not care to decide whether it be well taken or not, much less to rest this case upon it, for such a decision might be construed as an implied recognition of the validity of the principle which we are constrained to believe cannot be sustained.

The purpose of the act, as expressed in the section quoted, is to provide the destitute with provisions, and with grain for seed and feed. This legislation must be construed in the light of known facts. For reasons unnecessary here to recount, in some portions of the state last season there was a total, and in others a partial, failure of the crops. It was generally understood that many farmers would come to this spring's sowing with little or no seed, and with stock weakened for lack of grain. To make good this lack is the evident purpose of the act,—to provide grain for seed and feed. Its aim is not to furnish food to the hungry, clothing to the naked, or fuel to those suffering from cold. It is not the helpless and dependent whose wants are alone sought to be relieved. If it were, the fact that many who are neither helpless nor dependent might obtain assistance through its administration, would be no valid objection to the constitutionality of the law. It contemplates a class who have fields to till and stock to care for, and proposes to help them with seed for their fields and grain for their stock, that thus they may pursue with better prospects of success their ordinary avocations. It taxes the whole community to assist one class, and that, not for the purpose of relieving actual want, but to assist them in their regular occupations.

These people are engaged in the business of farming. This *424 business cannot *be successfully carried on without seed, nor without stock strong enough to do the ordinary work. They are destitute of seed, and their stock require grain. Hence the tax upon the community. The principle would be the same if their supply of grain was sufficient, but, through the prevalence of the epizooty, or some other disease, their stock had all died. Could a tax be sustained to purchase stock for their ordinary farm work? Or, again, suppose some prairie fire, driven by a fearful wind, sweeps through a county, consuming its fences and farming tools, can a tax be sustained to supply this loss, and enable the farmers to prosecute their labors? Nor need the inquiry be limited to a single class. Were the carpenters or shoemakers, or any other industrial class,

located in a separate quarter of a city, and their tools and stock in trade swept away by fire, could a tax be sustained to purchase new sets of tools, and new stock in trade, to enable them to re prosecute their business, and secure support for themselves and families? No distinction in principle can be made between these different supposed cases and the case at bar. They all rest upon this proposition: that a tax is laid upon the public to furnish to one class the means of carrying on its regular occupation. A further examination of this act will but strengthen the views herein expressed. The four succeeding sections are as follows:

"Sec. 6. Each person receiving any portion of the aid provided for in this act shall take and subscribe the following oath:

"I do solemnly swear (or affirm) that I am buying the aid, this day furnished to me, for myself, and not for speculation, but in good faith, for the use of myself and family, and that I am unable to procure the same on my own account. (Name.)

"Attest: _____.

"Sec. 7. Each person receiving any part of the aid provided for in this act shall execute his or her note to such township for an amount equal to the cost of the aid received by him; and if the maker of such note be a married man, the same shall be signed by his wife; which note shall bear the same date as the bonds herein provided for; shall bear interest at the rate of ten per cent. per annum, payable semi-annually; and the principal of the note shall be payable in *425 *two equal annual installments; and the said note shall be payable at the treasury of such township; and such township shall have a lien against the real and personal property of the makers of such note until the amount thereof is fully paid. Said township clerks shall immediately make a register of all such notes, in a book to be kept for that purpose, showing the names of the maker or makers of such note or notes, the number and dates thereof, and the amounts of the same; and, so soon as such register is made, such notes shall be delivered to the several treasurers of such township, who shall immediately make a like record of such notes, and shall file such notes in their respective offices; and within thirty days after the making of the abstract aforesaid, by the township clerks as aforesaid, said clerks shall make out and deposit in the office of the register of deeds of their respective counties a full and complete certified copy of such abstracts; and such register of deeds shall enter such abstract in a book to be kept by him for that purpose. The note provided for in this section shall be in form substantially as follows:

"\$ _____, 187—.

"For value received _____ promise to pay to the township of _____, in the county of _____, the sum of _____ dollars, payable in installments as follows: _____ dollars on the _____ day of

_____, 187—, and _____ dollars on the _____ day of _____, 187—, with interest on said sums at the rate of ten per cent. per annum until paid; and this note shall be a lien upon the real and personal property now owned, or hereafter acquired, by _____, until the said note is fully paid.

“ _____.

“Sec. 8. The treasurers of such townships shall collect said notes as they become due, and credit the amounts so collected to the ‘relief fund’ of such township; and it shall be the duty of such treasurers to take all proper and needful action for the purpose of enforcing the claims of such township against the property of the makers of said notes.

“Sec. 9. Upon the recommendation of the proper officers of such townships, the proper officer or officers of the county in which such township is situated shall annually, when other taxes are levied, levy and collect, as other taxes are levied and collected, a sufficient tax to pay the interest on the bonds provided for in this act, as the same falls due, and to provide a sinking fund for the final payment of the principal of said bonds; but in no case shall any such tax be levied if the payments made on the notes provided for in the seventh section of this act shall be sufficient to meet the interest and principal of such bonds as they fall due.”

*426 *These various provisions show that the idea of the legislature was not the relief of the helpless and dependent, but the assistance of a class temporarily embarrassed. The recipient is required to make oath that he is buying the aid for himself, and not on a speculation. He is to give a note for the amount received, and, if a married man, the note must also be signed by his wife. The note is to bear the same date, and draw the same interest, as the bonds, and the interest is payable at the same time as the interest on them. This note is to be a mortgage as well, and the most sweeping kind of a mortgage, too, embracing all the real and personal property of the maker, whether owned at the time of its execution or subsequently acquired. And, finally, it is made the express duty of the township treasurer to see to the collection of this note, and to take all proper and needful action therefor. Nothing is contemplated but a loan, and a secured loan at that. The credit of the township is invoked to procure funds for the accommodation of a single class temporarily, and through unexpected calamity, embarrassed in the prosecution of its ordinary business. Can this be called a public purpose? Clearly not. It would doubtless relieve the temporary wants of that class, would enable it to enter upon the business of the year with increased hope, and a reasonable expectation of ordinary success in that business, and thus indirectly result in great benefit to the general public. But a similar result would follow the success and prosperity of any other class in business. And if the principle be once recognized in

its application to this class, who can tell how soon it may be invoked in aid of another? If one hundred farmers may receive seventy-five dollars each to assist them in their farming, why may not one hundred mechanics with equal propriety receive seventy dollars each to assist them in their business? or a single manufacturer, who employs one hundred hands, receive seventy-five hundred dollars to assist him in his manufacturing? A difference in amount makes no difference in the principle:

*427 But it may be said that this legislation can be defended *as* preventive and anticipatory. To prevent the spread of disease, quarantine regulations are enforced, and ships coming from certain places are, with all their passengers, detained in quarantine, even when not a solitary case of sickness exists on board. To prevent ignorance in the voter, the child is compelled to be educated. To prevent crime in the man, the boy is sent to the reform school. To prevent the spread of fire, valuable buildings are pulled down and destroyed. Grant that these parties are not now helpless and dependent; that they are not a public charge. Unless they are able to make and harvest a crop they may become so the ensuing winter. Is it not the part of wisdom to expend a little now to purchase seed and feed, rather than run the risk of having them become paupers hereafter? Under the peculiar circumstances of this case, this argument is a strong one. We are not disposed to belittle the magnitude of the calamity, or make light of the hardships of those upon whom it has principally fallen. If we consulted simply our own feelings, we should gladly approve of this as of every effort to mitigate the severity of the blow. But though this calamity is great, and though by reason thereof it may seem wise to appropriate out of the public funds a little now to guard against the risk of future want, yet the principle is dangerous and unsound. Let the doorways of taxation be opened, not merely to the relief of present and actual distress, but in anticipation of and to guard against future want, and who can declare the result? How certain must be the expectation of want? How nigh its approach? What efforts must the individual make to ward it off? May he do nothing, and demand that the public make provision to guard against the possibility of future suffering? Must widespread and general calamity precede the granting of such anticipatory relief, or is it enough that individual misfortune or indolence render probable the approach of want? The mere mention of these questions suggests the dangers which would follow the adoption of this as a rule of public conduct.

But the attendant dangers of such a rule are not the sole or
 *428 the controlling *as* considerations. The relief provided in this act is only indirect, and contingent. There is no direct appropriation to meet future want. The appropriation is for present use, and the relief is contingent on the successful prosecution of the business of the recipients during the ensuing year. If the crop proves

a failure, the public funds are lost, and no relief is secured. It is a speculation, which, however proper and reasonable for individuals, is not a legitimate part of public duty. The same principle would justify assistance to a mechanic destitute of tools, to enable him to purchase tools, and through their use in his regular calling prevent his becoming a public burden. Indeed, it would be difficult to deny its application in any case where, by present assistance, either in the purchase of implements or stock in trade, the recipient might reasonably be expected to earn a subsistence in the prosecution of his regular business. We should expect to find but few authorities to throw any light upon this question. The case of the Citizens' Sav. & L. Ass'n v. City of Topeka, heretofore cited, decides that taxation cannot be invoked to assist private manufacturing establishments. The propositions laid down by Mr. Justice MILLER in reference thereto are broad. It matters not how great may be the necessities of such an establishment, or how much it may indirectly benefit the community, it cannot be aided by taxation. The same propositions were asserted by the supreme court of Maine in the case of Allen v. Inhabitants of Jay, 60 Me. 124. That was a case of an attempted loan of the credit of a town to certain parties in consideration of their engaging in some manufacturing enterprises for their private emolument. In delivering the opinion of the court APPLETON, C. J., uses this strong language: "But whether the money raised is to be distributed *per capita* or loaned can make no difference in principle. If towns can assess and collect money to be again loaned to such persons as the majority may select, for such purposes as it may favor, with such security, or without security, as it may elect, property ceases to be protected in its acquisition or enjoyment. * * * If the loan be made to *429 *one or more, for a particular object, it is favoritism. It is a discrimination in favor of the particular individual, and a particular industry thereby aided, and is one adverse to and against all individuals—all industries—not thus aided. If it is to be loaned to all, then it is practically a division of property under the name of a loan. It is communism incipient, if not perfected." But the case most nearly in point is that of Lowell v. City of Boston, 111 Mass. 454, recently decided by the supreme court of Massachusetts. In that, as in this, it was the circumstance of a great public calamity,—the Boston fire,—and a praiseworthy effort on the part of the legislature to provide assistance for the sufferers thereby. An act was passed authorizing the city of Boston to loan its credit to assist in rebuilding the burnt district. But this was declared to be outside the purposes for which taxes could be levied or bonds issued. We have been able to find nothing more in point than these authorities, and they all point in the same direction as the considerations we have heretofore adverted to.

It is with reluctance that we have reached the conclusion that this act cannot be sustained. But ours is an unmixed duty, to declare

the law as it is, and not as we might wish it to be. Especially imperative is that duty when, as in cases like the present, there is in the surrounding circumstances a strong appeal to overlook permanent rules in favor of a present and pressing want.

The judgment of the court below is reversed.

(All the justices concurring.)

*430

*JOSEPH G. MCCOY v. H. H. HAZLETT.¹

January Term, 1875.

1. **Payment: Promissory Note: Pre-existing Debt.** The mere giving and receiving of a note of the debtor does not operate as a satisfaction and discharge of a pre-existing judgment.
2. ———: **Judgment: Alleged Payment: Conflict of Testimony.** Where an action is brought to restrain the collection of a judgment on the ground that it has been satisfied by the note of the judgment debtor; and the parties testify positively and directly contradictory to each other,—one that it was agreed that the note should be taken in satisfaction and discharge of the judgment, and the other that it was not so agreed; and there is some testimony supporting each of the parties, but none conclusive upon the question; and it appears that the note has not been paid, but is filed with the clerk of the district court: *held*, that this court will not reverse the findings of the district court that the note was not so taken in discharge.

Error from Dickinson district court.

The case is stated in the opinion. There was judgment in favor of Hazlett in the district court.

Case & Putnam, for plaintiff in error, contended that the testimony showed that the note was taken by Hazlett in *satisfaction* of the judgment.

N. C. McFarland, for defendant, cited *Merrick v. Boury*, 4 Ohio St. 60; *Porter v. Talcott*, 1 Cow. 380; and *Tobey v. Barber*, 5 Johns. 72,—that a note given by a debtor for a pre-existing debt is no payment of the original demand, unless it is *agreed* that the note shall be taken as satisfaction; and when such "agreement" is alleged, it must be proven by clear and undoubted testimony, to avail the party who alleges it.

*431 *BREWSTER, J. The facts in this case are as follows: Hazlett commenced an attachment suit against McCoy in the district court of Dickinson county, and at the April term, 1870, recovered a judgment for \$649.29. On the same day McCoy paid \$500 in cash,

¹See *Kermeyer v. Newby*, *ante*, *164, and note; *Shepard v. Allen*, 16 Kan. 189; *Mullins v. Brown*, 32 Kan. 312; S. C. 4 Pac. Rep. 305

and gave his note for the balance, payable on or before the first of August next ensuing. In consideration of this, Hazlett released his attachment lien, and credited the \$500 on the judgment. McCoy claims that he paid, and that Hazlett received, the cash and note in full satisfaction of the judgment, and that the latter agreed to cancel and discharge it of record. This Hazlett denies. Afterwards Hazlett brought suit on the note before a justice of the peace, and was beaten, McCoy testifying in such action that the judgment was still in force to the amount of the note, and that the plaintiff had levied on property to satisfy it. Hazlett took no appeal from this judgment of the justice. The note itself was filed with the clerk of the district court, never having been paid by McCoy. This action is brought by McCoy to restrain Hazlett from proceeding to collect the \$149.29 as balance due upon the original judgment. A temporary restraining order was made, but, upon final hearing, the district court found in favor of Hazlett, and discharged the order. To reverse this ruling this proceeding in error is brought. It seems to us that there is but a single question in the case, and that one of fact, and one upon which there was contradictory testimony. Was it agreed between McCoy and Hazlett that the \$500 and the note should be in full payment and satisfaction of the judgment? If it was, the restraining order should have been made perpetual; if not, it was properly discharged. The mere giving and receiving of a note of the debtor does not operate as a discharge of a pre-existing judgment. This will not be questioned. Upon the trial Hazlett testified positively that he never agreed to take this note in satisfaction. McCoy testified to the contrary. McCoy's testimony before the justice tended to support Hazlett's testimony here. *432 The fact of Hazlett's bringing suit on the note tended to support McCoy's evidence. There was no other testimony bearing upon this question. The district court having upon this evidence found in favor of Hazlett, and it being ample to support such finding, well-settled rules of procedure in this court forbid us to interfere with the decision.

The judgment will be affirmed.

(All the justices concurring.)

ISAAC SHELLABARGER and another v. J. W. BISHOP and others.

January Term, 1875.

Mechanic's Lien: Law of 1872: Filing Statement: Time. Under the mechanic's lien law of 1872 a party furnishing materials for the erection of a building had four months from the completion of the building in which to file his statement for a lien.¹

Error from Shawnee district court.

Shellabarger & Leidigh sold and delivered to Bishop, in October, 1872, lumber to be used in the erection of a building on real estate then owned by Bishop. On the first of November, 1872, Bishop gave S. & L. his note for the lumber. Said building was completed in December, 1872. On the twenty-first of March, 1873, S. & L., the note being unpaid, filed their statement, under the mechanic's lien law then in force, for a lien on said building and lands for the amount due on said note. In October, 1873, S. & L. commenced their action to foreclose said lien, making Bishop and a subsequent purchaser of the premises defendants. Trial at the June term, 1874. The district court held that, as the lien statement had not been filed within four months from the delivery of the lumber, no lien had been acquired, and that plaintiffs were entitled only to a judgment *in personam* against Bishop. Judgment accordingly.

*433 *N. C. McFarland and J. G. Slonecker, for plaintiffs.

The lien law of 1872, § 3, says, "Such statement shall be filed within four months after the *completion of the building*," which is decisive of the question, unless the law is held to mean differently from what it says. The completion of the building means the completion of the *whole* building; and the lien may be filed within the time limited after the completion of the whole. *Squires v. Fithian*, 27 Mo. 139; *Holden v. Winslow*, 18 Pa. St. 160.

Martin & Case, for defendants.

Under the mechanic's lien law of 1872 a person who furnishes lumber for the erection of a building, in order to avail himself of the provisions of said law, must file his lien within four months from the time of delivering the last item of lumber. Sections 2 and 3 of said act. The four-months limitation commences to run whenever *the contract between the parties* is completed. The contract is completed when the last item of material is furnished. This is the construction which other statutes of limitation have received; and we cannot conceive of

¹ A statement filed four months before the completion of the building or improvement is not filed within the time prescribed by statute. *Conroy v. Perry*, 26 Kan. 472. The four months within which to file statement for a lien dates from the time the machinery is in fact furnished or put up. *Bashor v. Nordye & Co.*, 25 Kan. 223. Statement held to have been filed prematurely, *Davis v. Bullard*, 32 Kan. 284; S. C. 4 Pac. Rep. 75; *Seaton v. Chamberlain*, 32 Kan. 239; S. C. 4 Pac. Rep. 89. Affidavit for lien, see *Dorman v. Crozier*, ante, *224.

any reason why we should depart from all analogy to give this statute a different interpretation, nor can we understand how a better or juster rule can be made. *Bartlett v. Kingan*, 19 Pa. St. 341; *Stine v. Austin*, 9 Mo. 558; *Viti v. Dixon*, 12 Mo. 479; *Pond v. Wyman*, 15 Mo. 176.

BREWER, J. The question in this case is on the construction to be given to a portion of the mechanic's lien law of 1872. The plaintiffs in error furnished lumber to be used in the erection of a building belonging to one of the defendants. They filed their papers for a lien within four months from the completion of the building, but not within four months of the time of delivering the lumber. Have they a lien? This is purely a question of the construction of the statute. The first section provides that "any mechanic or other person who shall, under contract, * * * perform labor or furnish *434 material for erecting, altering, or repairing any building, or the appurtenances of any building, or any erection or improvement, or shall furnish or perform labor in putting up any fixtures or machinery in or attachment to any such building or improvement, or plant and grow any trees, vines, and plants, or hedge fence, or shall build a stone fence, or shall perform labor or furnish material for erecting, altering, or repairing any fence on any tract or piece of land, shall have a lien upon the whole tract," etc. Section 3, after describing the statement that must be prepared, adds: "Such statement shall be filed within four months after the completion of the building, improvements, or repairs, or the furnishing or putting up of fixtures or machinery, or the planting of such hedge, or the building of such fence, or the furnishing of such material or labor for the building of such fence."

It seems to us that the only time given from which to date, in a case like the one at bar, is the completion of the building. The latter part of the quotation is of course inapplicable, referring, as it does, specifically to fixtures, machinery, hedge, and fence, so that we must look to the first clause. That says, "after the completion of the building, improvements, or repairs." Now, in this there is nothing which, by any sort of fair construction, can be held to refer to the delivery of material. It obviously refers to the completion of the work for which the material was furnished, and upon which the labor was performed. If it was a matter of repairs, the time dated from the completion of the repairs, and not from the time each separate contractor completed his part of the repairs. And the same, if it was the erection of a building. It is true that this may in some cases give a long time in which a secret lien is preserved, and that the law looks with disfavor upon secret liens. But with the wisdom of such legislation we have nothing to do. The legislature prescribes the time, and we are not authorized to limit it. This construction gains some little support from the last clause of the quotation from section 3, that in

reference to the building of a fence. Here the furnishing of the material, as well as the doing of the labor, is made a point from *435 which to date the four months. So that *the matter was before the attention of the legislature, and for reasons which we do not know a distinction was made between fences and buildings. The authorities cited from Missouri and Pennsylvania have little application, as the terms of their statutes are different.

The judgment of the district court will be reversed, and the case remanded for a new trial.

(All the justices concurring.)

WILLIAM H. CLARK *v.* WASHINGTON LIBBEY.

January Term, 1875.

Indian Lands: Ottawa Treaty of 1862: Lands Inalienable for Five Years. Lands patented to the chiefs, councilmen, and head-men of the Ottawa Indians, under the first clause of article 3 of the treaty with said Indians, proclaimed July 28, 1862, were inalienable to others than Ottawa Indians during the five years succeeding the ratification of such treaty.

Error from Franklin district court.

Ejectment, brought by Clark, for 160 acres of land. The case is stated in the opinion. Libbey had judgment at the November term, 1873, of the district court.

C. B. Mason and A. W. Benson, for plaintiff.

Welsh & Meigs, for defendant.

BREWER, J. This was an action of ejectment for a tract of land *436 in Franklin county. Both parties claimed title under *the same patentee, one William Hurr, an Ottawa Indian. Defendant holds under a deed executed December 1, 1865; and the question is whether this deed was void under article 7 of the Ottawa treaty of 1862, (12 U. S. St. at Large, 1239.) There is no dispute but that if this deed is void plaintiff's title is good, and he ought to recover. It was conceded that William Hurr, the patentee, was a councilman and head-man of the Ottawa Indians, and that the lands in controversy were patented under the provisions of article 3 of the said treaty. The treaty provided in its first article that the Ottawa tribe should be dissolved at the expiration of five years from its ratification, and that the individual Ottawas should be deemed and declared to be citizens of the United States from and after that time. Article 3 reads as follows: "It being the wish of said tribe of Ottawas to remunerate several of the chiefs, councilmen, and head-men of the tribe, for their services to them many years without pay, it is

hereby stipulated that five sections of land are reserved and set apart for that purpose, to be apportioned among the said chiefs, councilmen, and head-men as the members of the tribes shall in full council determine; and it shall be the duty of the secretary of the interior to issue patents in fee-simple of said lands, when located and apportioned to said Indians." Said article also grants to these parties, and to all heads of families, 160 acres, and to all other members of the tribe, 80 acres each. By article 6, twenty thousand acres are given for the endowment, and one section for the site, of a school. Article 7 provides that ten acres shall be set apart for the Ottawa Baptist Church, and eighty acres to each of the two children of a former missionary among the Ottawas, which last two tracts are to be selected and located as the other allotments provided for are to be selected and located, and to be "inalienable, the same as the land allotted to the Ottawas." It then continues as follows: "And all the above-mentioned selections of lands shall be made by the agent of the tribe under the direction of the secretary of the interior. And plats and records of all the selections and locations shall be made, and, upon their completion and approval, proper patents by *437 the United States *shall be issued to each individual member of the tribe, and person entitled, for the lands selected and allotted to them, in which it shall be stipulated that no Indian, except as herein provided, to whom the same may be issued, shall alienate or incumber the land allotted to him or her in any manner until they shall, by the terms of this treaty, become a citizen of the United States; and any conveyance or incumbrance of said lands, done or suffered except as aforesaid by an Ottawa Indian, of the lands allotted to him or her, made before they shall become a citizen, shall be null and void."

Does this apply to the lands patented under article 3? It seems to us that it does. It says: "All the above-mentioned selections." Upon what shall be founded an exception in favor of this selection? It must refer to lands selected under article 3, because it speaks of allotments to Indians, and only in that article are such allotments provided for. Indeed, there are no personal allotments provided for except in article 3, and those to the children of the missionary, and as to them we have seen that it is expressly mentioned that they are to be inalienable, the same as the allotments to the Ottawas. Referring, then, necessarily to selections under article 3, and declaring that it embraces "all the above-mentioned selections," it must include this, unless there be something to make this an exception. It is said that the restriction contemplates some exception, because it says, "no Indian, except as herein provided," and that there can be no other exception than these selections for the chiefs, etc. The use of the term, "except as herein provided," would naturally refer to some express exception, and not to one arising by mere implication; and we find in the treaty, as originally made by the Indi-

ans, the express exception attached to the first article was a proviso "that John T. Jones, now a member of the Ottawas, being an educated and experienced man, * * * is hereby declared to be a citizen of the United States, exempt from the restrictions hereinafter provided concerning the purchase, alienation, or incumbrance of the Ottawa lands." Here, then, was the express exception, and the only express exception,—one which might properly be said to be *438 "herein provided." When the *treaty was presented to the senate this proviso was stricken out, and the treaty as thus amended finally ratified. Striking out the proviso to which this term of exception could alone properly apply did not have the effect of creating an exception elsewhere, but left the term nugatory and meaningless.

Again, it is said that patents are to be issued for these lands in fee-simple, and this implies a full title, free from any restrictions upon alienation. This expression, at least when used in Indian treaties, carries no such necessary implication. See the briefs of counsel and the opinion of the court in the case of *Blue-jacket v. County of Johnson*, 3 Kan. *299, and the subsequent opinion of the supreme court of the United States reversing this case, (*The Kansas Indians*, 5 Wall. 737.) Again, it is said that this restriction only applies to selections made by the agent, and that the selections for the chiefs, etc., were to be made by the Indian counsel. We do not so understand the treaty. The seventh article declares that "all the above-mentioned selections of lands shall be made by the agent," while article 3 does not provide for any selection. It says that five sections are to be apportioned among the chiefs, etc., as the council shall determine. This we understand to mean that the council shall determine the amount each chief and councilman shall receive. It also provides that the secretary shall issue patents "of said lands when located and apportioned." The location is not given to the council,—only the apportionment.

It follows from these considerations that the restrictions of article 7 applied to this land, and that the deed under which the defendant holds is null and void. The judgment of the district court must therefore be reversed, and the case remanded for a new trial.

KINGMAN, C. J., concurring.

*439

*DANIEL HORVILLE v. LEVI L. NORTHRUP.

January Term, 1875.

Bills and Notes: Principal and Surety. The maker of a negotiable promissory note is *prima facie* the principal debtor, and the payee and indorser the surety, to the holder thereof, in respect to the indebtedness evidenced by the note.¹

Error from Allen district court.

Northrup brought suit against Faulkner as maker, and Northrup as indorser, of the following note:

"\$1,339.45. .

IOLA, KANSAS, July 22, 1872.

"Ninety days after date I promise to pay to the order of Daniel Horville thirteen hundred thirty-nine and 45-100 dollars, at the banking-house of L. L. Northrup, Iola, Kansas, for value received, with interest at the rate of 12 per cent. per annum after maturity.

"JAMES FAULKNER,

"Executor of Estate of Gabriel Dressback, Deceased."

This note was indorsed, "Daniel Horville," and it was duly protested for non-payment, and notice given, October 23, 1873. Defendants answered separately. Horville's answer was a general denial; and, *second*, "that when he indorsed the said note to the plaintiff he did so for the accommodation and as surety for defendant Faulkner, and that no consideration for such indorsement passed from defendant Faulkner or said plaintiff to him (Horville) therefor, and that there was no consideration whatever for said indorsement, and that said note was made, indorsed, and delivered to plaintiff as one and the same transaction," etc., alleging plaintiff's knowledge of all the facts. Reply, general denial. Trial at November term, 1873. Verdict and judgment for plaintiff against both defendants for \$1,602.19.

Thurston & Keplinger, for plaintiff in error.

J. B. F. Cates, for defendant in error.

*440 *BREWSTER, J. Defendant in error sued one James Faulkner and plaintiff in error upon a promissory note. Faulkner was the maker, and plaintiff in error the payee and indorser. The indorsement was in blank, and the error complained of is in the refusal of the court to permit the plaintiff in error to show by parol testimony that he was liable simply as surety and not as indorser on the note. As the record comes before us, we think no error is apparent. It was proved that demand and notice had been legally made and given, so that Horville's liability as indorser was fixed beyond dispute. Nor

¹ As to the rights and liabilities of sureties, see the notes to *Rose v. Williams*, 5 Kan. 298; *Turner v. Hale*, 9 Kan. 36; and *Ray v. Brenner*, 12 Kan. *100.

was there at any time any effort to question the fact of due demand and notice. But during the introduction of the evidence for the defendant, the counsel for plaintiff and Horville discussed before the court the question whether Horville could introduce parol testimony "to show that his liability on the note sued on was that of surety merely," and the court decided "that the rule of law which did not permit parol evidence to vary or contradict the terms of written instruments admitted of no exceptions except upon equitable grounds, as in case of fraud, accident, mistake, and the like, and that in this case defendant Horville, not having brought himself within any of these equitable exceptions, could not introduce evidence to vary or contradict the terms of the contract sued on." It would be a sufficient disposition of this matter to say that it appears by the record to have been a discussion upon no actual present question before the court, and a decision followed by no exception.

But, waiving these suggestions, and considering the ruling as properly before us, we think, as the case stands, it must be sustained. We confess to a little embarrassment in determining in what manner to construe the claim of counsel. It cannot, of course, be that he claims that Horville could show that he was, as surety, liable on the note, without any proof of demand and notice,—the ordinary steps to charge an indorser,—for that would be a claim it were idle *441 to make, as the record states that due proofs *of these matters had already been made. And, besides, it would be a claim against Horville's interest,—a waiver of any objection that could be made to the sufficiency of the proof already made upon these matters, as well as of any counter-testimony he might have thereon. It would be a concession of one of the points otherwise necessary to be proved to establish his liability. On the other hand, if the claim was simply that, after the liability of Horville was fixed by proof of demand and notice, then he could show that, as between himself and Faulkner, the latter was the principal debtor, and himself only the surety, the law implied that to be the relation of the parties, and no testimony was necessary to change this implied relation. While it may not be correct to say that the contract of indorsement is merely one of suretyship, for "one who is technically a surety on promissory paper is generally an original promisor, and primarily liable, which an indorser never is," yet the relation of indebtedness of the maker and indorser of a note to the holder is *prima facie* that of principal and surety. Whatever releases the maker discharges the indorser. Any new contract with the maker upon valid consideration, which changes the nature and extent of his liability, releases the indorser. In Byles on Bills (marginal page 190) it is said that "the acceptor is the principal debtor, and all the other parties are sureties for him, liable only on his default. But though the other parties are, in respect to the acceptor, sureties only, they are not, as between themselves, merely co-sureties, but each prior party is a principal in respect of

each subsequent party." And, again, on the succeeding page: "As the acceptor is at law in all cases the principal debtor on a bill, so the maker is at law the principal debtor on a note, though it be given by the maker to the payee without consideration, and the holder take it with notice of absence of consideration. The indorsers of a note severally stand as principals or sureties in the same situation as the indorsers of a bill." So that the relation which, by implication of law

from the note itself, Horville sustained to this indebtedness, *442 was precisely that which he claimed the *right to show to the court by parol testimony. The ruling of the court, therefore, whether correct or not, was in his favor, and he has no grounds of complaint therefor in this court.

After this ruling of the court, Horville asked leave to amend his answer so as to allege that he signed his name on the back of the note under the impression that the note was payable to the order of the plaintiff, and not, as was the fact, to the order of himself. No showing was made upon this application, and we cannot see that the court abused its discretion in denying it. A good deal of testimony was admitted as to the circumstances attending the execution of this note, and as to its consideration. Upon that testimony, and independent of the instrument itself, it may be doubtful whether either party could properly be said to be the security of the other. This note was given in renewal of a prior note, and there appear to have been several renewals. The note first given was by Gabriel Dressback as maker, and Horville as security. The consideration of this was a loan from plaintiff to Dressback. The sole consideration for each succeeding note was the preceding. Intermediate the first and the last, Dressback died, and Faulkner was appointed his executor. Faulkner signed this note, describing himself as executor, and evidently supposing he was simply binding the estate, but really rendering himself personally liable. Was either Faulkner or Horville then in fact the surety of the other, or were they both simply co-sureties for an unnamed principal, the estate of Gabriel Dressback? We forbear pursuing this inquiry further, for Faulkner is interested in the question, and should properly be brought before the court before it is determined.

The judgment of the district court will be affirmed.

(All the justices concurring.)

*443 *H. D. SHEPARD and another v. M. B. HAAS and another.

January Term, 1875.

1. **Evidence: Contemporaneous Parol Agreement.** Where a written agreement is obscure and uncertain, and clearly does not cover all the points which would ordinarily be settled between parties in an arrangement concerning the subject-matter of such agreement, it is error to refuse to permit inquiry as to whether there was or was not some independent contemporaneous parol agreement concerning it.¹
2. **Error: Sufficient Assignment of.** An assignment of error in these words: "That the court erred in ruling out the evidence offered by A. B., [the plaintiff in error,] on the trial of said action, to which said A. B. at the time excepted,"—is sufficient.

Error from Osage district court.

Action by M. B. Haas and H. B. Haas, as partners, against Shepard & Playford, as partners. Trial at the November term, 1873. Verdict and judgment in favor of plaintiffs, and Shepard & Playford bring the case here.

James Rogers, for plaintiffs in error.

It was not irrelevant and incompetent to introduce verbal testimony to show what the contract between Haas & Co. and Wheat was relative to the purchase of the note and mortgage; that the papers called a "contract" are so vague, indefinite, and uncertain, of themselves, that they are meaningless without explanation; and that the court should have allowed them to be explained. The papers, of themselves, are only receipts; but they refer to an agreement which may be conditional, or positive, or both, and which plaintiffs in error had a right to prove in support of their set-off.

Ellis Lewis, for defendants in error.

The petition in error only assigns as error "that the said court, *444 in ruling out the evidence offered by the said H. D. *S. and J. J. P., on the trial of the said action, to which they at the time excepted." This is not a good assignment under the statute. Civil Code, § 544. The assignment of errors relied upon must be specific. *Wright v. Potter*, 38 Ind. 61; *Waggoner v. Liston*, 37 Ind. 357; *Jolly v. Terre Haute Drawbridge Co.*, 9 Ind. 419.

Wheat and Haas & Co. had entered into a written contract in reference to a particular matter, and whatever rights Wheat had acquired under that written contract with Haas & Co. he might assign, and nothing more; and the court did nothing but "exclude parol evidence tending to vary a written contract." Such evidence can be given to explain a written contract, and Wheat was allowed to do

¹See *Babcock v. Deford*, *ante*, *408, and note. *A contract, which is not required by statute to be in writing, may be partly expressed in writing and partly in an unwritten understanding between the parties; and, if so, such understanding may be proved by parol. *St. Louis, L. & W. Ry. Co. v. Maddox*, 18 Kan. 546.

this. A written instrument may be both a *receipt* and a *contract*. Anything that needed *explanation* was explained. But when plaintiffs in error offered to show a contract *different* from the writing, it was properly excluded.

BREWER, J. Defendants in error brought an action on an account for merchandise sold and delivered to plaintiffs in error. The correctness of this account was not disputed, but plaintiffs in error claimed an offset as follows: They alleged, in substance, that Haas & Co. (the defendants in error) sold, and agreed to assign, to one Joseph Wheat a note and mortgage of the value of \$351.25; that the money paid by Wheat therefor was the money of H. D. Shepard & Co., and that all claims for the money and the note and mortgage were assigned to plaintiffs in error, and that defendants in error refused to return the money, or assign the note and mortgage. Upon the trial it appeared that these papers were executed at the time of the negotiations between Haas & Co. and Wheat:

"BURLINGAME, August 13, 1872.

"Rec'd of Joseph Wheat one draft at sight, dated August 13, 1872, for \$200, on Messrs. Gregory, Strader & Co., Kansas City, Mo., which, if said draft of \$200 is paid and promptly honored, and be placed to the credit of Joseph Wheat, in full of the account of Craig & Wheat:

"HAAS & Co.

"Otherwise this receipt to be of no effect, and void.

*445 *Which, if said property is foreclosed, to be bought by Haas & Co., and make a deed to Joseph Wheat.

"August 13, 1872.

HAAS & Co.

"The expense to be paid of foreclosing and costs by Jos. Wheat."

Upon the presentation of these papers (for they are spoken of as two exhibits) the court ruled out all evidence tending to show any agreement between the parties other than as therein expressed, and this is the alleged error. The direct question was asked the witness Wheat whether there was any other and further agreement between Haas & Co. and himself than is expressed in these writings; but the court sustained an objection to the question. It appeared from the evidence that the property referred to in the exhibits was a mortgage on some property in Newton, Kansas. The witness Wheat testified that the last clause in the second exhibit referred to the costs of foreclosing this mortgage. He was also asked at whose option this mortgage was to be foreclosed, and whether the mortgage was to be foreclosed without his request, and whether Haas & Co. were to do anything in case there was no foreclosure. All these questions were objected to, and the objections sustained. In these rulings we think the court erred. Doubtless these exhibits are something more than receipts. They are, in some parts at least, evidently contracts, and thus within the rule which forbids parol testimony to vary or contra.

dict written agreements. But the existence of a written contract does not always exclude the possibility of a contemporaneous parol agreement bearing upon the same general subject-matter, yet referring to some point or phrase of it not expressed in the writing. And this written agreement, obscure and uncertain as it is, evidently does not reach to all the matters of ordinary consideration in a transaction like the one at bar. Without noticing others, it is enough to refer to the question at whose option the foreclosure was to be had. Upon this the written agreement is silent, and nothing can be implied from the language used concerning it; yet it was a proper matter of agreement, and one ordinarily determined in such an agreement.

*446 But whatever were the facts of the case, it is possible that there was some contemporaneous parol agreement, not contradicting nor varying the written, and yet having some bearing upon the matters in issue. The court refused to let the witness testify whether there was or not, and in this erred. It is true that the first part of the exhibits speaks of the receipt of the \$200 as in full payment of an account; but it is also evident, from the remaining portion, that either in consequence or as a part consideration of the payment the witness Wheat had some rights in a note and mortgage in the possession of Haas & Co. What the extent of those rights was, is, from the papers, doubtful. Perhaps it would have been made clearer if the rejected testimony had been admitted.

But it is insisted by counsel for defendant in error that the assignment of error is insufficient. The assignment is "that the said court erred in ruling out the evidence offered by the said H. D. Shepard and J. J. Playford, on the trial of said action, to which they at the time excepted." And it is objected that it does not specify the particular evidence whose rejection is assigned for error. Notwithstanding the authorities cited from Indiana by the learned counsel, it seems but a necessary deduction from questions already decided in this court to hold the assignment sufficient. *Da Lee v. Blackburn*, 11 Kan. *190.

The judgment of the district court will be reversed, and the case remanded for a new trial.

(All the justices concurring.)

F. W. NEITZEL v. CITY OF CONCORDIA.

January Term, 1875.

1. **Appeal: Criminal Action: Municipal Corporation: Prosecutions under City Ordinances: Appeal.** A prosecution in a municipal court under a city ordinance for a matter which is penal by the laws of the state, or made penal because of its supposed evil consequences to society, is a criminal action; and if after an appeal to the district court, and a *447 judgment therein, it is sought *to bring the case to this court for review, it can be done only by appeal, and not by proceeding in error.¹
2. ———. Whether the rule would be different if the prosecution was simply to enforce a private right of the city is a question left open for further consideration.

Error from Cloud district court.

At the August term, 1873, of the district court, Neitzel was convicted of "selling, and consenting to be sold, bartered, and drank upon premises occupied by him, in the city of Concordia, fermented, vinous, and distilled liquors, by the glass, without having obtained a license from said city, and contrary to the ordinance of the city of Concordia in such case made and provided." The action was commenced in the police court in the name of the city of Concordia as plaintiff. Neitzel brings the case to this court by "petition in error," and the city moves to dismiss such petition.

C. K. Wells and *F. W. Sturgis*, in support of the motion.

L. J. Crans, for plaintiff in error, *contra*.

BREWER, J. Neitzel was convicted in the police court of the city of Concordia upon a charge of selling liquors without a license, and fined one dollar. He appealed to the district court, where he was again found guilty, and sentenced to pay a like fine. This judgment he seeks to reverse in this court, and he has brought it here by case made and petition in error; and the first point made is that this is a criminal case, and can be brought to this court only by *appeal*, and by notice to the clerk and attorney. No notice appears in the record; and it is well settled that notice to the clerk is essential to perfect the removal of a criminal case to this court for review. *State v. King*, 1 Kan. *466; *Carr v. State*, Id. *331; *State v. Brandon*, 6 Kan. *243; *State v. Baird*, 9 Kan. *60; *State v. Boyle*, 10 Kan. *113. The only question, then, is whether a prosecution for selling liquor *448 *without a license from a city, commenced in the municipal court of such city, is a criminal action. The sale of liquors without license is by statute a criminal offense; and, when the prosecution is for a violation of the state law, it is unquestionably a criminal action. *Dram-shop Act*, (Gen. St. 400,) § 3; *State v. Volmer*, 6 Kan.

¹ See *Olathe v. Adams*, 15 Kan. 394; *Salina v. Seitz*, 16 Kan. 148; *Burlington v. James*, 17 Kan. 223; *State v. Ashmore*, 19 Kan. 545; *West v. Columbus*, 20 Kan. 634; *Mariner v. Mackey*, 25 Kan. 671; *In re Rolfs*, 30 Kan. 761; *S. C. 1 Pac. Rep.* 528.

state two distinct and separate causes of action: the first for a recovery of a money judgment upon the promissory note set forth in the petition, and the second to avail *himself of the contract and bargain verbally made in reference to placing the contracts in escrow. He relies upon the note as the first cause of action, evidenced by writing; and for the second he relies upon the verbal contract made at the time the railroad contracts were placed in the hands of Playter. He separately states and numbers each. He demands a separate judgment in each: the first an ordinary money judgment upon a promissory note; the second a judgment or decree as in actions to foreclose a mortgage. But this is error. There was no mortgage; hence only one cause of action; and the court, on motion of plaintiff in error, should have stricken out the second count, so called, as surplusage.

The record contains all the evidence, and also a special finding of the facts by the court. Let us summarize these facts: One Kerchner owned the several railroad land contracts set forth in the record. These contracts he sells and assigns to Curtis for the sum of \$450. Curtis pays \$200 cash, and executes and delivers his promissory note to Kerchner for the \$250 remaining unpaid. Curtis, to secure this note, talked of executing a mortgage on the land mentioned in these contracts, but desired to avoid the expense of the mortgage. The parties were then informed that this expense could be avoided by a delivery and placing in escrow these several railroad contracts; that this would constitute a *mortgage*. The contracts are so delivered, and with an agreement that if Curtis paid the note when due he should receive the contracts, otherwise they were to be delivered to Kerchner. The petition alleges a forfeiture, and there seems some dispute about it as to whether, upon failure to pay the note, there was to be a forfeiture, or cancellation of the assignment to Curtis. But the court settles this question by simply finding that the contracts were placed in the hands of Playter as security for the payment of the note, and to be delivered to Kerchner on Curtis' failure. Kerchner transfers the Curtis note to Buckley, with his supposed "lien" on said contracts as security. Now, these railroad contracts are not title papers to this land. They convey no interest in the realty. *452 They are bare and *naked promises to *sell* in the future,—not a present *sale*. The contracts pass no *title*,—no *estate*. So the conditional transfer by Kerchner of these contracts to Curtis passed no title, estate, or interest in the land to Curtis, and constituted no "mortgage" security for Curtis' note, either in the hands of Kerchner or Buckley. The idea of calling these railroad contracts title papers, and depositing them in escrow, and foreclosing as an equitable mortgage on real estate, would deserve, it seems to me, to be treated by courts and lawyers with ridicule. The so-called second cause of action, then, performs no office whatever. It asks to foreclose nothing. Then, if these contracts gave no interest in the land,

how stands the case? The contracts were by Playter turned over to Buckley, Kerchner's assignee. This changed no right. Buckley held Curtis' note, and he held these contracts as "collateral security for what they were worth,"—rather precarious security. But Buckley undoubtedly had a clear right to the possession of these contracts, and the court would have had the right to order and direct a sale of them, subject to all the rights of the railroad company. The only difficult question in the whole case arises on his security, and his remedy thereon. If it was goods and chattels, there is no doubt about his right to sell for payment of the debt. If it was real estate, the right is equally clear. On these two propositions there can be no doubt. If the contracts appeared to be utterly valueless, then of course no order would be made. But they have been treated by the parties to this transaction as of the value of \$450. The judgment should have been for the face of the note and interest, and an order directing the sale of these contracts in the same manner as personalty is sold on execution, and the proceeds applied first to payment of the costs of suit, and next to Buckley's debt and interest, and the over-plus, if any, paid to Curtis, and, if contracts failed to bring amount of Buckley's claim and costs, then judgment for balance against Curtis.

Another error which we think Curtis justly complained of is the *453 allowance of notarial protest costs and damages. The *notarial protest is void, because there was no notice served under it. There is no evidence in this record showing any notice served, or that one was ever even made out. We have a statute making a proper notarial protest evidence of demand and refusal. But demand and refusal is one thing, and the service of notice another and very different thing; and the interpolation of a statement in this protest that notices were left in some post-office proves nothing. It is not evidence of any fact except as made so by the statute, and the statute does not make it evidence of notices, or of the service thereof, and the court does not find any such notice, yet renders judgment for 6 per cent. damages.

Playter & Pursel, for defendant in error.

Curtis knew that the title papers had been conditionally delivered to Playter from him, (Curtis,) and that the delivery would become absolute at any time on payment of the purchase money. It is not denied that Kerchner owned the equitable title to the said land. It is not denied that he sold the same to Curtis. It is not denied that Curtis, at the time this action was brought, was in possession of said land. It was not claimed that Curtis had sold the said land to any person. Therefore this judgment and order could not interfere with the rights or equities of any third person. It was purely a question between the grantee and the assignee of the grantor. Buckley was a *bona fide* holder of the said note given by Curtis for the purchase money. The grantor and grantee expressly stipulated that this purchase money should be a lien on this land. Courts always carry out the intention of the parties to a contract where it can be done.

The judgment and order works no damage to Curtis. It is simply the result of his agreement.

W. C. Webb, also for defendant in error.

The value of Kerchner's title, under his contract, is not a question before the court. Kerchner and Curtis regarded it as valuable, *454 and negotiated accordingly. Afterwards Kerchner *and Buckley regarded it as valuable, notwithstanding the rights and equities of Curtis under the assignment to him, and they negotiated with that understanding. Kerchner is not interested in the contest between Curtis and Buckley. Curtis does not appear (from brief of plaintiff in error) to object to the judgment *in personam*, and his counsel does not seem to claim that Curtis can have the full benefit of the assignment to him until he pays the \$250, (for which said personal judgment was rendered;) but he complains of the decree of the court by which *his* interest *as assignee* is held as security for the payment of said debt. There was no error in the decree. Curtis acquired Kerchner's right and title, *subject* to the payment of the \$250 note, in like manner as if Kerchner (having title) had sold by title bond; and the assignment, being deposited in escrow, had the same effect as a title-bond, where the equitable title passes to the vendee, (Curtis,) and the legal title is retained in the vendor (Kerchner) as security for the payment of the unpaid purchase money. The vendor (Kerchner) thus holding the title, (that which the parties have between themselves acted upon and treated as title,) he sells that title to Buckley, and of course could sell only such rights and interests as remained in him. One of these rights was to *foreclose the equities of Curtis* if Curtis did not pay the note. Such foreclosure is in the nature of a mortgage foreclosure, requiring that the amount of the debt shall be ascertained, followed by a decree that if said debt is not paid, etc., the interest of the debtor (Curtis) in the land shall be sold. Such is legally this case. Curtis has no cause for complaint.

VALENTINE, J. This was an action on a promissory note, and to foreclose a certain supposed equitable lien on certain real estate. The principal question involved in the case is whether any such lien has any actual existence. Some other questions, however, are suggested by counsel, which we shall also consider.

*455 1. Upon the point made by counsel for plaintiff in error * (defendant below) that there were two causes of action attempted to be stated in the petition of the plaintiff below, while only one was in fact stated, and that the court below erred in overruling a motion of the plaintiff in error to strike out the second supposed cause of action, and also erred in overruling a demurrer of the plaintiff in error to said second count, see *Andrews v. Alcorn*, 13 Kan. *351. That case was a much stronger case for reversal upon such a point than this, but still we held in that case, as we must hold in this, that no substantial error was committed by the court below.

2. The main question in the case is, do the facts of this case con-

stitute an equitable lien upon said real estate? The facts are substantially as follows: The Missouri River, Fort Scott & Gulf Railroad Company sold a certain piece of land to Benjamin Kerchner. The purchase money was not all paid down, and no deed of conveyance was executed, but the parties reduced to writing the nature and character of their transaction. Both parties signed said writing and the instrument embodying the same was then placed in the possession of said Kerchner. The instrument provided for Kerchner taking possession of the land, cultivating it, making improvements thereon, paying the deferred payments for the land, and the company making a deed of conveyance to him or his assignee. Afterwards Kerchner sold said land to Leander Curtis, plaintiff in error, received a portion of the purchase money down, and took a promissory note for the balance. Kerchner himself, having no deed for the land, merely assigned his contract with the railroad company to Curtis. It was suggested that Kerchner should take a mortgage on the land from Curtis to secure the payment of said promissory note, but the parties in lieu thereof finally agreed to deposit said written instrument which Kerchner had received from the railroad company with a third person, to be held by such third person until Curtis should pay said promissory note, and then to be delivered (with the assignment thereon) to Curtis. The parties understood that said written instrument was to be held by said third person as a *456 security for the payment of said promissory note, and to answer the purposes of a mortgage. Afterwards Kerchner sold and assigned said promissory note to Robert R. Buckley, defendant in error. This note was not paid at maturity, was protested, etc., and then Buckley commenced this action against both Kerchner and Curtis, asking for a judgment on the note for the amount thereof, with interest, protest fees, and damages, and also asked to have said land sold to satisfy said judgment. Kerchner was not served with summons, and the trial proceeded against Curtis alone. Judgment was rendered by the court below against Curtis, as asked for by Buckley, and Curtis now asks to have that portion of the judgment reversed which ordered the land to be sold, and which gave to Buckley protest fees and damages.

It seems to be admitted that the railroad company had a good title to said land at the time they sold it to Kerchner; but it is claimed by the plaintiff in error that neither Kerchner nor Curtis ever had any title, legal or equitable. Whether either of them ever had any such title or not, we do not think it is necessary now to decide. Kerchner had a legal and valid contract with the railroad company whereby he could obtain title, both legal and equitable, merely by fulfilling his contract. When he complied with all the conditions of said contract, he would surely have the equitable title; and, having the equitable title, he could surely compel the railroad company to convey to him the legal title. Whatever Kerchner's interest in the land may have

been, he had the power, at his own option, to obtain a complete and absolute title. This interest he transferred to Curtis, reserving merely a lien thereon for the payment of said promissory note. This lien, of course, does not amount in law to any estate or title, either legal or equitable; for even a mortgage in this state does not amount to any estate or title, either legal or equitable, (*Chick v. Willetts*, 2 Kan. *385;) and an equitable lien of this kind is probably of no higher character than a mortgage. It is claimed by counsel for plaintiff in error, substantially, that an equitable lien on real estate, *457 where it has any real existence, is an interest in land, and cannot be created merely by parol; that the statute of frauds (*Gen. St. 505, § 5*) prohibits such a thing. All of this we agree to; but still the statute of frauds does not attempt to prohibit the creation of equitable liens by operation of law, nor does any other statute. *Stevens v. Chadwick*, 10 Kan. *406. Such a lien should, of course, be in accordance with the contract and understanding of the parties affected by it, but still it may sometimes result, by operation of law, from the transactions of the parties, almost wholly independent of the contract that may be made between them. It results, however, from the *whole* transaction, including all the contracts, agreements, and understandings of the parties, parol or otherwise. The lien in the present case was not created merely by parol. It resulted, by operation of law, from the whole transaction between the parties. It can hardly be said, however, to have been *created* at all when Kerchner sold his interest in the land to Curtis. It was more properly *reserved* by Kerchner at that time as a part of the interest which he already had.

3. The evidence shows that the note was protested for non-payment by authority of Buckley, the owner thereof. This was sufficient. But the evidence does not show that any notice of the demand of payment, or the failure to pay, was ever given to Kerchner, the indorser of the note. Indeed, there was no legal evidence even tending to prove this, offered to be introduced. While the statute provides that "a notarial protest shall be evidence of a demand and refusal to pay a bond, promissory note, or bill of exchange, at the time and in the manner stated in such protest, until the contrary is shown," (*Gen. St. 117, § 18*;) yet no statute provides that such protest shall be any evidence that the indorser ever received any notice of such demand and refusal. And, in the absence of such a statute, no mere statement of the notary, in his notarial protest, that he gave the required notice, can be any evidence of such fact, or, indeed, of any fact material to the case. And where no such notice has been *458 given, and the indorser, through want of such notice, has not been made liable on the note, no protest damages can be allowed. *Noyes v. White*, 9 Kan. *640. The court below, in this case, allowed protest damages, and for this error the judgment must be reversed and new trial ordered, unless the plaintiff below will remit the

protest damages. If the plaintiff below shall remit protest damages, then the judgment will be affirmed.

The costs of this court will be equally divided between the parties.
(All the justices concurring.)

MARY V. SANDERSON and others v. JAMES STREETER and others.

January Term, 1875.

Fraud: Voluntary Conveyances: When Upheld. Where G., who holds the title to certain real estate, conveys the same to J., and J. holds the title over four years, and then conveys the same to the wife of G., and G. was not indebted at the time these conveyances were executed, and there was no intention on the part of any of the parties to hinder, delay, or defraud any creditor of G., prior or subsequent, and said conveyances were duly acknowledged and immediately recorded, and some time subsequent thereto G. contracts a debt, *held*, that the real estate thus conveyed is not liable for said debt, although G. may now be insolvent, and the conveyances may have been voluntary, and without any consideration.¹

Error from Davis district court.

At the November term, 1872, of the district court said court found and decreed that a certain deed of conveyance from Jonathan Sanderson to Mary V. Sanderson was made without any consideration whatever passing from the said Mary V. to the said Jonathan; that at the time of said conveyance the said Jonathan Sanderson held said real estate in his name as the trustee of George Sanderson; that *459 said conveyance by Jonathan Sanderson to said Mary V. was made, at the instance and request of said George, in fraud, to cover up and conceal the same from his creditors, and that said Mary V. holds said real estate as a naked trustee of the said George Sanderson, who is the equitable owner; that said real estate is subject to the payment of a certain judgment for \$622, and interest and costs, recovered by the plaintiffs herein, Streeter and Rizer, against said George Sanderson and Evander Light; and that unless the said defendants should pay the said judgment, interest, and costs within ten days from the date of such decree, said lands and tenements should be sold to satisfy said judgment. Defendants Mary V. and George Sanderson bring the case here on error.

Case & Putnam, for plaintiffs in error.

Our statute of frauds (Gen. St. 504, § 2) certainly is no stronger or more unfavorable to plaintiffs in error than the statute of 13 Eliz. c.

¹See *Horder v. Horder* 28 Kan. 891. See the full notes of cases on voluntary conveyances, and fraudulent conveyances, to *State v. Wallace*, 24 N. W. Rep. 610; *Lewin v. Hopping*, 8 Pac. Rep. 75; *Knight v. Kidder*, 1 Atl. Rep. 148; *Zoeller v. Riley*, 2 N. E. Rep. 892.

5, which declares "all gifts, conveyances, and alienations of real or personal estate whereby creditors may be delayed or defrauded, void as against such creditors." And judicial interpretation has determined that creditors at the time of the transaction are alone intended by the statute. *Reade v. Livingston*, 3 Johns. Ch. 481, 492; *Bayard v. Hoffman*, 4 Johns. Ch. 450; *Blakeney v. Kirkley*, 2 Nott & McC. 544; *Chamberlayne v. Temple*, 2 Rand. 384; *Sexton v. Wheaton*, 8 Wheat. 229. Before a deed can be pronounced fraudulent by the court, where there is a money consideration expressed, the jury must find fraud, or at least such facts as will warrant the court in finding fraud. *Ridgeway v. Ogden*, 4 Wash. C. C. 139. This conveyance was not voluntary, and Sanderson was not indebted; and "to bring a conveyance of land within the 13 Eliz. c. 5, it must be voluntary, the grantor at the time indebted, and it must be made with intent to hinder, delay, and defraud creditors or others of their pay and lawful actions." *Gilmore v. North Amer. L. Co.*, Pet. C. C. 460. A voluntary deed is void only as to antecedent and not as to subsequent creditors. *Harding v. Handy* 11 Wheat. 133. That such conveyances are not void as to subsequent creditors, where no intent *460 exists to defraud such creditors, seems to be admitted *law; and, if not fraudulent at the time, no subsequent creditors can disturb the title. 3 Washb. 297; *Thacher v. Phinney*, 7 Allen, 150; *Herschfeldt v. George*, 6 Mich. 466.

McClure & Humphrey, for defendants in error.

A person about to engage in business cannot, with a view of securing his property for the benefit of himself and family, in the event of losses occurring in such new business, convey such property to his wife voluntarily. Such conveyance is void as to subsequent creditors. *Case v. Phelps*, 39 N. Y. 164; *Stileman v. Ashdown*, 2 Atk. 481; *Black v. Nease*, 37 Pa. St. 438; *Savage v. Murphy*, 8 Bosw. 97; *Vandall v. Vandall*, 13 Iowa, 247; *Baldwin v. Tuttle*, 23 Iowa, 66. A conveyance which is fraudulent as well as voluntary is void as to subsequent as well as to existing creditors. *Gardner v. Baker*, 25 Iowa, 343; *Parish v. Murphree*, 13 How. 92, 99; *Hinde v. Longworth*, 11 Wheat. 199; *Hutchison v. Kelly*, 1 Rob. (Va.) 123; *Miller v. Thompson*, 3 Port. 196; 1 Story, Eq. Jur. § 356.

*VALENTINE, J. In September, 1872, James Streeter and Robert O. Rizer were the owners of a certain judgment which they had previously recovered against George Sanderson and Evander Light. This judgment they could not collect in the ordinary way, or on execution, on account of the insolvency of Sanderson & Light. So they, therefore, commenced this action against Sanderson & Light and Mary V. Sanderson for the purpose of having certain real estate (the title to which was in Mary V. Sanderson) declared subject to the payment of said judgment. The court below rendered judgment in favor of the plaintiffs, and the defendants, as plaintiffs in error, now

bring the case to this court. The property which the court below ordered to be subject to the payment of said judgment was the undivided half of lots 12, 13, and 14, in block 27, in Junction City. The order of the court below was made upon the ground that the property really belonged to George Sanderson, and not to Mary V. Sanderson, (his wife,) and that the title to the property was kept in her name merely for the purpose of hindering, delaying, and defrauding creditors.

*461 It appears from the record that in *1866 the title to the property was in fact in George Sanderson; that on June 13, 1866, he and said Mary V., his wife, conveyed the same for the expressed consideration of \$965 to Jonathan Sanderson. The deed of conveyance was acknowledged on the same day, and was recorded on June 15, 1866. The title thus conveyed remained in Jonathan Sanderson for over four years, when Jonathan conveyed the same to Mary V. Sanderson by two deeds; one of which was for the undivided half of lots 11, 12, and 13, in said block 27, consideration expressed \$1,000, dated August 11, 1870, acknowledged the same day, and recorded August 26, 1870; and the other deed was for lot 11 and the undivided half of lot 14, in said block 27, consideration expressed \$1,000, dated September 9, 1870, acknowledged the same day, and recorded September 10, 1870. It does not appear that at the time these deeds were executed, acknowledged, and recorded, George Sanderson was indebted to any person, or that he even contemplated contracting any debts. Nor has he since contracted, or attempted to contract, any debts of any considerable amount except the one for which said judgment was rendered. On May 10, 1871, George Sanderson was arrested on a charge of misappropriating government property. The time when said offense was supposed to have been committed, is not shown or stated. The charge, however, was tried upon its merits, and Sanderson was acquitted. At the time he was arrested he promised one James H. Brown that he would pay Brown \$500 for going on his recognizance as bail for his appearance at the next term of court. Afterwards, on December 5, 1871, Sanderson as principal, and Light as surety, gave to Brown their promissory note for \$600, due January 1, 1872, the consideration therefor being said \$500 agreed to be paid to Brown for going Sanderson's bail, and \$100 more for other debts recently incurred. This note was transferred by Brown to Streeter and Rizer, and upon this note Streeter and Rizer recovered their said judgment against George Sanderson and said Light.

There was direct and positive evidence in abundance, outside *462 of the several deeds of conveyance, that *said deeds from George and Mary V. Sanderson to Jonathan Sanderson, and from Jonathan Sanderson to Mary V. Sanderson, were made in good faith, and for a sufficient consideration. But suppose that they were not made in the best of faith,—suppose that they were made without

any consideration; that they were purely voluntary,—and still we cannot see how the plaintiffs (Streeter and Rizer) can question their validity. The deeds were not made to defraud them, nor in any manner to delay or hinder the collection of their claim. It cannot be supposed that the parties to the deeds could have had in contemplation, at the time the deeds were made, the state of things which afterwards occurred, and out of which the plaintiffs' cause of action arose. It cannot be supposed that the parties expected, when said deeds were executed, that some time in the future George Sanderson would be charged with the misappropriation of government property; that Brown should afterwards go his bail, and that Sanderson & Light should afterwards give their promissory note to Brown for \$500 therefor. It was nearly five years after George Sanderson conveyed away his title to said lots before he was arrested on said charge; and there is no evidence in this case that he ever did misappropriate government property, or that he was even suspected of such a thing until he was arrested therefor. Said deeds could not have been executed to defraud prior or existing creditors, for it does not seem that George Sanderson had any such creditors. And they could not have been executed to defraud subsequent creditors, for there is no evidence that any of the parties ever contemplated that George Sanderson would have any of that kind of creditors. And the deeds were all, immediately after their execution, put on record, so that all persons dealing with any of the parties might know where the title to the property was. When Streeter and Rizer purchased said note of Brown they had had about five and one-half years in which to ascertain from the county register's office the fact that George Sanderson had conveyed away his title to said lots. Under such circumstances, it would hardly seem that they could have been very badly deceived or defrauded. The suspicious circumstances of this case are about these: It would seem that George Sanderson has a great deal of property in his possession, and that he does a large amount of business, but that the title to all the property is held by his wife, Mary V. Sanderson, and all the business is done in her name. Any person who will trust such a man, perhaps, ought to lose occasionally, in order to learn a proper lesson. But the courts cannot, in such case, take property held, for a long time, openly, notoriously, and publicly by the wife, and pay debts subsequently contracted by the husband. We shall decide this case upon the theory that all of said deeds were voluntary, and that the title to said lots was a gift from George Sanderson to his wife, Mary V., through the intervention of Jonathan Sanderson. And even upon that theory we must reverse the judgment of the court below.

Judgment reversed, and new trial ordered.

(All the justices concurring.)

CHARLES E. OLMSTEAD v. CHARLES F. KOESTER, Treasurer, etc.

January Term, 1875.

1. **Petition: As an Affidavit and as a Pleading.** When a verified petition is used as an affidavit, its allegations must be construed as those of an affidavit, and must be such statements of fact as would be proper in the oral testimony of a witness. Allegations which are simply conclusions of law, whether sufficient or not as matter of pleading, are incompetent as testimony.
2. **Preliminary Injunction: Discretion.** A preliminary injunction is not a matter of strict right. Its issue rests with the sound discretion of the judge; and before one is issued there should be such a full showing of all the facts that the judge acts with a thorough understanding of the entire case.¹
3. ———: **To Restrain Collection of Taxes.** Where an application is made for a preliminary injunction to restrain the collection of certain
 *464 taxes *levied to pay for bonds, and the only evidence of the invalidity of the bonds is the general allegation in a verified petition that the bonds were illegally issued, and were never issued by the township in which the property of the plaintiff is situate, *held*, that this court cannot say that there was error in the refusal by the district court of any preliminary injunction.

Error from Marshall district court.

On the sixth of December, 1873, Olmstead, "who sues as well for the other tax-payers of Blue Rapids City township as for himself," applied to the judge of the district court for a temporary injunction against Charles F. Koester, as treasurer of Marshall county, to restrain him as such treasurer from collecting a certain tax levied upon the real property of the plaintiff, and other citizens of Blue Rapids City township. The application was made and heard upon plaintiff's verified petition, and the injunction was refused.

Nathan Price, for plaintiff in error.

The only question to consider is, does the petition, on its face, present a case upon which an injunction should be granted? The petition shows that the treasurer is attempting to collect a tax which is illegal in two respects: (1) That it is levied to pay bonds that were illegally issued; (2) that this township never issued said bonds. Certainly, if these propositions are true, the tax must be illegal, and section 253 of the Code gives Olmstead the right to enjoin the treasurer from taking any steps to collect this tax on the lands specifically described in the petition. Such being the case, it was error for the court to refuse to grant the injunction. If he had not the right to sue for the others, it was the duty of the court to give him, or any other plaintiff, the rights which the petition showed him entitled to, and not to refuse all relief. We think this view of the law is substantially the same as that taken by this court in the

¹See *Stoddart v. Vanlaningham*, *ante*, *18; *Conley v. Fleming*, *ante*, *381.

cases of *County of Leavenworth v. Lang*, 8 Kan. *284, and *City of Atchison v. Bartholow*, 4 Kan. *124.

*465 *J. D. Brumbaugh*, for defendant in error.

The petition presents two questions: (1) That the bonds were never issued by the said Blue Rapids City township; (2) that the bonds were illegally issued, and are void in law.

The bonds in question were issued under a special law of 1870, c. 23, p. 57, at a time when Blue Rapids City township was included in, and formed a part of, the township of Blue Rapids. The parties now seeking to avoid the payment of the tax participated in the election authorized by the act above cited. Chapter 142, Laws 1873, p. 267, authorized the county clerk to place upon the tax-rolls the seven-mills tax to pay the interest, etc., of said bonds upon the real estate that was embraced within Blue Rapids township at the time said bonds were authorized to be and were issued. The county clerk did nothing more than the law required him to do. The petition in this case being sworn to, is used as the affidavit, and does not allege that said bonds were not issued by another municipal township in Marshall county, at a time when said Blue Rapids City township formed a part of such township. If the act of 1873 is valid, then all the real estate in Blue Rapids township, as it existed at the time said bonds were authorized to be issued, is held for this tax, the same as if no change in the boundary line of said township had been made.

The petition is insufficient in not alleging in what the illegality consists. The allegation in the petition is that the "tax was levied upon all the real estate in Blue Rapids City township for the purpose of paying certain pretended bonds illegally issued for the purpose of building a bridge," etc. The petition should state facts showing the illegality. The statement that the bonds were "illegally issued" is a conclusion of law, and not sufficient. A court of equity ought not to interfere with the speedy and ordinary collection of taxes, unless the plaintiff makes a showing coming within some acknowledged heads of equity jurisdiction. *Heywood v. Buffalo*, 14 N. Y. 534; *Susquehanna Bank v. County of Broome*, 25 N. Y. 312.

*466 *As the tax complained of was levied for paying bonds issued by Blue Rapids township to build a bridge, said township should have been made a defendant. *Allen v. Turner*, 11 Gray, 436. Koester, as county treasurer, the only defendant, has no interest in the adjudication. He is merely the agent to collect the money, and pay it out to the parties entitled to receive it. To adjudicate upon a question of such vital importance without the parties in interest being before the courts, would work untold hardships. The bondholders should be made parties defendant. *State v. Anderson*, 5 Kan. *90.

BREWER, J. This was an action to restrain the collection of a tax of seven mills levied to pay certain bonds. An application for a

temporary restraining order was refused, and this ruling is the alleged error. It does not appear that any evidence other than the verified petition was presented upon such application, though so far as anything in the record is to the contrary there may have been abundance of contradictory testimony. Upon this verified petition ought a temporary restraining order to have been made? The only allegation bearing upon the illegality of the tax is that the defendant, the county treasurer, is threatening to collect a tax levied on the real estate in "Blue Rapids City township for the purpose of paying certain pretended bonds illegally issued for the purpose of building a bridge across the Big Blue river, at the foot of Main street, in or near the city of Irving, in the said county of Marshall; and plaintiff further alleges that the said bonds were never issued by the said Blue Rapids City township; and that neither the hereinbefore described property of this plaintiff, nor any property in the said township of Blue Rapids City, is liable for the said bonds, or any part thereof; and that the said levy of the said tax on the said real estate of this plaintiff, and on all other real estate of said township, is illegal and void at law." Counsel contend that "the petition shows that the treasurer is attempting to collect a tax which is illegal in two respects: *First*, that it is levied to pay bonds which were illegally issued; *second*, that this township never issued said bonds," and that therefore, the tax being illegal, its collection should be enjoined. We think counsel errs in the conclusion he draws, and from overlooking two considerations: *First*, that the petition is made in this case to subserve two purposes,—that is, that of a pleading, and that of evidence; and, *second*, that there are oftentimes considerations which, upon the same testimony, will forbid a temporary restraining order, when upon final hearing they will require a permanent injunction. Now, it may be sufficient to state in a petition that bonds were "illegally issued," but it would manifestly be improper for a witness to so testify. It is not a fact of which he may speak, but a conclusion of law to be drawn from the facts to which he testifies. Doubtless, witnesses do often speak of matters being duly and legally done, but it is either where there is no objection, or where the matter is collateral, or not seriously questioned, and never where it is the substantial matter in dispute. Where the petition alleges illegality, and the time to answer having passed, and none has been filed, or one tendering no issue upon the illegality, the illegality may be taken as admitted, and the court may act upon such admission. But where the answer-day has not arrived, the illegality is not admitted; and the petition, though verified, is to be construed as any affidavit or other testimony.

We have in several cases, of late, referred to the fact that often a court is justified in refusing a temporary restraining order, and requiring the plaintiff to wait until the final disposition of the case, even where the preponderance of the evidence on the application is in favor of the right to a restraining order. A preliminary injunction

is not a matter of strict right. It is not like an order of attachment, which goes upon the filing of a statutory affidavit and bond. Its issue rests with the sound discretion of the judge. If the rights of the plaintiff can be as well secured by the final injunction, and are not prejudiced by a refusal of the temporary restraining order, it *468 ought to be refused. If the injuries *which will result to the defendant if the order is erroneously granted will greatly exceed the benefits which will issue to the plaintiff from its issue, if properly issued, the court may sometimes properly decline to grant it. And in all cases there should be a full and clear showing of the facts, that the court may act advisedly, and upon a clear understanding of the whole case, otherwise there is the liability, not only to commit an error, but also thereby to inflict a wrong upon the defendant which cannot be adequately compensated. See *Stoddart v. Vanlaningham, ante*, *18; *Akin v. Davis, ante*, *144; *Conley v. Fleming, ante*, *381. Now, in this case, there is far from that full showing of the facts which ought to be made to require the issue of a temporary restraining order. We feel, after reading the petition, that we are illy informed as to the real facts of the case, or matters of actual contest. The petition alleges that the bonds were never issued by Blue Rapids City township. Counsel for defendant in error refers to an act of the legislature of 1870, (Laws 1870, c. 23, p. 57,) authorizing Blue Rapids township to issue bonds to build a bridge at the place named in the petition; and also cites an act of the legislature of 1873, (Laws 1873, c. 142, p. 267,) which declares that all bonds heretofore or hereafter issued by any county or township shall be a lien upon all the real estate of such county or township; that no change in the boundaries shall affect this lien; and provides, in case of a change of the boundary of a county, for the collection of the tax upon the real estate which has ceased to be a part of the county issuing the bonds. But whether the contest is upon the constitutionality of these acts, or whether, indeed, either of them has any application to the bonds in question, is mere matter of conjecture; and it would be manifestly improper for us to be deciding questions which are not in the case, and may never actually arise. It seems evident, from the fact that the regular collecting officers are attempting to collect a tax for these bonds, that there is at least some pretense of their validity; and before a court should interfere to restrain the collection *469 of taxes for their payment, it should *be fully advised of the circumstances under which they were issued, or are claimed to have been issued, and the facts, whatever they may be, which are claimed to invalidate them.

For the reason that we are not so advised, we cannot say that the district judge erred in refusing the temporary restraining order, and his decision and order of refusal will be affirmed.

It is understood that the case of *Means v. Koester* is similar to this, and the same judgment will be entered therein.

(All the justices concurring.)

PACIFIC RAILROAD Co. v. R. H. BROWN.

January Term, 1875.

1. **Instructions: In Supreme Court: Insufficient Record.** This court has repeatedly held, and again decides, that, where the record fails to show that all the instructions which were given are preserved, we cannot say there was error in refusing any, because those refused may have been so refused because already once given.¹
2. **Negligence: When Contributory, will not Prevent Recovery.** In an action for damages for killing stock on a railroad track, where it appears that the stock was killed through the negligence of the train-men on a passing train; that the stock was running at large, and strayed on the track; that the night preceding the injury it had been shut up in the plaintiff's barn, but without his knowledge had gotten out of the barn into the barn-lot, and thence through a gate into the road, and thus strayed away to the place of injury: *held*, that the fact that plaintiff had another horse which was in the habit of opening the gate of the barn-lot, and did in fact open the gate at that time, did not amount to such contributory negligence as to defeat the plaintiff's recovery.²

Error from Wyandotte district court.

Action by Brown to recover damages for the alleged killing of two horses by the railroad company, "by so carelessly and negligently running and managing its loco*motive and cars that the same ran against and over said horses," etc. Answer, general denial, and negligence on the part of plaintiff. Trial at the October term, 1873. Verdict and judgment in favor of plaintiff for \$368.

Bartlett & Hale, for plaintiff in error.

The court erred in refusing to give the fifth instruction asked for by plaintiff in error. The act of 1870, c. 33, (St. Joseph & D. C. R. Co. v. Grover, 11 Kan. *302,) has not changed the rule of law as to the negligence of the owner of stock in allowing them to roam at large in the vicinity of an unfenced railroad. The statute, and the rule adopted in the cited case, only affect the question of negligence, and the relative rights of the parties. It is still gross negligence on the part of the owner of stock to allow them to run at large in the

¹Same principle applied, *Pfeiffer v. Evangelical Church*, 20 Kan. 102; *State v. O'Laughlin*, 29 Kan. 24; *Bard v. Elston*, 31 Kan. 276; S. C. 1 Pac. Rep. 565.

²Where the owner of a colt confines it in an inclosure surrounded by a sufficient and safe fence, and in the night-time, without any fault or negligence on his part, a gate is opened, and left open through the misconduct or negligence of some unknown party, and through this open gate the colt escapes, and goes upon the track of a railroad company, held, that the company is bound to use ordinary care to prevent any injury to such colt from its trains. *Atchison, T. & S. F. R. Co. v. Davis*, 31 Kan. 645; S. C. 3 Pac. Rep. 301. Liability of railroad companies for injuries to stock, see notes to *Burlington & M. R. Co. v. Webb*, 24 N. W. Rep. 709; *Atchison, T. & S. F. R. Co. v. Gabbert*, 8 Pac. Rep. 221; *Louisville, N. A. & C. Ry. Co. v. Goodbar*, 2 N. E. Rep. 388.

immediate vicinity of a railroad in this state, and which the owners thereof are not bound to fence; and hence the ruling of this court in *Union Pac. R. Co. v. Rollins*, 5 Kan. *167, is of binding force, except in relation to the relative rights of the parties on the question of negligence. Previous to the act of 1870 the defendant, in cases like this, was only liable for *gross* negligence. Now, however, it is held liable for ordinary negligence. Still, if there is negligence on the part of the plaintiff which contributed to the injury, there can be no recovery. *Bemis v. Connecticut & P. R. R. Co.*, 42 Vt. 375; *Railroad Co. v. Skinner*, 19 Pa. St. 298; 29 Me. 397; *Sullivan v. Philadelphia & R. R. Co.*, 6 Amer. Law Reg. 342.

The court refused to give to the jury the sixth instruction asked. The plaintiff in error had the undoubted right to submit this question of contributory negligence to the jury. The act of 1870 gives no authority to the owner of horses and cattle to allow them to run at large and trespass with impunity on the lands and possessions of others. It was important that the jury should be instructed as to the law on this point. The answer of plaintiff in error set up contributory negligence on the part of Brown by suffering his horses *to run at large in the immediate vicinity of the railroad. The court in refusing to give the instruction virtually gave to the jury the converse of the proposition, viz., that the defendant in error had the right to allow his horses at the time of the accident to run at large in the immediate vicinity of the railroad, and the jury undoubtedly drew this conclusion. *Shear. & R. Neg.* § 363; *Waldron v. Portland, S. & P. R. Co.*, 35 Me. 422; *Marsh v. New York & E. R. Co.*, 14 Barb. 364; *Lafayette & Q. R. Co. v. Shriner*, 6 Ind. 141. And by refusing the seventh instruction the court gave the jury to understand that it was a part of the law of the case that it was a duty of the employes on moving trains to watch for horses and cattle trespassing on the railroad of plaintiff in error; or, in other words, it is the duty of the employes to divide their time between the operation of the cars and the cattle or horses of negligent owners trespassing on the track of the railroad. The servants of the plaintiff in error on the train were not employed to watch trespassing cattle and horses, but to devote their whole time and attention to the train, passengers, and property of plaintiff in error.

Plaintiff in error asked the court to instruct the jury that "it is a presumption of law that the employes of moving trains do their duty in all respects, as well as to those on their own train and the property of the company, as those off the train and their property." This instruction was refused, thereby giving the jury to understand the converse of the instruction asked for was the presumption of law, viz., that the presumption of law is that the employes on moving trains do not do their duty in all respects, as well to those on the train and the property of the company, as those off the train and their property, thus reversing the whole course of authority. *Gonzales v. New York*

& H. R. Co., 39 How. Pr. 420; Williams v. East India Co., 3 East, 192; Grippen v. New York Cent. R. Co., 40 N. Y. 34; Bank of U. S. v. Dandridge, 12 Wheat. 70; Hartwell v. Root, 19 Johns. 345.

The jury found that Brown had a horse "that was in the habit of opening the gate at his lot, and that this horse opened the gate, and let the horses in question out of the lot after they got out of the barn."

Defendant in error is as much responsible for the acts of his *472 vicious horse, of which *he has previous knowledge, as for those of his servants. The accident would not have happened but for the singular propensity of the horse in question, and as defendant in error was well aware of this he must be held responsible for all the results flowing directly therefrom. He contributed to the accident, and hence the verdict should have been set aside, and a new trial granted.

Scroggs & Bartlett, for defendant in error.

Every legal proposition contained in the fifth instruction asked by plaintiff in error, and refused, is contained in said plaintiff's fourth instruction, which was given; and when the court has once given the law upon a point it is not necessary to repeat it when asked. Kansas Ins. Co. v. Berry, 8 Kan. *159; Abeles v. Cohen, Id. *180; Loebenstein v. Pritchett, Id. *213.

There was no error in refusing to give the special instructions asked by the defendant below. Said instruction embodies a question of fact, controverted by both the pleadings and the evidence, as to whether defendant in error *did allow* his horses to stray upon the track of plaintiff in error, or whether they got there through the negligence of his servants. The testimony all shows that the horses did not get upon the track by any permission of Brown, nor by any negligence of his servants. And it appears from the evidence that the giving of the instructions refused could not have affected the verdict. The refusal to give such instructions is no ground of error. 3 Mich. 55, 70; Sinclair v. Murphy, 14 Mich. 392; Sheehan v. Dalrymple, 19 Mich. 239.

BREWER, J. This was an action to recover damages for the killing of a span of horses. The errors assigned are in refusing certain instructions asked by the plaintiff in error, and in overruling a motion for a new trial. So far as the first of these errors is concerned, it would be sufficient to say that the record fails to give the charge of the court, or the instructions (if any) given at the instance of the defendant in error, or to show that the instructions preserved were the only ones given. It may be that the instructions refused were so *473 re*fused because already once given. Wilson v. Fuller, 9 Kan. *176; Da Lee v. Blackburn, 11 Kan. *190; Furguson v. Graves, 12 Kan. *39.

We think the rulings of the court in this matter would, however, have to be upheld upon other grounds. It seems to us that the in-

structions refused were incorrect, or inapplicable, or in substance already sufficiently given. Thus, the sixth instruction, viz., "that it is carelessness on the part of the owner of horses and cattle to allow them to roam at large in the vicinity of an unfenced railroad," was clearly inapplicable. The only testimony in the case showed that Brown was not in the habit of letting his horses run at large, and that on the night preceding the injury he had shut them up in his barn, from whence they had gotten out into his barn-yard, and thence through the gate into the street, and wandered away; so that whatever of blame might attach to the plaintiff, it did not lie in the direction of this instruction. The seventh instruction asked for was as follows: "It is no part of the duty of those in charge of moving railroad trains to keep watch for cattle or horses that may accidentally have strayed upon the track of the railroad." Now, whatever of truth there may be in this, as an abstract proposition, it would, under the circumstances of this case, have been apt to convey a wrong impression. The place of the accident was visible for half a mile in either direction along the track. There was testimony to show that the speed of the train was not slackened; that no warning was given by whistle, or bell, or letting off of steam. There was no testimony offered for the defense, and none for the plaintiff, from which the jury could infer that any of the train-men knew of the presence of these horses on the track before the moment of injury. Would not a jury gather the impression from such an instruction, then, that there was no breach of duty—no negligence—on the part of the train-men, even if they remained thus wholly unaware of the presence of the horses on the track until the very moment of striking them, and therefore took no measures to prevent the injury? We think, *474 therefore, that the *court properly refused the instruction.

It could have subserved no proper purpose, and was liable to mislead. A similar criticism may be passed upon another instruction, asked, viz., that "it is a presumption of law that the employees of moving trains do their duty in all respects, as well to those on their own train and the property of the company, as to those off the train and their property."

The motion for a new trial was also properly overruled. The testimony of the plaintiff tended to show negligence on the part of the defendant, and the defendant introduced no testimony. Defendant claims that the answer of the jury to a certain question showed contributory negligence on the part of the plaintiff. That answer stated that plaintiff had a horse which was in the habit of opening the gate of his barn lot, and did on the night in question open the gate, and let the team that was killed out into the road. There was no testimony tending to show where the plaintiff resided, or how near to the railroad track. We cannot think that this is such contributory negligence as to defeat the plaintiff's recovery. If negligence at all, it was both slight and remote.

Upon the whole record we see no error, and the judgment must be affirmed.

(All the justices concurring.)

L. C. CHALLISS v. WILLIAM HEKELNKEMPER.

January Term, 1875.

1. **Taxation: Assessing Lands: Uniting Separate Lots.** Where two adjacent lots are of different sizes and values, and belong to different owners, the one open and unimproved, and the other inclosed and improved, it is improper to assess them together, and as one parcel or tract of land.¹
2. ———: **Apportionment.** The owner of the larger and more valuable lot cannot in such case, by paying one-half the joint tax, cast the burden of the remaining half upon the other lot.
- *475 *3. **Equity: Rule for Relief.** Equity will assist a party to cast off from his property an inequitable and unjust burden, but in so doing will require that he pay what is fairly and justly due.²

Error from Atchison district court.

The case is stated in the opinion.

W. W. Guthrie, for plaintiff.

The tax deed was void on its face, but was nevertheless a cloud upon the title. *Dean v. City of Madison*, 9 Wis. 402. It shows that two distinct parcels were assessed and valued and taxed as one tract. Each parcel must be separately assessed. Section 32, Tax Law. Here these two parcels had been separate since the plat was filed in 1868, and had been many times conveyed by separate deeds, all of record. Lot 28 was 40 feet front, with a house on it; lot 29, but 25 feet front, and vacant. The two lots were assessed at \$1,200 for 1868, and taxed \$61.19, and lot 29 was sold for the full half. For 1869 total tax was \$66.60, and the half charged to lot 29. Hence the sale was for an excessive tax. *McQuesten v. Swope*, 12 Kan. *32.

Section 32 of the tax law provides means for ascertaining the description of property, and the owner cannot be chargeable with laches in this respect, nor made to suffer for the errors of the county officials, resulting from their negligence only. The board of equalization have no power to divide up or apportion valuations; only to raise or lower on descriptions as returned.

¹See *Bruce v. McBee*, 23 Kan. 388; necessity of assessment, etc., see note to *Worthington v. Whitman*, 26 N. W. Rep. 125.

²See *Smith v. Smith*, 15 Kan. *295; *Coe v. Farwell*, 24 Kan. 569; *McKeen v. Haxton*, 26 Kan. 696.

Horton & Waggener, for defendant.

BREWER, J. This was an action to set aside a tax deed, and re-
*476 move the cloud on plaintiff's title arising therefrom. *The court made a conditional decree, that, upon payment by the plaintiff of \$201.47, the defendant should be barred from setting up any claim under said tax deed, and that each party should pay half the costs. Plaintiff excepted to this decree, or to so much as required payment of \$201.47 and half the costs, but tendered judgment for \$70, and now asks that the ruling of the district court be modified to that extent. Of course, as a basis for this decree, the court found against the regularity and validity of the tax proceedings,—found the existence of some substantial defect therein; for no mere irregularity would defeat the deed. Gen. St. 1057, § 113. With this ruling we need not trouble ourselves, for the plaintiff cannot, and the defendant does not, complain of it. The question for us is, what, if anything, upon the basis of the invalidity of the tax proceedings, ought the plaintiff to pay? And as bearing upon that question the following are the important facts: The tax deed was upon a sale for the non-payment of the taxes of 1868. The premises in controversy were known as "lot No. 29, in block 15," in Challiss' addition to city of Atchison. It and the adjacent lot were assessed together, and as one parcel, for both 1868 and 1869. One-half the tax was paid by the owner of the adjacent lot, leaving one-half unpaid, and for which it was sold. It appeared that lot 29 was 25 feet front, and unimproved and uninclosed, while the adjacent lot was 40 feet front, inclosed, and improved with house, etc. The value of the improved lot was three times that of the lot in question. Subsequent to 1869 the lot was assessed separately, and of those subsequent taxes plaintiff makes no complaint, but tendered judgment therefor in his offer of \$70. Of the tax of 1868 and 1869 he complains, and says that, by reason of the facts above stated, no lien was cast upon the lot, but that the whole tax must be treated as void. On the other hand, the district court held that the unpaid tax on the two lots, being the one-half of the entire tax thereon and interest, should be paid, basing the decision evidently on section 117 of the tax law, (Gen. St. 1057,) which provides that if the holder of a tax
*477 deed be defeated in an action for the recovery of the land the successful claimant shall be adjudged to pay the full amount of all taxes paid, with interest and costs.

We think the court erred in its conclusions. The two lots, jointly assessed, were equal neither in size nor value. The owner of the larger and more valuable could not, by payment of one-half the tax, cast the burden of the remaining half on the other lot. There was nothing in the condition of the two lots to justify this joint assessment. They were not owned by the same person; they were not covered by a single improvement, nor inclosed with the same fence. The

one was open and unimproved; the other inclosed and improved. No laches can be imputed to the owner. The joint assessment was through no fault of his. It is the duty of the *assessor* to make out a *correct* description of *each parcel* of real property, and not the duty of the owner, unless required by the assessor, to furnish such description. Gen. St. 1032, § 32. So that to require the plaintiff to pay one-half the tax on the two lots is to cast on him an unjustifiable burden, and to make him pay for the mistakes of the assessor. The court, therefore, erred in requiring the plaintiff to pay the whole of the unpaid tax.

On the other hand, it does not seem to us that the claim of the plaintiff can be sustained. While a court of equity may assist a party to cast off an inequitable burden from his property, it will not assist him to remove that which is fair and just, or to avoid bearing his due share of the burdens and expenses of government. Now, the plaintiff, claiming that this tax is excessive, seeks to be relieved from it altogether. He would not simply rectify the blunders of the officers, but he would make those blunders the means of his own profit. Because too much is asked, he would not pay that which fairly and justly he ought to pay. This a court of equity will not tolerate. It appears from the unchallenged findings that the value of the adjacent lot was three times that of the one in controversy. There is no pre-
*478 tense that the joint assessment was excessive, or the tax in*equitable. Clearly, therefore, as taxes are based upon value, the lot in controversy should have paid one-fourth, and only one-fourth, of the joint tax. *City of Ottawa v. Barney*, 10 Kan. *270. This, as we figure it, makes the amount of the taxes and interest properly chargeable on this lot at the time of the decree \$140.02, and the decree will be modified by reducing the amount required to be paid to that sum.

As to the matter of costs, it does not appear that any tender was made by plaintiff prior to the commencement of the suit, so that it seems to us eminently fair that he pay one-half the costs. The costs of this court also will be divided.

(All the justices concurring.)

PHILIP CASEY v. J. KILGORE and others.

January Term, 1875.

1. **Roads and Highways: Statutory Construction.** Chapter 181 of the Laws of 1872, being an act declaring section lines in certain counties public highways, did not take away the power to open highways in those counties upon other than section lines, where the public interest required it, or set aside the mode of proceeding to establish and open such highways provided by the general road law of 1868.
2. ———: **Bond to Secure Costs: Misrecital.** A misrecital of one of the *termini* of the proposed road in the bond given in such proceedings to secure the costs and expenses in case the road be not opened, will not, after the road has been established, and ordered opened by the commissioners, avoid the proceedings, or be sufficient error to set them aside.
3. ———: **Description of Road in Petition, Etc.** Proceedings to lay out and establish a road will not be held illegal and void merely because the petition omits to designate whether the road proposed is east or west of any particular meridian.¹

Error from Miami district court.

The case is stated in the opinion.

*479 **W. R. Wugstuff*, for plaintiff in error.

Look at section 4, p. 365, Laws 1872, and interpret the plain and obvious meaning of the legislature in declaring section lines public highways. Under the law, when the petition for the road in question was filed with the county board the section line intended to be designated was already a public highway. It is not disputed that where the law points out a mode of accomplishing anything, that mode, and no other, must be adopted. In this case there is a mode pointed out of changing a road from a section line. The proposed road is nothing more or less than the changing of a road from a section line. While the law of 1872 may not, in terms, repeal the old road law, yet it provides for a new condition of things, and renders the old law inoperative when in conflict with its designs, purposes, objects, and ends. In this case the county board and the court rejected the mode pointed out by the law in force. The county board and the court find, from the papers in the case, that notice was given on the twenty-seventh of February, one month prior to the taking effect of the said act of 1872; and also find that the petition was in due form of law governing highways *at the time said proceedings were commenced*; and further find that the proceedings for the location of roads and highways are deemed and held to be commenced by this court when the notice of the filing or intention of filing a petition is made. Are such findings authorized by law? Suppose application had never been made to the board by petition, under section 1 of the

¹ See *County of Leavenworth v. Espen*, 12 Kan. *531, and note; *Willis v. Sproule*, 18 Kan. *257, and note.

general road law, would the board have acquired jurisdiction of the subject-matter stated in the notice? If the board had no jurisdiction, which it had not, then the jurisdiction attaches, and the proceedings are commenced upon filing petition, executing bond, *480 *and giving notice. The finding of the court that "giving of notice" is the commencement of proceedings before the commissioners, within the meaning of the law, is erroneous.

The bond given in the case is for the location of a road beginning at north-east corner section 20, etc. The road prayed for and ordered located begins at south-east corner section 20, etc. The court finds that the said petitioners have given bond in such cases provided by law. The finding on this point is against the fact as shown by the bond itself. The finding of the court is against the law.

There is another defect apparent. The description of the road as proposed does not show it to be east or west of any particular meridian, nor the county or state in which the purposed road is to be located. To determine this fact, it is necessary to look beyond the record.

The records fail to show that the court found said proposed road to be of public utility. The law appropriating private property for public uses ought to be strictly construed; and, under the application of this rule, even the old road law of 1868 has not been complied with, and this without modification by subsequent legislation. The intention of the law of 1872 is to put roads on section lines. It is the duty of the court to carry into effect its intention. When it is made to appear to a court by petition and remonstrance, in a manner provided by law, that an application for a new road is in fact only for the alteration of an established road, it seems the mode pointed out for the alteration should be carried into effect.

B. F. Simpson, for defendants in error.

This court will not examine into the merits of the road, but will only examine the record in order to determine the regularity of the proceedings, and to see that the necessary jurisdictional facts appear. *People v. Goodwin*, 5 N. Y. 572. The notice of the application for the road was posted on the twenty-seventh of February, 1872. This, then, was the commencement of the proceedings, and it was *481 under the old law. All the *statutes require to be recorded is the report of the viewers, the survey and plat of road; and, in the absence of anything else from the record, or the presence of other matter in the record, is not error. General Road Law, (Gen. St. c. 89, § 6;) *Anderson v. County of Hamilton*, 12 Ohio St. 635; *Beebe v. Scheidt*, 13 Ohio St. 406; *Dunross v. Francois*, 15 Ill. 543; *Davenport M. S. F. & L. Ass'n v. Schmidt*, 15 Iowa, 214; *McCollister v. Shuey*, 24 Iowa, 363; *State v. Lane*, 26 Iowa, 225.

BREWER, J. Proceedings were had before the county commissioners of Miami county, under the general road law of 1868, which re-

sulted in the establishment of a road through the land of plaintiff in error. Being, as he thought, wronged by such proceedings, Casey filed his petition in error in the district court of that county to set them aside. The district court found no error, and affirmed the action of the commissioners. That ruling he now brings to this court on error.

The record of the proceedings before the commissioners is full, and contains the notices, with proof of posting and advertisement, the petition, bond, order appointing viewers, notice to viewers, notice to plaintiff in error of time and place of meeting of viewers, plaintiff's claim for damages, report of viewers, with plat of road, etc., remonstrance of Casey and others, and order of commissioners approving report of viewers, and ordering road established and opened. The principal question presented by counsel for plaintiff in error is as to the effect of chapter 181 of the Laws of 1872 upon these proceedings. That act in the first section declares that all section lines in certain counties, among them the county of Miami, are public highways. The second and third sections provide for the contingency of a hedge or other valuable improvement being upon the section line, and the steps that must be then taken to open the road. Section four provides that when it shall be impracticable to open a road on any part of a section line the commissioners shall direct the road-overseer to take three disinterested freeholders, and view the part said to be impracticable, and lay the road as near to the section line as *482 practicable. There is *in this act no express repeal of the general road law. So far from it, upon the same day, by the same legislature, was passed an act amending that law. And waiving the question discussed by counsel as to whether these proceedings were or were not commenced before the law of 1872 took effect, it seems to us there is nothing in that law which in any way militates against their legality and sufficiency. Both the laws may stand. Neither conflicts with the other. Because certain lines are declared to be highways, no restraint is thereby put upon the power to open other roads where the public interest demands it. This is not a case where the maxim, "*expressio unius, exclusio alterius*," applies. The law of 1872 does not purport to cover the whole ground. It is in no sense, even for the counties therein named, a general road law. It simply as to those counties aims to supplement that law. Effect must, if possible, be given to both enactments. Repeals by implication are not favored. No attempt was made in this case to lay out a road upon the section line, or upon the nearest practicable route thereto. It starts at the north-east corner of plaintiff's quarter section, and ends at the south-west corner of the same quarter, passing in its intermediate course, in a very circuitous and zigzag manner, through this and an adjacent quarter. The entire proceeding was under the general road law of 1868, and that law remains in full force, so far as anything in this case is concerned, notwithstanding the sec-

tion-line road law of 1872. It is useless to inquire what effect the latter law would have had if the application had been to open a road upon the section line.

A second objection is that the bond which was given did not in its description of the road conform to the petition, etc. The road prayed for and located commenced at the *south-east* corner of section 20, etc. The bond referred to a road begining at the *north-east* corner of section 20, etc. This was doubtless a clerical error, and would probably under no circumstances have vitiated the bond, other mat-

ters therein showing clearly for what it was given. But, even *483 if the bond were fatally defective, that would not now *vitiate the proceedings; for this, like all such bonds, was only conditioned to pay the costs and expenses in case the application for the road *failed*. It did not fail, but was sustained. If the objection had been made pending the proceedings, and the bond had been fatally defective, it might have stayed the proceedings until a sufficient bond had been given. But after the proceedings had terminated successfully, and in the establishing of the road prayed for, the bond ceased to have any value, and became wholly immaterial.

Another objection made is that "the description of the road as proposed does not show it to be east or west of any particular meridian, nor the county or state in which the proposed road is to be located." We think this objection not fully borne out by the record, or, at least, that there is sufficient description to make clear and certain the location of that road. The petition recites that "your petitioners are all residents of the county of Miami, and along and near the proposed line of said road;" gives the location of the road as "commencing at the south-east corner of section 20, town 16, range 23," without, it is true, there giving the county or state, or stating whether the range was "range east" or "range west" of any meridian; states, as one of the intermediate points, "the crossing of Rock falls, on Bull creek," and as the *terminus* the "Paola and Marysville road." There seems to have been no difficulty in ascertaining the location of the road, and we think the description was sufficient.

These are the principal matters complained of, and, in them appearing no error, the judgment of the district court is affirmed.

(All the justices concurring.)

*484

*A. M. ROBINSON v. CHARLES T. MELVIN.

January Term, 1875.

1. **Supreme Court: Examination of Questions of Fact.** Where all the material testimony on a motion to discharge an attachment is in affidavits, or other written evidence, the questions thereon are presented to this court under nearly the same conditions as to the district court; and while the judgment of that court is entitled to consideration, and may, in doubtful cases, turn the balance in favor of affirmance, yet this court may properly, in many cases, proceed to examine the questions as though they were in the first instance presented here. [Keith v. Steller, 25 Kan. 101; Macfarland v. Buck, 27 Kan. 784.]
2. **Attachment: When not Authorized.** Where it appeared that the defendant, subsequently to the contract upon which the plaintiff's cause of action arose, had made purchases of three different tracts of land in his wife's name, paying therefor less than \$500 in cash and personal property; that his indebtedness outside of plaintiff's claim was about \$2,200; that part of this indebtedness was secured by mortgage on real estate in the same county in which the controversy arose and the parties resided, worth \$2,000; and it also appeared that these purchases in his wife's name were in pursuance of a promise made years before, and at the time of his marriage with his wife, that he, a minister of the gospel, would give her all the fees received from performing the marriage ceremony, and that such fees exceeded the amount of such purchases; that the property owned by himself and wife was the proceeds of their mutual labor; and that he was possessed of property in his own name within the reach of the process of the court more than sufficient to pay all his indebtedness, including the plaintiff's claim; and that in addition he was at the time exchanging property outside of the state for real estate in that county of greater value than the amount of plaintiff's claim, and the title to which he was taking in his own name: *held*, that the allegation that the defendant was about to convert a part of his property into money for the purpose of placing it beyond the reach of creditors, and had assigned, removed, and disposed of a part with the intent to defraud, hinder, and delay his creditors, was not sustained, and that the attachment should be discharged.

Error from Lyon district court.

Robinson sued Melvin to recover \$1,150, and upon an affidavit therefor obtained an order of attachment against defendant's property. On motion, supported by affidavits, the district court,

*485 at the March term, *1874, discharged said attachment.

J. V. Sanders and E. S. Waterbury, for plaintiff.

Buck & Cunningham and R. M. Ruggles, for defendant.

BREWER, J. We are asked to review an order of the district court of Lyon county discharging an attachment. The grounds for the attachment were that the defendant was "about to convert a part of his property into money for the purpose of placing it beyond the reach of his creditors, and had assigned, removed, and disposed of a part of his property with the intent to defraud, hinder, and delay his creditors."

The cause of action stated in the petition grew out of a contract between the parties, of date March 17, 1873, whereby the defendant agreed to build a house on a certain lot, and then convey the lot and improvements to plaintiff. At the time of the contract defendant received a gold watch and chain valued at \$200, and \$32.50 in cash, as part payment. Nothing further was paid by plaintiff directly to defendant, though, relying on the contract, plaintiff built a barn upon the lot. Subsequently the defendant conveyed the lot to a third party, and hence arose this action for breach of contract. Defendant claims by his affidavit that the plaintiff was the party which broke the contract, and that the latter has no claim upon him for any amount whatever. That, however, is a question properly to be determined by a jury, and upon oral testimony rather than upon affidavits, and on this motion. In support of the attachment plaintiff introduced several affidavits showing indebtedness on the part of the defendant to different parties amounting in the aggregate, and exclusive of plaintiff's claim, to about \$2,200. Some of this was secured by mortgages, and some had been standing for several months. He also showed that the only property *486 he had been able to find standing in defendant's name was a farm which was valued by real-estate men at \$2,000, and upon which were the mortgages spoken of; also that, since the contract with plaintiff, defendant had bought one lot, for which he gave the gold watch and chain received from plaintiff, another lot, for which he paid \$101, and ten acres, for which he gave a horse valued at \$150, and his note and mortgage upon said ten acres, for \$200; and the title to all these pieces of property he had taken in his wife's name. On the other hand, the defendant's affidavit showed that he was a minister, and authorized to perform the marriage ceremony; that when he married his present wife he promised to let her have for her own use all the fees he might receive for such services, and that these fees had amounted to \$500 or \$600; that at the time of his marriage he was worth about \$400, and she nothing, and that all the property they had since owned or controlled had been the proceeds of their mutual labor; that the property which had been placed in his wife's name at no time exceeded or even equaled in value the amount of the marriage fees above named; that he himself was solvent, and had property in this state not exempt from execution worth at least \$2,000, and probably \$3,000, over and above all his debts, exclusive of the plaintiff's claim, the validity of which he denied, (though the items of his property, other than the farm heretofore spoken of, were not designated;) that in addition he owned 320 acres of land in Wisconsin, which he had traded to a party in Emporia for 640 acres of land in Lyon county and two lots in the city of Emporia; that the deeds had been made out, and were in the possession of Almerin Gillett, of Emporia, waiting to be delivered whenever a defect in the chain of title to the Wisconsin lands was removed, and that he had received information from Wisconsin that a missing deed, the only defect, had

been found, and would be immediately recorded; that the deed to said lands and lots was to himself, and not his wife, and that said property was worth \$1,500 to \$2,000. Other matters appeared in the *487 several affidavits, (for they were many, and quite lengthy,) *but these are the principal facts.

Upon these facts ought the attachment to have been sustained or discharged? We have examined the question as though it were an original question first presented to us, and not as reviewing the ruling of the district court. This we may properly do, for, except as to some immaterial matters, the whole testimony was in writing, and therefore comes to us in about the same way as to the district court. It is doubtless true that the judgment of the district court, even upon written testimony, is entitled to consideration, and in many doubtful cases may sometimes turn the balance in favor of affirmance; but, for reasons to be hereafter noticed, we have preferred to examine this as an original question. And it seems to us that the attachment ought to have been discharged. It is unnecessary to affirm the validity of the agreement between defendant and his wife that she should have the marriage fees as her individual and separate property, and yet it would be difficult to deny the justice or propriety of setting apart to the wife some portion of the property which is the proceeds of their joint labor. At any rate, such an agreement tends to overthrow the evil intent which might otherwise be inferred from the fact of placing property in her name, and to show that the act was in pursuance of a purpose formed long anterior to the present difficulties, and not in consequence of those difficulties. Especially is this significant in view of the solvency of the defendant, as shown by his own testimony, and the exchange by which he was at the time placing an additional amount of property within the jurisdiction of the court in which this controversy was pending. Not only has he means in this state with which to pay any judgments that may be rendered against him in this action, but at the very time he is charged to have been disposing of his property with intent to delay, hinder, and defraud his creditors he is trading property outside of the state for real estate in Lyon county worth more than the plaintiff's claim. Such conduct is so manifestly at variance with any evil intent as against his creditors that it clearly overthrows any that might be in-
*488 ferred from the purchases in *his wife's name. And in addition, in reference to such purchases, while the amount invested is small, (only \$400 or \$500,) he is thereby converting property easy of concealment, and easy of sale, such as a watch and chain, and a horse, into real estate, incapable of concealment, and difficult of sale. On the whole evidence it seems to us that the allegations of the affidavit for attachment are not sustained, and that it ought to have been discharged.

One other question is raised by counsel. After the dissolution of the attachment plaintiff moved to have the order dissolving the attach-

ment set aside, and the matter referred to a judge *pro tem.*, on the ground of the interest of the judge, and in support of such motion filed an affidavit alleging that subsequent to the dissolution he had ascertained that the judge was security for defendant on a past-due note of \$125, and that while the motion to dissolve was pending before him he had received from defendant a chattel mortgage on a span of horses worth not over \$120 to indemnify him. We have taken this case as if originally presented to us, and considered it independent of any prior adjudication, because, even though the judge was disqualified by reason of interest, it would be wrong to the parties to remand it for examination before a judge *pro tem.* if it was reasonably clear to us that the attachment ought upon the evidence to have been discharged. That would be simply making additional costs with the same ultimate result. We do not mean to decide that the judge was actually disqualified by interest, the showing having been entirely *ex parte*; but we cannot forbear remarking that it is the duty, as it is generally the wish, of a judge to avoid sitting in judgment upon questions in which he has a direct, even though slight, pecuniary interest.

The judgment will be affirmed.

(All the justices concurring.)

*489 *M. B. LIGHT, Co. Clerk, v. STATE *ex rel.*, etc.¹

January Term, 1875.

1. **County-Seat Elections: Notice of Second Election.** Where two elections are necessary to determine the question of a county-seat, the failure of the sheriff to give notice of the second election does not vitiate said election.
2. ———: **Mistake in Canvass: Failure to Contest in Due Time: Second Election: Laches: Estoppel.** At an election for the relocation of a county-seat, A., B., and C. were candidates. At the first election neither place received a majority of the votes. The commissioners met, canvassed the vote, rejecting part of the returns, and declared that A. and B. had received the highest votes, and were the candidates at the second election. If a full canvass of all the returns had been made, A. and C. would have been found to have received the highest votes, and would have been declared the subsequent candidates. Notwithstanding the error, the second election was had, A. and B. being the places voted for. A. received the highest vote, and was declared the county-seat. Subsequently the friends of C. obtained an alternative writ of *mandamus*,

¹See *In re County Seat of Linn Co.*, 15 Kan. *500.

commanding the commissioners to meet and make a correct canvass of the first vote, or show cause why they had not so done. In obedience to this alternative writ, and without attempting to show cause, the commissioners met, canvassed the entire vote, declared A. and C. to have received the highest votes, and ordered an election to decide between them. Such election was held, and C. received the majority, and was declared the county-seat. *Held*, that inasmuch as no proceedings to contest the validity of the first canvass were had until after the second election, that that election was final; that the subsequent recanvass of the first vote, and the following election, were unauthorized and void; and that A. was the legal county-seat.

Error from Howard district court.

Mandamus, brought in the name of the state as plaintiff, by Samuel Donelson, county attorney, as relator, to compel M. B. Light, as county clerk, to remove his office, and the books, records, and papers thereto belonging, from the town of Boston to the town of Elk Falls, and there hold and keep the same. The action was tried at the May term, 1874. The court determined that Elk Falls was the *490 county-seat, and gave judgment *in favor of the state. A peremptory writ of *mandamus* was awarded, requiring Light to remove his office to Elk Falls.

Charles J. Peckham, York & Humphrey, and J. D. McCue, for plaintiff in error.

Samuel Donelson, Co. Atty., and R. H. Nichols, for the relator, defendant in error.

BREWER, J. The material facts in this case are these: On the twelfth of August, 1873, the town of Peru was the county-seat of Howard county. An election was on that day held for the relocation of the county-seat. Boston, Elk Falls, and Peru were candidates. No place received a majority. By the canvass of the commissioners, Elk Falls and Peru were declared to have received the highest number of votes, and to be the two candidates to be voted for at the second election. This election was ordered to be held and was held on the twenty-sixth of August. No notice was given by the sheriff of this election. On the day for the canvass of the votes cast at this election the commissioners were summoned to appear before the district judge, and were unable consequently to attend and make the canvass. But afterwards, and on the twenty-sixth of September, 1873, they met, canvassed the votes, and declared Elk Falls to have received the majority, and to be the county-seat. At the canvass of the votes cast at the first election the commissioners rejected some of the returns, and thereby changed the result; for, if all the votes had been canvassed, Boston and Elk Falls would have received the highest number of votes, and been the competitors at the second election. Subsequently one of the justices of this court issued an alternative writ of *mandamus*, commanding said commissioners to

canvass the entire vote cast at said first election, or show cause, on the first Tuesday of January, 1874, why they did not. On the *491 receipt of this *alternative writ the commissioners met on the twenty-ninth of October, 1873, canvassed the entire vote, declared Boston and Elk Falls to have received the highest vote, and to be the competitors at a new election ordered to be held on the eleventh of November. On the eleventh of November, in obedience to this call, an election was held, and Boston received the majority, and was declared by the commissioners the county-seat. All the county officers but the county clerk, the plaintiff in error, hold their offices at Elk Falls. He moved his to Boston after the last canvass, and this action was to compel him to move it back to Elk Falls.

Upon these facts counsel for plaintiff in error claim, "(1) that a partial canvass of the votes cast at the first election is not a compliance with the law; (2) that a canvass of the entire vote is essential to the validity of the second election; and (3) that proclamation of the result, and notice of the time of holding the second election, is necessary to make such election valid; and, all these elements being wanting in this case, that Elk Falls takes nothing by the second election." In reference to the last point it may be said that it is very doubtful whether the omission of the sheriff to give notice of any election would vitiate that election, provided the people generally participated in it. And again, while section 10 of the act respecting county-seat elections (Gen. St. 298) declares that all such elections "shall be conducted in all respects as provided for by the general election laws of the state," yet the provisions in the latter laws concerning notices seem inapplicable. The sheriff is to give, "ten days before the holding of any special election, * * * public notice by proclamation, * * * one copy of which shall be posted up at each of the places where the elections are appointed to be held, and inserted in some newspaper published in the county, if any be published therein." By the county-seat election law, § 6, the commissioners are to meet on the Saturday succeeding the first election to make the canvass; and by section 7, if a second election is necessary, it is to be held on the second Tuesday thereafter. The *492 day of the *canvass is thus itself only the tenth day before the day of the election. The practical difficulties in the way of giving the notice indicate that the legislature did not intend to make that essential to the validity of such second election.

The other is, however, the more important and difficult question. Suppose that the commissioners ignorantly or willfully reject a part of the returns of the first election, and in consequence declare that A. and B. have received the highest vote, and are therefore the candidates at the second election, when in truth and upon a full canvass A. and C. received the highest vote, and are entitled to be the subsequent candidates, what remedy, if any, has C.? Can the commissioners thus nullify the will of the people? and if not, how can the

wrong be righted? It may be that there is no direct, full, and adequate remedy; that it is one of those wrongs which can only indirectly be remedied. Perhaps in case of glaring omission or misconduct, the friends of the candidate improperly left out might ignore the canvass of the commissioners, and vote for that place on the second election, and thus right the wrong. But this, if legal, would manifestly come far short of being adequate, because many would be loth to believe wrong or mistake on the part of the canvassers, and would be controlled by their proclamation of the result rather than by any evidence which in the brief time intervening could be collected and presented to the voters at large. *Mandamus* will lie to compel a correct canvass; but whether it will lie after the dissolution of the canvassing board is a question perhaps doubtful under the authorities. *People v. Supervisors of Greene*, 12 Barb. 217; *Hadley v. City of Albany*, 33 N. Y. 603; *S. C. in Bright. Elect. Cas.* 307; *Bowen v. Hixon*, 45 Mo. 340; *People v. Hilliard*, 29 Ill. 413. These authorities seem clearly to show that a canvassing board, having met at the legal time and place, made the canvass, and adjourned, cannot of their own will thereafter come together and make a second canvass.

Their powers are exhausted by the first action. If, however, *498 the board has not met, or having met, *has refused to act, its action can be compelled. *Hagerty v. Arnold*, 13 Kan. *367. Doubtless the correctness of the canvass, at least of the final election, can be determined in *mandamus* proceedings under section 2, c. 79, Acts 1871, (Laws 1871, p. 191,) and section 7, as amended in 1872, (Laws 1872, p. 271, § 1.) But these *mandamus* proceedings do not run against the canvassers, and are not directly to compel a recanvass. But, whatever may be the rule as to the power of the court by direct proceeding to compel a recanvass after the dissolution of the canvassing board, it seems to us that any proceedings to compel such recanvass as to the *first* election should be had before the *second*. In other words, parties cannot accept the canvass of the first election as correct, enter into the contests of the second upon the basis of such prior canvass, and then, when disappointed in the result of the second election, obtain a recanvass of the first, or contest the result of the second on the ground of an incorrect canvass of the first. This, while it has manifest fairness on its side, seems also warranted by the legislation of 1872 above cited. That amendment, after declaring that in any action or proceeding under the act the validity of the election, and of any votes cast or refused at such election, may be inquired into, adds this proviso: "Provided, however, that in no case shall the validity of any election be inquired into beyond the one last had, and upon which the proceeding is based." This proviso, which was first added in that year, contemplates proceedings in which two elections are provided for as sometimes necessary to a final determination; and the only proceedings named in the act requiring two elections are county-seat elections. It there-

fore obviously refers to such elections, and plainly indicates that a contest made after the second election must be limited to that election. It is true that the proceedings named in the act are not directly to compel a recanvass, and a proviso cannot be extended beyond the reach of that to which it is a proviso. Yet this is evidence of the legislative will in the matter, and sustains us in the *494 conclusions otherwise reached. It seems *to us therefore that the second meeting and canvass by the commissioners of the votes cast at the first election availed nothing, and that, no proceedings having been taken to correct the first canvass prior to the second election, all parties must be held concluded by that canvass. It follows, therefore, that the judgment of the court below is correct, and must be affirmed.

KINGMAN, C. J., concurring.

VALENTINE, J. I think perhaps the decision of this case is correct, but still I have no doubt of the power of any proper court to allow a writ of *mandamus* to be issued to compel a board of canvassers to canvass or recanvass election returns where such board has in the first instance neglected or refused to canvass the same, or to canvass some definite and ascertainable portion thereof. And this I think may be done, although a particular day is fixed by law for the canvass, and the board has met on that day, and canvassed a portion of the returns and adjourned. The canvassing board are simply ministerial officers, having no judicial power, and therefore, when they neglect or refuse to canvass election returns, they thereby create a cause of action against themselves, to-wit, the action of *mandamus*, and they cannot, merely by an adjournment of their board, defeat or destroy that cause of action.

D. R. ANTHONY v. R. F. HERMAN and others.

January Term, 1875.

Contract: Consideration: Promise to Third Party. An action can be maintained upon a promise made by a defendant, upon valid consideration, to a third party, for the benefit of the plaintiff, although the plaintiff was not privy to the consideration.¹

*495 *Error from Cloud district court.

Action by Anthony against Mark J. Kelley, R. F. Herman, and four others, on a certain contract. Kelley made default. Her-

¹Whatever may be the rule in other states, it is well settled in this state that third parties not privy to a contract, nor privy to the consideration thereof, may sue upon the contract to enforce any stipulations made for their especial benefit

man and the other four defendants demurred, and their demurrer was sustained at the August term, 1873. The facts are stated in the brief of plaintiff, and in the opinion.

Byron Sherry, for plaintiff in error.

On the twenty-second of July, 1870, Kelley made his promissory note, payable to one Young, for the sum of \$435, with interest, which note was by said Young indorsed and delivered to Anthony. To secure the payment of the note Kelley, on the twentieth of August, 1871, executed and delivered to Anthony a chattel mortgage on one Washington hand-press, ten thousand pounds type, office fixtures, and good-will in and appertaining to the Republican Valley Watchman, a paper printed and published in the city of Clyde, Cloud county, with the usual conditions, which chattel mortgage was filed in the office of the register of deeds of Cloud county. The lien obtained by virtue of the chattel mortgage was continued by the making and filing of the necessary affidavit. Kelley in the mean time sold the mortgaged property to Nat. Baker and Samuel Enfield, with the understanding and agreement that they would pay the note in the hands of Anthony. Upon their failure to do so, Kelley instituted suit against them for the possession of the mortgaged property, and it was during the pendency of the suit of Kelley that the defendants in this action, in consideration that Kelley would dismiss and discontinue the prosecution of the case commenced by him, executed and delivered the bond now sued upon. The bond was an obligation to assume the payment of the note to Anthony; and Kelley, in consideration of this bond of indemnity, turned over to the defendants the property men*ioned. It was a consideration passing between Kelley and defendants, by which they agreed to pay the note.

The demurrer was interposed upon the ground that the petition did not state facts sufficient to constitute a cause of action, and upon the theory that defendants had not agreed in writing with Anthony. The only point in the case is, was the promise of defendants, as set forth in the bond, sufficient upon which to maintain an action by the plaintiff? Or, in other words, was the bond, as between plaintiff and defendants, void for want of consideration? The rule as laid down in the case of *Lawrence v. Fox*, 20 N. Y. 268, is that an action will lie on a promise made by a defendant, upon valid consideration, to a third person, for the benefit of the plaintiff, although the plaintiff was not privy to the consideration. Such promise is to be deemed made to the plaintiff, if adopted by him, though he was not a party nor cognizant of it when made. That was a case where money was borrowed and paid over to a third party upon the promise that this third party should pay a certain indebtedness of the party making the loan,

and interest. *Life Assur. Soc. v. Welch*, 26 Kan. 642; *Brenner v. Luth*, 28 Kan. 558; *Strong v. Marcy*, 33 Kan. 109; S. C. 5 Pac. Rep. 366. Rights of beneficiary to sue, see full notes to *Winninghoff v. Wittig*, 24 N. W. Rep. 914; *Baker v. Elgin*, 8 Pac. Rep. 280.

—a case similar in principle to the one at bar. And see *Farley v. Cleveland*, 4 Cow. 422; *Cleveland v. Farley*, 9 Cow. 639; *Barker v. Bucklin*, 2 Denio, 45; *Delaware & H. C. Co. v. Westchester Co. Bank*, 4 Denio, 97; *Arnold v. Lyman*, 17 Mass. 400; *Hall v. Marston*, Id. 575; *Brewer v. Dyer*, 7 Cush. 337.

BREWER, J. This was an action commenced in the district court of Cloud county, by D. R. Anthony, as plaintiff, on a certain bond, of which the following is a copy:

"Know all men by these presents that I, Mark J. Kelley, of Osborne county, Kansas, in consideration of R. F. Herman, B. V. Honey, F. K. Teter, David Keller, and E. Kennedy assuming the payment of a certain chattel mortgage given by the said Mark J. Kelley, to D. R. Anthony, dated August 20, 1871, and filed August 30, 1871, in Cloud county, Kansas, and holding the said Mark J. Kelley harmless and indemnified therefrom, which by the said R. F. Herman, B. V. Honey, F. K. Teter, David Keller, and E. Kennedy is agreed, as is shown by their becoming parties hereto, and signing these presents, *497 and in consideration of one *dollar in hand paid, do hereby sell, assign, transfer, and set over unto the said R. F. Herman, B. V. Honey, F. K. Teter, David Keller, and E. Kennedy the following described property, viz., one Washington hand-press, and all the type, being about four hundred pounds of type, and one lot of office fixtures, being the same which were formerly in and about the office of the Republican Valley Watchman, heretofore published at Clyde, Cloud county, Kansas. Witness our hands and seals at Concordia, June 24, 1872.

"R. F. HERMAN.	[Seal.]	MARK J. KELLEY.	[Seal.]
"B. V. HONEY.	[Seal.]	F. K. TETER.	[Seal.]
"DAVID KELLER.	[Seal.]	E. KENNEDY."	[Seal.]

A demurrer was sustained to the petition, and of this ruling plaintiff in error complains. No brief has been filed by counsel for defendants in error, so we are not advised as to the point upon which the district court placed its ruling. Counsel for plaintiff in error states in his brief that the only question in the case was whether the promise of the defendants, as set forth in the bond, was sufficient to sustain an action by the plaintiff, and it seems probable that the ruling was based upon this question. In it, we think, the court erred. That the defendants received ample consideration, is evident. Indeed, if none were expressed, the promise in writing imports a consideration, under our statutes. For this consideration they agreed to assume the payment of the chattel mortgage to plaintiff. True, the consideration of this promise did not proceed from the plaintiff; but, notwithstanding some conflict in the authorities, we think the rule is settled that an action will lie on a promise made by a defendant, upon valid consideration to a third party, for the benefit of the

plaintiff, although the plaintiff was not privy to the consideration. *Coggs v. Bernard*, 1 Smith, Lead. Cas. 385, 388; *Schemerhorn v. Vanderheyden*, 1 Johns. 140; *Cleaveland v. Farley*, 9 Cow. 639; *Barker v. Bucklin*, 2 Denio, 45; *Delaware & Hudson C. Co. v. Westchester Bank*, 4 Denio, 97; *Lawrence v. Fox*, 20 N. Y. 268; *Arnold v. Lyman*, 17 Mass. 400; *Hall v. Marston*, 17 Mass. 575; *Carnegie v. Morrison*, 2 Mete. 381; *Brewer v. Dyer*, 7 Cush. 337. But *498 see, on the other hand, **Mellen v. Whipple*, 1 Gray, 317. It may be proper to state that Kelley, one of the parties to this agreement, is not party to the controversy in this court, he not having joined in the demurrer below.

The judgment of the district court will be reversed, and the case remanded, with instructions to overrule the demurrer.

(All the justices concurring.)

DAVID S. RICE v. SOPHIA NAGLE.

January Term, 1875.

Trespass: Injuries Committed by Cattle: Fence. Where roaming cattle, belonging to one person, break through a lawful fence, enter upon the land of another, and there commit injuries, the owner of the land may recover from the owner of the cattle for such injuries, notwithstanding such land may not have been entirely surrounded by a lawful fence.

Error from Jackson district court.

Sophia Nagle sued Rice to recover damages for injuries to plaintiff's growing crops. On appeal to the district court the case was there tried at the January term, 1872. The following instruction was given: "If, however, you find from the evidence that the cattle belonging to the defendant did break into and enter the inclosed land of the plaintiff, and injure her fence, or growing crops, you will decide from the evidence whether, at the places where said cattle broke in, the plaintiff had a legal and sufficient fence. Then, if at those places she had a legal and sufficient fence, she is entitled to recover; and you will then ascertain from the evidence what injury was done by said cattle to the fence and crops, and return a verdict *499 for the plaintiff for that amount." *The defendant asked the court to give the following instruction, which was refused: "Before the plaintiff can recover in this action the jury must find from the evidence that cattle belonging to the defendant, or in his charge, did break into and enter the inclosed land of the plaintiff, and injure her fence, or her growing crops, and that at that time the plaintiff's field or inclosure was surrounded by a legal and sufficient fence."

Verdict in favor of the plaintiff for \$33 damages, and judgment on the verdict for such damages, and for \$220.85 costs.

Martin, Burns & Case, for plaintiff in error.

Hopkins & Hayden, for defendant in error.

VALENTINE, J. The only question presented by the record in this case is as follows: Where roaming cattle, belonging to one person, break through a lawful fence, enter upon the land of another, there commit injuries, can the owner of the land recover from the owner of the cattle for such injuries, notwithstanding such land may not have been entirely surrounded by a lawful fence? This question must be answered in the affirmative.

The judgment of the court below is affirmed.

(All the justices concurring.)

WILSON C. TURNER and others v. OSCAR CRAWFORD and another.

January Term, 1875.

1. **Judgments: Setting Off: Rule Stated.** Where two persons have judgments against each other, either may maintain an action against the other to have the two judgments compensate, and pay each other up to the amount of the smaller judgment.
- *500 *2. ———. And where C. and T. have judgments against each other, and C. assigns his judgment to B. as collateral security to secure the payment of a debt, and B. afterward assigns it back to C., *held*, that as C. never parted with his entire interest in the judgment, he may, after the reassignment of the judgment to him, maintain an action against T. to have one judgment compensate the other, up to the amount of the smaller judgment.
3. **Attorney's Lien: Subject to the Right to Set Off Judgments.** And in such a case, where T., after C.'s judgment was rendered, assigned his judgment to H., and H., also after C.'s judgment was rendered, had obtained an attorney's lien on said T.'s judgment, *held*, that neither such assignment to H., nor the attorney's lien of H., nor both together, can destroy or defeat the right of C. to have one judgment compensate and pay the other up to the amount of the smaller judgment.
4. ———. The case of *Leavenson v. Lafontane*, 3 Kan. *523, is considered and overruled, so far as relates to attorney's liens.

Error from Wyandotte district court.

Action by Oscar Crawford and James T. Johnson, plaintiffs, against Wilson C. Turner, Hadley & Glick, and William B. Bowman, as defendants. The object was to compel a compensation of the judgments which Turner had recovered at the October term, 1871, of said district court against said Crawford, amounting in the aggregate to the sum of \$261.65, debt and costs, against a judgment which

Crawford had recovered against Turner in the same court, at its June term, 1870, for the sum of \$511.95, debt and costs, and that Crawford have judgment for the balance. Said suits of Turner against Crawford had been commenced originally before a justice of the peace, where judgment was given in favor of Turner. Crawford appealed both cases to the district court, and Johnson became his surety in the appeal-bonds. After the issuance of executions (from the district court) on said judgments in favor of Turner, and the return thereon of "no goods," Turner, with Hadley & Glick, (who claimed an interest in said judgments as assignees,) commenced an action as plaintiffs before Bowman, a justice of the peace, against Crawford and Johnson, on said appeal-bonds. This action was thereupon commenced by Crawford and Johnson, and a part of the relief de-
 *501 manded was that the defend*ants should be forever enjoined from prosecuting their action on said appeal-bonds. Trial at the October term, 1872. The district court found generally in favor of the plaintiffs, and gave judgment in their favor, and against the defendants, as prayed for in their petition.

D. B. Hadley and C. S. Glick, for plaintiffs in error.

Bartlett & Hale, for defendants in error.

VALENTINE, J. It would seem from the record in this case that in 1870 Crawford and Turner each had claims for money against the other. Judgments were subsequently rendered on these claims,—one in favor of Crawford and against Turner, and two in favor of Turner and against Crawford. The judgment in favor of Crawford was greater in amount than both of the judgments in favor of Turner. Afterwards, said Crawford and one Johnson, as plaintiffs, commenced this action against Turner and the other plaintiffs in error for the purpose of having the Turner judgments applied (so far as they would go) in partial payment of the Crawford judgment, and also for the purpose of perpetually enjoining the collection of the Turner judgments. The court below rendered judgment in favor of the plaintiffs, (Crawford and Johnson,) as prayed for in their petition, and the defendants below (Turner and others) now bring the case to this court. If no assignment of any of said claims or said judgments had been made, or if no right of third persons had intervened, we suppose such an action as this might properly be maintained. And in such a case the judgment rendered by the court below would be upheld by this court.

But it is claimed by the plaintiffs in error (defendants below) that said judgments were *assigned*, and that the right of third persons had intervened, before this suit was commenced. The plaintiffs in error claim that the Crawford judgment was assigned to Bartlett &
 *502 Hale, and that the *Turner judgments were assigned to Hadley & Glick, and that Hadley & Glick also had an attorney's lien upon said last-mentioned judgments. Now, as Crawford is seek-

ing to have the Turner judgments and his judgment compensate each other to the amount of the Turner judgments, it would certainly seem necessary that Crawford should still be the owner of the Crawford judgment. A previous assignment by him of all his interest in the Crawford judgment would certainly destroy his right to have it pay and cancel the Turner judgments. But did he so assign the same? As the record is brought to this court we cannot say that he did. The findings of the court below were general, and in favor of the plaintiffs, Crawford and Johnson, and against the defendants, Turner and others. The findings of the court below were therefore, in effect, that no such assignment was made. And we cannot say that the findings were not supported by sufficient evidence. The evidence undoubtedly tends to show that Crawford at one time assigned his said judgment to Bartlett & Hale, and that Bartlett & Hale afterwards, but before the commencement of this suit, assigned the judgment back to Crawford. But what kind of an assignment was this? Did Crawford assign said judgment to Bartlett & Hale merely as a collateral security for a debt, and himself still retain an interest in the judgment, or did he assign the judgment absolutely? The evidence does not show what kind of an assignment was made, with any degree of certainty. It tends, however, to show that the assignment was merely as a collateral security for a debt. Crawford himself testified "that in the spring of 1871 he assigned his judgment against Turner for \$403.25 to Bartlett & Hale to *secure fees* he owed them, and the same was not assigned back to him until just before the commencement of this suit." Now, if the assignment of the judgment to Bartlett & Hale was merely an assignment to secure attorney's fees, and was not an absolute assignment of all the property in the judgment, then we think that Crawford had the right after the judgment was reassigned to him to commence this ac-
 *503 tion. *And under the evidence and *the findings of the court below* we must consider that the assignment was made merely to secure attorney's fees, and not as an absolute assignment.

We do not think that the assignment of the Turner judgments to Hadley & Glick, or their attorney's lien on said judgments, can make any difference in this case. Crawford's claim and judgment existed prior to the Turner judgments, prior to the said assignment to Hadley & Glick, and prior to their attorney's lien. Turner could therefore not assign his judgments, nor the claims upon which they were rendered, nor incur such claims or such judgments with attorney's liens, or any other kind of liens, so as to defeat Crawford's right to have his judgment or his claim compensate and pay the Turner judgments or claims. A judgment is not like negotiable paper. It may be assigned, but will still be subject to all the defenses, counter-claims, or set-offs which the judgment debtor might, at the time of the assignment, have against it. This right of Crawford to have his judgment compensate and pay the Turner claims and judg-

ments existed from the time the Crawford judgment was rendered down to the present time, and still exists, except that possibly, during the time the Crawford judgment was pledged to Bartlett & Hale to secure attorney's fees, Crawford's right to so use said judgment would have been subject to the consent of Bartlett & Hale. If Turner had not assigned his judgments, or incumbered them with attorney's liens, his right to have his demand compensate that of Crawford up to the amount of his demand would have existed, notwithstanding the assignment of the Crawford judgment to Bartlett & Hale.

The view we have taken of this case is in accordance with our statutes. An action may be maintained in this state on a domestic judgment. *Burnes v. Simpson*, 9 Kan. *658. If either Turner or Crawford had commenced an action against the other on his judgment, the other could have set up his judgment as a set-off, (Gen. St. 648,

649, §§ 94, 98;) and section 100 of the Code provides that *504 "when cross-demands have *existed between persons under such circumstances that, if one had brought an action against the other, a counter-claim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, but the two demands must be deemed compensated, so far as they equal each other." Gen. St. 649. The view that we have taken of this case is also in accordance with equitable principles. So far as this decision conflicts with the decision made in the case of *Leavenson v. Lafontaine*, 3 Kan. *523, that decision is overruled.

The judgment of the court below is affirmed.

(All the justices concurring.)

ST. JOSEPH & D. C. R. Co. v. THOMAS CASEY.

January Term, 1875.

1. **Attachment: Discharged by Defendant's Appeal.** Where a case in a justice's court, in which an attachment has been issued and levied upon property of the defendant, is taken by the defendant on appeal to the district court, the attachment is thereby discharged, and the attached property should be delivered to the defendant.
2. ———: **Motion to Discharge: Effect of Appeal.** In such a case, where a motion which had previously been made in the justice's court to discharge the attachment, and there overruled, was "called up" by the defendant in the district court, and affidavits offered to be read in support thereof, *held*, that such motion could not rightfully be entertained by the district court, and therefore that the district court did not err in refusing to permit the affidavits to be read, and in overruling the motion.

3. ———: **Costs on.** And in such a case, although a motion might properly have been made in the district court to tax the costs made on the attachment against the plaintiff, because the attachment was wrongfully obtained, yet said motion "to discharge the attachment" could not be considered merely a motion to tax the costs of the attachment, and especially not, as the motion was "called up" before the trial in the district court was commenced.

*505 *Error from Doniphan district court.

Casey, as plaintiff, had judgment, at the June term of the district court, 1874, for \$112.20, and costs, and the railroad company brings the case here on error.

John Doniphan, for plaintiff in error.

Nathan Price and *W. D. Webb*, for defendant in error.

VALENTINE, J. This action was originally commenced by Thomas Casey against the St. Joseph & Denver City Railroad Company before a justice of the peace. An attachment was issued in the case. From the record we learn that, on the day set for trial, the "case was called, and parties appeared, and the defendant, by its attorneys, Messrs. Hawkins & Baldwin, filed affidavit and motion to discharge the attachment issued in this case. Motion was argued by counsel, and thereupon the said motion was overruled by the court upon the ground that plaintiff did not (in the opinion of the court) have reasonable notice of the filing of the same, as the law contemplates." Now, suppose that reasonable notice of said motion was in fact given, and still there is nothing to show that the motion should have been sustained. What did the motion or the affidavit contain, and whose affidavit was it? Was it the affidavit of Casey, Hawkins, Baldwin, or some one else? The justice of the peace rendered judgment in favor of Casey, and against the railroad company, for \$200.55, and costs, and ordered that the attached property be sold to satisfy said judgment. The railroad company then appealed to the district court. We suppose the appeal-bond was an ordinary appeal-bond, but we cannot tell, as no copy of the same is given in the record. What, then, became of the attached property? The record does not show, but we would infer from the briefs of counsel

*506 *that it was delivered by the officer to the railroad company. This we think was right.

Section 52 of the justices' act provides that "if the defendant, or other person in his behalf, at any time before judgment, cause an undertaking to be executed to the plaintiff by one or more sureties, resident in the county, to be approved by the justice, in double the amount of the plaintiff's claim, to be stated in his affidavit, to the effect that the defendant shall perform the judgment of the justice, the attachment in such action shall be discharged, and restitution made of any property taken under it, or the proceeds thereof. Such undertaking shall also discharge the liability of a garnishee in such

action for any property of the defendant in his hands." Gen. St. 787. Section 213 of the Civil Code is precisely like the foregoing section of the justices' act, except the words which we have put in italics are changed as follows: "in" is changed to "on;" "justice" is changed in two places to "court;" and "to be" is changed to "as." The appeal-bond, where the defendant appeals, is in spirit substantially the same as the bond mentioned in the foregoing sections. Section 121 of the justices' act provides that "the party appealing shall, within ten days from rendition of the judgment, enter into an undertaking to the adverse party, with at least one good and sufficient surety, to be approved by such justice, in a sum not less than fifty dollars in any case, nor less than double the amount of the judgment and costs, conditioned—*First*, that the appellant will prosecute his appeal to effect, and without unnecessary delay; *second*, that, if judgment be rendered against him on the appeal, he will satisfy such judgment and costs. Such undertaking need not be signed by the appellant." Gen. St. 800.

Now, as the defendant who appeals gives ample security for the prosecution of his appeal to effect, and for the payment of any judgment that may be rendered against him, it would seem to be hardly necessary that the attachment should continue any longer in force. And as no provision is made by law for the officer who holds the attached property at the time the appeal is taken to turn the property over to some officer of the district court, it would hardly seem *507 that it was *intended that the district court should take charge of the attached property. And it can hardly be supposed that after all the proceedings of the justice's court are taken by appeal to the district court, that any officer of the justice's court will continue to have possession and control of the attached property; and the appeal-bond, in spirit and substance, certainly answers all the requirements of section 52 of the justices' act, and section 213 of the Civil Code.

It has been held in this court that where a justice has discharged the attachment, and the *plaintiff* has appealed by filing an ordinary appeal-bond, the attachment is not thereby taken to the district court. *Gates v. Sanders*, 13 Kan. *411. The proceedings of the district court with regard to the attachment issued in this case will appear from the following quotations from the record brought to this court: "Be it remembered that, on the call of the above [case] action for trial, defendant called up the motion to discharge attachment made in the court below, and read the said motion and affidavit of H. C. Hawkins, as follows: [Here follows motion and affidavit of Hawkins.] No motion was made in this court to discharge attachment. The defendant then read the following notice of filing counter-affidavits, [here follows notice;] and tendered and offered to read the affidavits of L. D. Suthill and E. H. Saville filed in said action in this court, which affidavits are in the following words,

[here follow affidavits of Suthill and Saville;] but the court refused to hear the affidavits read, and overruled the motion, which order is in the following words and figures: '[Title, etc.] The motion of said defendant to discharge attachment in this case being argued by counsel, the court, upon due consideration, overruled said motion;' to which defendant duly excepted. To all of said rulings of the court, in refusing to hear the affidavits read, to discharge, and in disallowing said motion, the defendant then and there duly excepted."

The parties then proceeded with the trial, and the court, at the close of the trial, rendered judgment in the following words, to-wit:

"It is therefore considered, ordered, and adjudged by the court
 *508 here that the said plaintiff have and recover of and *from the said defendant the said sum of \$112.20, and interest as aforesaid, and also his costs in and about this suit expended, taxed at \$——, and that execution issue therefor;" to all of which the defendant then and there excepted.

It is not stated in the record why the district court refused to hear said affidavits read, nor why the court overruled said motion to discharge said attachment. But we would infer from the briefs of counsel that the same was so done because the court considered the attachment discharged by the appeal-bond. If this was the view of the court below, we think the court below was right. When the railroad company gave the appeal-bond we think the company became entitled to the immediate custody of the attached property, and we presume, from the briefs of counsel, that it immediately obtained such custody. The district court did not make any order with reference to said attached property. This we think was right.

But it is claimed by the railroad company that the attachment was wrongfully obtained; that costs accrued thereon; and that judgment has been wrongfully rendered against the company for such costs. This, in fact, is the only ruling of the court below of which the plaintiff now complains as substantial error. Now, in our opinion, the entire judgment of the justice of the peace was wholly vacated by the appeal and trial and judgment in the district court. The attachment was also discharged by the appeal. The question of damages for the wrongful suing out of the attachment cannot be heard in this case; and hence the question of who shall pay the costs which have accrued on the attachment is the only question left having any connection with the attachment proceedings which could have been heard by the district court in this case. And this question, we think, should have been submitted to the district court, if any ruling were desired upon the question. Nothing that transpired either in the justice's court, or the district court, would have precluded the defendant from submitting the question to the district court.

*509 But the defendant did not *submit the question to that court in any proper mode. A motion made in the justice's court to discharge the attachment, and "called up" in the district court,

where no such motion could rightfully be entertained, can hardly be construed to be a motion made in the district court to tax costs; and especially not as the motion was "called up" in the district court before the trial in that court was commenced. And although the court below rendered judgment against the defendant for the costs of the plaintiff in general, yet it does not seem that any costs—those on the attachment, or others—have ever yet been taxed. Except for the affidavits of Hawkins, Suthill, and Saville, it would appear from the record that the costs of the attachment should be taxed against the defendant below. And as these affidavits were merely read, or offered to be read, on a motion which the district court could not rightfully entertain, we think the affidavits can hardly be considered as in the case. If the defendant had offered to read them upon a motion to tax the costs of the attachment against the plaintiff, the plaintiff would probably have opposed them with counter-affidavits.

The judgment will be affirmed.

(All the justices concurring.)

JOSEPH R. NELSON v. JOHN C. BECKER.

January Term, 1875.

Judgment: Voidable Judgment: Justices' Courts. A judgment of a justice of the peace, rendered upon a service of summons made only two days prior to the rendering of such judgment, is not void, but only voidable, and must be held valid and binding in all cases until reversed, vacated, or set aside by some direct proceeding instituted for that purpose.¹

*510 *Error from Butler district court.

The case is stated in the opinion.

R. M. Ruggles, for plaintiff in error.

H. T. Sumner and *A. J. Miller*, for defendant in error.

VALENTINE, J. The principal, if not the only, question involved in this case, is whether a judgment of a justice of the peace, rendered upon a service of summons made only two days prior to the time of rendering such judgment, is to be deemed valid and binding, when attacked collaterally, or whether such a judgment must be deemed void in all cases. We think that such a judgment is never void, but only voidable, and must be held valid and binding in all cases until reversed, vacated, or set aside by some direct proceeding instituted for that purpose. It is not like a judgment rendered upon *no service*. The service was good, except that it was made only two days before the time set for trial, while it should have been at least three days before that time. Gen. St. 777; Justices' Act, § 12.

¹See *Cross v. Knox*, 32 Kan. 725; S. O. 5 Pac. Rep. 32; *Gross v. Funk*, 20 Kan. 656.

The service was merely *irregular*, it was not *no service*, or a *void service*, and a judgment rendered thereon was not void, but, at most, was only voidable. *Ballinger v. Tarbell*, 16 Iowa, 491; *Freem. Judgm.* § 126. See, also, in this connection, *Dutton v. Hobson*, 7 Kan. *196; *Armstrong v. Grant*, 7 Kan. *285; *Claypoole v. Houston*, 12 Kan. *324, *327; *Meisse v. McCoy's Adm'r*, 17 Ohio St. 225.

In the present case the facts are these: One C. W. Donaldson sued one William Hoy before a justice of the peace, and obtained an order of attachment. The summons and order of attachment were issued on October 14, 1872. Both were made returnable on *511 October 25th. The order was served on *the same day that it was issued, by levying the same on some corn standing in a field. The summons was served, as appears from the record, on October 25th, but from the brief of the defendant in error we suppose it was served October 23d. It probably, however, makes but little difference whether it was served on the 23d or 25th, as it was served and returned before the case was called for trial. The summons and the order of attachment were both returned on October 25th. The plaintiff appeared for trial, but the defendant did not appear. The justice then, upon the evidence of the plaintiff, rendered judgment for the plaintiff, and against the defendant. The attached property was afterwards sold at constable's sale to satisfy this judgment, and Nelson, the plaintiff in error in this case, (defendant below,) bought it. Nelson afterwards took the corn away. Becker, the defendant in error, (plaintiff below,) also claimed to own the corn. He claimed that he purchased it direct from the said William Hoy, the judgment debtor, before said suit was commenced against Hoy. He also claimed that he had possession and control of the ground on which said corn stood. He therefore commenced this action against Nelson for entering the premises and taking away said corn. It was shown on the trial of this case that Hoy did in fact, at one time, own the corn. He had a lease of the ground, and raised the corn, and was to pay one-half of the corn raised for the use of the premises. Nelson did not take away more than one-half of the corn. It was also shown on the trial that Becker, subsequent to the time when he claims to have purchased said corn from Hoy, admitted and stated to various witnesses, and at different times, that Hoy owned the corn. Nelson then offered to introduce a transcript of judgment, and the proceedings connected therewith, for the purpose of showing that he, Nelson, had obtained all the interest in said corn that Hoy ever had; but the court below excluded the evidence, and afterwards, on the other evidence, rendered judgment in favor of Becker, and against Nelson.

We think the court below erred in excluding said evidence. It *512 was competent and material, and *should have been received.

The only ground for excluding it seems, from the brief of defendant in error, to have been said irregular service of summons, which we have already discussed.

The judgment of the court below is reversed, and a new trial ordered.

(All the justices concurring.)

KANSAS PAC. RY. CO. v. MARGARET SALMON, Adm'x.¹

January Term, 1875.

1. **Amendments: Pleading: Amending Petition: Changing Nature of Claim.** This action was brought by Margaret Salmon, as administratrix of the estate of Daniel Salmon, deceased, against the Kansas Pacific Railway Company, under section 422 of the Civil Code, for damages resulting from the death of said Daniel, claimed to have been wrongfully caused by the said railway company. In the original petition it was alleged that Salmon was killed through the negligence of the railway company while he was being transported by them as a passenger, but afterwards the petition was so amended as to make it allege that Salmon was killed through the negligence of the railway company while he was being transported by them as an employe of the company. *Held*, that the court below did not err in allowing said amendment to be made.
2. ———. A pleading may be amended by inserting allegations *material* to the case, and every material amendment of a petition must of necessity change more or less the nature of the cause of action.
3. **Evidence: Railroads: Non-Residence of Officials.** In an action against a railway company to recover damages for wrongfully causing the death of an employe, it is not error to admit testimony which tends to show that the president and directors of such railway company reside in other states, and give very little personal attention to the operating of the road.
4. ———: **Incompetency of Conductors and Engineers.** It is not error for the court to admit testimony tending to show incompetency on the part of conductors and engineers of colliding trains.
- *518 *5. **Negligence: Contributory: Question of Fact: Effect of Verdict.** A verdict that the death of the deceased "was caused by the gross negligence of the defendant, without any fault" of said deceased, is substantially an affirmative finding that the deceased, during the whole transaction resulting in his death, exercised due care and diligence to protect himself from injury, and to do his duty towards his employer.
6. **Verdicts in Supreme Court: Approval by Trial Court.** Where a jury return a verdict against the weight or preponderance of the testimony, and the trial court, upon a motion to set aside the verdict and grant a new trial because the verdict is not sustained by sufficient evidence, approves such verdict, and gives judgment thereon, if there is

¹This case in court, 11 Kan. *88; this case referred to, *Union Pac. Ry. Co. v. Young*, 19 Kan. 493; *Kansas Pac. Ry. Co. v. Little*, Id. 272; consult, on the subject of the liability of railroad companies for injuries to employes, the notes to the following cases: *Defective machinery*, *Kelley v. Erie, T. & T. Co.*, 25 N. W. Rep. 707; *employment*, *Chicago v. Sexton*, 3 N. E. Rep. 267; *scope of employment*, *Pittsburg, C. & St. L. R. Co. v. Kirk*, 1 N. E. Rep. 849; *fellow-servants*, *Phillips v. Chicago, M. & St. P. R. Co.*, 25 N. W. Rep. 549; *McGee v. Boston Cordage Co.*, 1 N. E. Rep. 745; *risks—negligence*, *Farmer v. Central Iowa Ry. Co.*, 24 N. W. Rep. 896, and the full note to *Kansas Pac. Ry. Co. v. Peavey*, 8 Pac. Rep. 791.

some evidence to sustain the verdict in every essential particular, this court cannot reverse the judgment merely because the verdict does not seem to be sustained by sufficient evidence. [Kansas Pac. Ry. Co. v. Kunkel, 17 Kan. 169, and cases cited.]

Error from Leavenworth district court.

The defendant in error, as administratrix of the estate of her deceased husband, Daniel Salmon, brought suit against the Kansas Pacific Railway Company to recover damages sustained by the widow and heirs of said deceased by reason of his death. The action was commenced in October, 1871, and was here on error two years ago, and will be found reported in 11 Kan. *83, where a full statement of the facts, agreed and admitted, will be found in the statement and opinion. The original petition (11 Kan. *84) alleged that Daniel Salmon was a *passenger*, riding on defendant's cars, on their railroad, and that his death was caused by the gross carelessness and negligence of the defendant, by its agents and employes, and through no fault or want of care on the part of said Daniel. On being remanded to the district court, that court gave plaintiff leave to amend her petition. This was done. The substantial amendment was the omission of the allegation that the deceased was a passenger, and the inserting, in lieu thereof, an allegation that, "at the time of the death of said Daniel Salmon, the said Daniel was in the employ of said defendant as a locomotive engineer, and as such had charge of an engine from Brookville west, for one run west of said point; and that, by request and permission of said defendant, said Daniel and other employees of the said defendant were, *and had for a long time been, accustomed to ride on the car on which the said Daniel was then being carried without other compensation than the good offices of said defendant and its employes toward each other; that the said Daniel had no office or duty to perform on said train, and no authority thereon; and that the death of the said Daniel Salmon was caused and produced by the gross negligence of said defendant." This amendment was objected to by defendant, "because and for the reasons—*First*, that the said amended petition substantially changes the cause of action of plaintiff; *second*, the cause of action stated in said amended petition is another and different cause of action from that alleged in the original petition filed in said cause; and, *third*, the cause of action on which this suit was brought is abandoned by the said amended petition, and a new cause of action substituted and alleged." The district court refused to strike off the amended petition. The answer was a general denial. Trial at the January term, 1874. An agreed statement of facts was filed, (the same as given in 11 Kan. *89, *90.)

Plaintiff called J. P. U. to testify as to place of residence of president and directors of the road, and what officers had personal charge and supervision in operating defendant's railroad. The depositions of the engineer of one of the colliding trains at the time of the collision

ion, and the conductor of the other of said trains, were read, to show the condition of the road, negligence, want of care, and that the weather was foggy, etc. Another witness was called to prove the incompetency of one of the engineers, but he testified, on cross-examination, that said engineer (Sheldon) "operated his engine as well as the average engineers on the road."

Plaintiff then called W. H. Brownhill, who testified as follows:

"My occupation is that of locomotive engineer. Have been in that business twenty years. Am at present employed on the Atlantic & Pacific Railroad, between Sedalia and State Line. From April to September, 1870, I was on the Kansas Pacific road, at Brookville, in charge of the round-house, as foreman. Brookville is 200 miles west of the Missouri river, and the terminus of the Kaw Valley division, and the Smoky Hill *division. Before that I had run an engine about four years on the K. P. road. I was appointed foreman by B. Marshall, who was division superintendent of the Smoky Hill division. I had a general supervision of everything at that point,—men and engines; to see that the engines were got ready, and that the men did their duty. I was on duty on the thirteenth of September, 1870. I knew Daniel Salmon. He occupied at that time the position of locomotive engineer on a freight train. He ran on the Smoky Hill division, from Brookville to Ellis. He was killed on the thirteenth of September, at Clear Creek, a point between Ellsworth and Brookville, on the line of the Kansas Pacific Railroad. I had last seen Salmon before he was killed, the night previous, at Brookville. His family resided at that time at Ellsworth. He had been home to visit his family, and I instructed him to return on the first train in the morning. His family was sick, and he had been up late at night, and he got into the caboose to ride back to his daily labor. I was not there, (at Ellsworth,) but know he went home from Brookville to Ellsworth the night of the 12th. I saw him last alive on the night of the twelfth of September, at Brookville; and saw him dead, in the forenoon, the next day, at Brookville. His body was brought in, I think, on the same train he was killed on. It was the first train coming east on the morning of the 13th. James Massey was the conductor of that train. E. M. Sheldon was the engineer. The morning of the 13th was very foggy,—more so than usual.

I had known James Massey, the conductor of the train on which the accident occurred, about a year or so. He was mostly employed as a brakeman; occasionally he ran as a conductor. He was not employed as a regular conductor, but occasionally ran a trip or two as a conductor. From my experience as an engineer on a railroad I should say I was capable of judging of the capacity of a man to run a train as conductor. I had no knowledge of Massey running trains as conductor; only an occasional trip, as I have stated. I should say he was not a fit man to run a train, from his lack of judgment and ability, and dissipation. I had known him on the road about a

year. I mean by dissipation: that he was in the habit of drinking too much liquor,—getting drunk. I had seen him in that fix a great many times. I have not seen him drunk while on duty, because I had no chance to. He was away from me when on duty.

"Marshall occupied the position of division superintendent,
*516 *Smoky Hill division,—the same division that the accident occurred on by which Salmon lost his life. Marshall had the sole power to employ and discharge employes in that division. He was the chief officer of the company in that division,—the highest authority we knew of. I knew E. M. Sheldon. He was at that time engineer of a freight train. He was the engineer of the train on which Salmon was killed. I had known him then about two years and a half. He was fireman about two years, and engineer about six months. From my experience as a locomotive engineer, and my knowledge of E. M. Sheldon, I could form a judgment as to his capacity as an engineer. I considered him an incompetent man. He lacked judgment and ability in running an engine. He was strictly moral and temperate. He had no bad habits. Mr. Marshall asked me why the engineer that was running that engine could not do better. This was before the death of Salmon. My reply was that it wanted an engineer, that he was no engineer, and never would be, and he had better get rid of him. Those were my words to Mr. Marshall. This conversation between myself and the division superintendent in reference to Sheldon was about two months before Salmon's death. Mr. Sheldon was retained on the road, in the capacity of an engineer, after that statement to Mr. Marshall. He remained on the road from the time of that conversation till the death of Salmon in the capacity of engineer. It was a wood or construction train that collided with the train upon which Salmon was at the time he was killed. I know this, because I furnished the engineer to run it. The engineer of that train was J. W. Wever. He resides now at Beardstown, Ill. The wood train did not have any conductor that day. The accident by which Salmon lost his life occurred at Clear Creek. At that point the track is crooked, and the grade very steep,—probably 75 feet to the mile either way from where the accident happened."

On cross-examination witness testified as follows: "I guess I was not the only competent man on that road. I don't know as Mr. Marshall was as competent to judge of the fitness of the men as I was. He had been a railroad man as long. He had a better opportunity of knowing the way Mr. Massey run on the road than I had. My principal business was at a particular point. I had charge of the engines and men there. I know Salmon was killed at Clear Creek, because the men came in and gave an account of an accident, —told me all about it. I was not there. I only know his
*517 *family was sick by being told so,—they told me so, and he told me so. It was customary for Salmon, whenever he wanted to, to go home, when he got permission, and on any train he pleased."

The cross-examination was very long, and went over the whole ground of his testimony in chief, and as to his means of knowledge, etc., which was oftentimes mere hearsay.

Defendant called E. M. Sheldon, who testified that he had been railroading since 1867; was a locomotive engineer, and as such engineer was in employ of the Kansas Pacific Railroad Company from 1869 to 1872. He further testified: "I was the engineer of the train on which Salmon was riding when he was injured. The train was the regular freight, running between Ellis and Brookville. We left Ellis in the night-time, before the morning on which the accident happened. We were at Ellsworth at about daylight, and stayed about 25 minutes, and then started east. James Massey was conductor on the train. He had been running from Ellsworth to Sheridan, and from Brookville to Ellis, on the same division with me. Salmon was injured about one mile east of Summit siding, and about 15 miles from Brookville. The accident occurred about half after seven o'clock in the morning, near a place called Clear Creek. The train of which I was the engineer had broken in two. We had to stop to make a coupling. After the coupling was made the conductor gave a signal to back up to get a start at the hill, of which we were at the bottom. We had backed up about fifteen car lengths—were backing very slow, about four miles an hour—when I saw a train and engine approaching us from the west, (we were backing west.) I immediately put my engine in the forward motion, blew one whistle for brakes, and had my train stopped, or nearly so, when we were struck by the train that I had seen coming. I did not get off from my engine before they struck us, but immediately after left my engine, and ran to the scene of the wreck. The train I saw coming was approaching us on a down grade. It was a very dewy, foggy morning, and the rails wet. During the time I was backing, up to the time of the collision, any person in the caboose of the train could have safely got off from it onto the ground very easily, and without danger of being hurt. All the persons that were on the caboose except Salmon did get off. The caboose was situated at that time on the hind end of the train of which I was the engineer. The *518 train *which collided with mine was hauling wood, and was an irregular train. I was not aware that there was any such train on the track, and had no notice thereof. After coupling my train I do not think we could have ascended the grade without backing up to get the headway. The track was very slippery,—impossible for an engine to use any great amount of steam without slipping. Aside from blowing one whistle for brakes, I know of no efforts the approaching train made to stop. I heard them whistle for brakes. At the time of the collision I was on my engine. We can feel the effect of the stroke of a collision at the rear end of a train on the engine. The jar was not very heavy on the engine,—not as hard as I have seen it on engines backing into trains to make a coupling. No

other person was injured on that train nor by the collision except Salmon. John Wever was the engineer of the train that collided with my train. I was on the road when he came onto the road, and at the time of the accident I had known him about two years. I think they did not have a conductor on the train. Wever is a competent engineer. Massey is a competent conductor. I think I was a competent engineer at that time. At the time of this collision, and for some time before, Brownhill was the foreman of the round-house at Brookville."

The deposition of B. Marshall, a witness for defendant, was read. He testified that he was one of the assistant superintendents upon defendant's railroad for more than three years before the fourteenth of September, 1870, and continued such superintendent until the winter of 1871; that at the time of the accident mentioned, and for several months prior thereto, he had been in the charge and superintendence of the division of the defendant's railroad between Brookville and Ellis, and of that part of the road where said accident occurred; that he was well acquainted with Sheldon, engineer, and Massey, conductor, of the train on which Salmon was injured; that he was also well acquainted with Wever, the engineer of the train colliding with the said train on which Salmon was; that he employed all of said persons; that he used due diligence in the employment of each of them; that he knew the qualifications of each of said persons, and that each of them was entirely competent for the business in which he was at that time engaged; that Sheldon was in all respects a competent engineer; that Massey was a competent conductor; and that both of them were competent, careful and temperate; that he never had any notice from Brownhill, or any other
 *519 *person, that either the said Sheldon, Massey, or Wever was incompetent or negligent, or that they were, or that either of them was, intemperate, or addicted to the use of intoxicating liquors.

M. D. Smith, a witness for defendant, testified that he was a locomotive engineer, and had been about ten years; had been on the Kansas Pacific Railroad ever since the spring of 1867. He had known E. M. Sheldon about five years. Sheldon's intelligence, habits of industry, competence to perform his duties, etc., were all good. He performed his duties well in every respect. Witness also testified that Massey was "called a good man," "did not neglect his business," etc.

Other testimony of like import was given on the part of the defendant. (The transcript is printed, and occupies two hundred pages.) The instructions given by the court of its own motion were very full. The defendant asked sixteen special instructions, of which all were given but the sixth and ninth, which are as follows:

"(6) Negligence cannot be inferred, but must be proved. The simple fact of the collision of these trains which caused the injury to

Salmon is no evidence of negligence in this case on the part of defendant, although the employes in charge of said trains were negligent; and, before the jury can find the defendant guilty of negligence which caused the injury to Salmon, they must find that by the preponderance of the evidence the plaintiff has established—*First*, that some of the employes in charge of the colliding trains were guilty of negligence which caused the collision by which deceased was injured; *second*, that the employes whose negligence caused the injury were not fit and proper persons to hold the positions they then occupied, and that the defendant employed them without using due care to ascertain their qualifications and fitness for their several positions, and did not believe them to be competent for the same; and, *third*, that the person employing them did not, of his own knowledge, know them to be competent; and unless the jury find from the preponderance of the evidence that the defendant neglected some duty as above indicated, they must find that the defendant was not guilty of negligence."

"(9) If Salmon went into said caboose, and went to sleep, when *520 if he had been awake, and careful of his safety, he could have left the car, and escaped injury, his so being asleep in said car is negligence which contributed directly to his own injury, and the jury are warranted in finding that his negligence proximately contributed to the injury which he received."

The jury returned a special verdict, stating the facts found by them; and they added to such finding "that if, as matter of law, the plaintiff is entitled to recover, we find for the plaintiff, and assess her damages at \$9,600." New trial refused, and judgment on the verdict.

J. P. Usher, for plaintiff in error.

Stillings & Fenlon, for defendant in error.

VALENTINE, J. This is the second time that this action has been brought to this court. *Kansas Pac. Ry. Co. v. Salmon*, 11 Kan. *83. When here first it was reversed, and sent back to the court below, for a new trial. On being returned to that court the plaintiff below, (Margaret Salmon,) with leave of the court, but over the objections of the railway company, amended her petition. This is the first ruling of the court below now complained of as error. It is claimed that such ruling was erroneous because the amendment, as is claimed, changed substantially the cause of action and defense.

Section 139 of the Civil Code reads as follows: "The court may before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party, or correcting a mistake in the name of a party or a mistake in any other respect, or by inserting other allegations material to the case, or conform the pleading or proceedings to the facts proved, when such amendment

does not change substantially the claim or defense; and when any proceeding fails to conform, in any respect, to the provisions of this Code, the court may permit the same to be made conformable thereto by amendment." Gen. St. 655.

With the view that we have taken of the question now under consideration we do not think that it is necessary for us to determine whether the phrase, "when such amendment does not change substantially the claim or defense," applies to and qualifies all that precedes it, or whether it merely applies to and qualifies the words, "or conform the pleading or proceeding to the facts proved." That it does one or the other seems to be evident, and yet, whichever way we view it, we are led into serious difficulties. It is certain, however, as we think, that under said section any pleading may be amended by correcting any mistake therein, or by inserting other allegations material to the case, when such amendment does not change substantially the claim or defense." In the present case we do not think that the amendment changes substantially the claim or defense. The action under the original petition was an action brought by Margaret Salmon, as administratrix of the estate of Daniel Salmon, deceased, against the railway company, under section 422 of the Civil Code, (Gen. St. 709,) for damages resulting from the death of said Daniel, wrongfully caused by said railway company, and the action as now prosecuted is still precisely the same. The parties are the same. The action is still prosecuted by the same plaintiff, in the same capacity, against the same defendant, for wrongfully causing the death of the same person, at the same time and place, by the same means, and in the same manner. The amendment is simply this: The original petition stated that Salmon was killed by the railway company while being transported by the company as a *passenger*. The amended petition states that he was killed by the railway company while being transported by them as an *employee* of the company. In all other respects the two petitions are alike. And as to the proof: Under the original petition the plaintiff had the right to prove that the death of Salmon was caused by the railway company through the negligence of any one or more of its servants, agents, or officers, superior or inferior. Under the amended petition the plaintiff had to show that the death was caused by the railway company through the negligence of some one or more of its *superior* agents, servants, or officers. Under the amended petition, if the death had been caused merely through the negligence of some fellow-servant,—some co-employee,—then the plaintiff could not recover. *Dow v. Kansas Pac. Ry. Co.*, 8 Kan. *642; *Union Pac. Ry. Co. v. Miliken*, Id. *647; *Kansas Pac. Ry. Co. v. Salmon*, 11 Kan. *88. These are the only differences required in the proof. The amended petition simply restricts the plaintiff's right to recover by making it necessary for her to show that the death was caused through the negligence of some *superior* officer, agent, or servant of the company, instead of

allowing her to show that it was caused through the negligence of any officer, agent, or servant of the company, superior or inferior, as the original petition did.

But suppose the amended petition has made such a change that the negligence required to be proved under it is the negligence of an entirely different set of officers, agents, or servants, from that required by the original petition, and still such a change does not necessarily change the cause of action or defense. It is not the officers, agents, or servants of the company that are sued, and it is not their negligence, *as such*, of which the plaintiff complains. But it is the railway company that is sued, and *the negligence of the railway company*, (through its officers, agents, or servants,) of which the plaintiff complains. It can certainly make but very little difference whether the railway company was guilty of negligence through one set of employes, or through some other set, for, if the company was guilty of negligence at all, it is liable for the same kind and character and amount of damages in one case as in the other; and in either case it devolves upon the plaintiff to show the negligence. The substantial question in the case is whether the company was guilty of negligence at all, and this was sufficiently charged in either petition.

But it is said that the contract under which a passenger is carried differs widely from the contract under which an employe is carried, and therefore that as the original petition alleged that Salmon was carried as a passenger, while the amended petition alleges that he was carried merely as an employe of the company, the cause of action must necessarily have been changed. This need not necessarily be so. In neither case would the obligation of the railway to carry Salmon safely rest wholly, or even mainly, upon the contract between the parties, but in each case it would rest principally upon the laws of the state. But, wherever it might rest, this action was not brought for any breach of contract. The action is not founded upon contract at all. It is more in the nature of an action of tort. It is an action for damages, resulting from a neglect on the part of the railway company to perform a duty imposed upon it by law. It is true, the contract may be shown. Indeed, it must be shown, not for the purpose of recovering for a breach of the contract, however, but incidentally, for the purpose of showing the *status* of the parties with relation to each other,—of showing the legal obligations resting upon each with respect to the other, and of determining whether either has been guilty of negligence or wrong towards the other. And whether Salmon was a passenger or an employe, the contract between him and the company must thus be incidentally shown merely for such purpose. The legal obligation resting upon railway companies to exercise care and diligence towards their employes does not differ so very much from the legal obligation resting upon them to exercise care and diligence towards their passengers, except in extent. It is the duty of a railway company towards both passengers

and employes to see that all its officers, agents, and servants, of whatever grade, who have the power from the company to employ, retain, or discharge other employes, or who have the power from the company to furnish implements, machinery, or materials to the other employes, for them to operate with, shall exercise reasonable care and diligence in furnishing a sufficient number of competent employes for the work to be done, and in furnishing a sufficient number and amount of proper implements, machinery, and materials

*524 for *the employes to operate with in accomplishing such work; and the company is liable to either passengers or employes for any injury resulting to them from any want of care or diligence in these respects. *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Flike v. Boston & A. R. Co.*, 53 N. Y. 549. (The latter case is very much like the case at bar.)

These officers, agents, or servants of the company, upon whom such powers are bestowed, are what we would designate as the higher or superior officers, agents, or servants of the company; and these higher officers, agents, or servants cannot, with any degree of propriety, be termed fellow-servants with the other employes who do not possess any such extensive powers, and who have no choice but to obey such superior officers, agents, or servants. Such higher officers, agents, or servants must be deemed in all cases, when they act within the scope of their authority, to act for their principal, in the place of their principal, and, in fact, to be the principal. We also think that it is the duty of a railway company, with reference to both passengers and employes, to exercise reasonable care and diligence in making sufficient regulations for the safe running of trains, so as to avoid danger from collision, or from any other source. *Shear. & R. Neg.* § 93, and cases there cited. And a railway company is also responsible for the negligence of its higher or superior officers, agents, and servants, even to other employes, when they act within the scope of their authority. Thus far the duty of the railway company towards its passengers and employes is about the same, and here the similarity of duty probably ends. The duty towards employes here stops, while the duty towards passengers extends further. A railway company is not responsible to one employe for the negligence of another employe, where they are both engaged in the same common employment. But a railway company is always responsible to a passenger for the negligence of any employe. The grade of the employe within the particular employment does not generally make much difference.

If the employe performs the duties of one of the higher officers,

*525 agents, or servants, of *which we have already spoken, the company is generally responsible for his negligence, whatever may be his grade. But if he is engaged in the same common employment with other employes, the company is generally not responsible for his negligence to the other employes, although he may be in fact the foreman for that particular work. The main issue in the

present case is whether the railway company was guilty of negligence or not towards Salmon; and whether Salmon was a passenger, or merely an employe, is a question of fact, brought into the case merely for the purpose of showing the *status* of Salmon towards the company, and thereby of showing whether the things charged against the company amount to negligence or not, and, if they do amount to negligence, its nature and character. The fact of Salmon being a passenger, or an employe, is not the cause of action, or the foundation for the cause of action. The negligence of the company, whereby the injury occurred, may more properly be termed the foundation of the cause of action. The fact of Salmon being a passenger, or an employe, is simply one of the facts which enter into the description of the cause of action. It of course is a material fact. The allegation in the petition which sets it forth is a material allegation. But said section 139 of the Code authorizes a pleading to be amended "by inserting other allegations *material* to the case." Immaterial amendments need not be made at all, and every material amendment of a petition must of necessity change more or less the nature of the cause of action. But if the amendment does not change the cause of action, or the defense, from one thing to another, we think it may be made. That material amendments may be made, where the amendments are merely of facts descriptive of the cause of action, and do not change the cause of action from one thing to another, we would refer to the following authorities: *Prater v. Snead*, 12 Kan. *447, *449, and cases there cited; *Spice v. Steinruck*, 14 Ohio St. 213; *Knapp v. Hartung*, 73 Pa. St. 290. If the plaintiff should state a cause of action in a petition, and the defendant should take issue upon *526 one of the *facts only, stated therein, then whether the plaintiff could so amend his petition as to abandon that fact, and set up an entirely new and distinct fact, and thereby wholly change the issue, we are not called upon to decide, as such question is not in this case. In this case the defendant filed a general denial to the plaintiff's petition, denying every fact alleged by the plaintiff. Before passing from this subject it is proper to say that the power of trial courts to allow or refuse amendments to pleadings rests to some extent within the sound judicial discretion of such courts, and that appellate courts will seldom reverse the rulings of the trial courts in such cases unless such discretion has been abused. Therefore a decision of an appellate court, sustaining the ruling of a trial court where the amendment has been refused, is but very little evidence that the appellate court would reverse the ruling of the trial court if the amendment had been allowed.

We have now disposed of the main question involved in this case, and in discussing it we have discussed some of the other questions propounded by counsel. The questions which we have already discussed we shall not again refer to, and those which we have not yet discussed we shall merely decide, without discussing them in detail.

It was not error for the court below to allow evidence to be introduced which tended to show that the president and directors of the railway company resided in other states, a long way from the railroad, and that they gave but very little personal attention to the operating of the road. The witness Brownhill was so obviously a "fast witness" that we suppose the jury knew it, and that they gave to his testimony only such credit as it was properly entitled to. We think, however, that his testimony sufficiently showed him to be such an expert that the court below did not err in permitting it to go to the jury, and be weighed by them, along with the other evidence in the case, for what it was worth, although it afterwards appeared that he testified concerning some things as though he had knowledge of them, when *527 in fact he had no knowledge of them whatever. A small portion of his testimony was stricken out, on motion of the railway company. But there was no motion made to strike out any other portion of his testimony, after it became apparent that it was incompetent. It was not error for the court below to permit evidence to be introduced tending to show incompetency on the part of the conductors or engineers operating the colliding trains, as such evidence, along with other evidence tending to show that the collision occurred from such incompetence, and that the railway company was aware of such incompetence, would be strong evidence against the company. As to the order in which the various portions of the evidence should be introduced, where it takes various and distinct portions of evidence to prove any particular fact in issue, the trial court is clothed with a very large discretion.

Whether Salmon was guilty of contributory negligence or not was a question of fact, properly submitted to the jury for their consideration, and the finding thereon by the jury that "the death of said Daniel Salmon was caused by the gross negligence of the defendant, *without any fault* of the said Daniel Salmon," was a sufficient finding with regard to said fact. It is substantially a finding of the affirmative fact that Salmon during the whole transaction exercised due care and diligence to protect himself from injury, and to do his duty towards the railway company. It is not an uncommon thing for adverse counsel to characterize a broad and comprehensive statement of a fact, or perhaps what might more properly be termed a simple but comprehensive statement of a compound fact, as a conclusion from facts, a conclusion of law, or a conclusion from facts and of law, forgetting, of course, that every fact that comes within our comprehension, however simple and diminutive it may be, must be composed of a vast number of other facts, more simple and more diminutive. There can probably be no such thing as an ultimate fact, or an absolutely simple fact. All are compounded of other facts. And *528 the division of facts into smaller facts is philosophically as *il-limitable as the division of time or space into smaller portions.

It takes events to make facts, and events must occur within time and

space, and must therefore be equally divisible with time and space. As to the extent of the detail with which the statement of any particular fact must be governed, the trial court must always be vested with a very broad and extended discretion. More detail is probably required in the statement of facts in the introduction of evidence than anywhere else in judicial proceedings.

The whole of the sixth instruction asked for by the railway company, and refused by the court, was substantially given in other instructions. The ninth instruction asked for by the defendant, and refused by the court, is not, as there asked, good law for this case. It attempted to make the court, upon a *single fact*, find that Salmon was guilty of contributory negligence, and withdraw the question from the jury, while this single fact could not conclusively prove contributory negligence, and there were other facts that should have been taken into consideration along with it. The court properly instructed the jury that the plaintiff could not recover if Salmon was guilty of contributory negligence. If the court below erred as to what should constitute the measure of damages, it was the fault of the railway company. The court adopted the theory of damages suggested by the railway company, and, whether right or wrong, we shall not now reverse the judgment of the court below because of any supposed error committed by it with regard to the measure of damages.

This case was very fairly tried in the court below, so far as the judge had anything to do with it, except, possibly, that he ought to have granted a new trial because the verdict of the jury was not sustained by sufficient evidence. The jury made the principal mistake that was made in the case, in finding a verdict for the plaintiff against the weight or preponderance of the evidence. The verdict ought probably to have been set aside by the court below, and a new trial granted for this reason. But as the court below sustained *529 the verdict, and rendered judgment thereon, thereby *presumptively approving the verdict, and as there was evidence to sustain the verdict in every essential particular, we cannot now reverse the judgment merely because the verdict does not seem to be sustained by sufficient evidence. Numerous decisions of this court may be found laying down this doctrine.

The judgment of the court below is affirmed.

(All the justices concurring.)

G. M. SIMCOCK and others v. FIRST NAT. BANK OF EMPORIA.

January Term, 1875.

1. **Service: Of Summons on Return-Day: Irregular.** A service of a summons made on the defendant on the return-day thereof is irregular and voidable, and a judgment founded on such a service may be reversed, vacated, or set aside, at the instance of the judgment debtor, in any proper proceeding therefor, provided no waiver of service has been had in the case by appearance or otherwise.
2. **Appearance.** Where the defendant appeared by his attorneys, and moved the court to set aside the summons, and to dismiss the action, because the service was made on the return-day of the summons, and the appearance was made expressly for the purpose of such motion only, and the motion was signed by the attorneys as attorneys for the purposes of the motion only, and no other appearance was made by the defendant in the case, *held*, that said appearance did not have the effect to waive service, or to cure the irregular service already made.¹

Error from Morris district court.

Action upon a promissory note, brought by the First National Bank of Emporia against Simcock and two others. The plaintiff had judgment, as upon default, at the April term, 1874.

*530 *Hughes & Bradley and Ruggles & Sterry*, for plaintiffs in error, contended that the service of the summons on the return-day thereof was defective and bad. The entry of judgment upon such defective service, over the objection and exception of plaintiffs in error, and as upon a default, was an error affecting the substantial rights of plaintiffs in error. Code, § 64; *Dutton v. Hobson*, 7 Kan. *196; *Meisse v. McCoy's Adm'r*, 17 Ohio St. 229.

VALENTINE, J. In this case the service of the summons was made on the defendants below (plaintiffs in error) on the return-day thereof. Such a service is irregular and voidable, and a judgment founded thereon may be reversed, vacated, or set aside, at the instance of the judgment debtor, in any proper proceeding therefor, provided no waiver of service has been had in the case by appearance or otherwise. *Dutton v. Hobson*, 7 Kan. *196; *Armstrong v. Grant*, 7 Kan. *285. In the present case there was an appearance by all the defendants below in about the same form. The appearance of G. M. Simcock is in the following form, to-wit:

"And now comes the defendant, G. M. Simcock, by his attorneys, Hughes & Bradley, and, appearing for the purpose of this motion only, moves this court to dismiss the above-entitled action, and to set aside the summons in said action so far as Simcock is concerned, for the reason that said summons in said action was served upon

¹See *Cohen v. Trowbridge*, 6 Kan. 282, and note.

said Simcock on the return-day of said summons. Said summons was issued by the clerk of said court on the nineteenth of February, 1874, and was made returnable on the twenty-third day of February, 1874, and was served on said Simcock on said twenty-third of February.

HUGHES & BRADLEY,

"Attorneys for G. M. Simcock for the Purpose of this Motion only."

The appearance in this motion was a special appearance merely for the purpose of contesting the jurisdiction of the court,—merely for the purpose of contesting the regularity of the service of the summons,—and cannot be construed into a waiver of jurisdiction *531 tion, or a waiver of service. The motion *itself shows that the appearance was for the purpose of the motion only, and that the attorneys were attorneys for the purposes of the motion only; and it also shows that the purposes of the motion were to contest the jurisdiction of the court and the service of the summons, and not to waive jurisdiction and service. And we do not think that jurisdiction or service, or indeed anything else, was waived by said appearance; nor did said appearance cure the irregular service already made. Possibly the court below did not err in overruling said motion as it was made; the motion not being to set aside the *service* of the summons, (as it should have been made,) but to set aside the summons itself, and to dismiss the action. But after the motion was overruled, then what was the court below to do? The plaintiff gave the court no alternative but to render judgment on said service, or to dismiss the action. Now, if the court had dismissed the action under such circumstances, probably it would not have erred. *Branner v. Chapman*, 11 Kan. *121. But to render judgment upon such a service as upon a default, as the court below did, was such an error that this court must reverse the judgment. *Dutton v. Hobson*, *supra*.

We have taken no notice of the irregularity in issuing the summons, in making the return-day thereof only four days from the date thereof, instead of ten days, as neither counsel has called our attention to it. We have considered the summons as though it was regular in every respect, and the full time given in which to return the same and in which to answer.

Judgment reversed, and cause remanded for further proceedings.
(All the justices concurring.)

*532 *COMMISSIONERS OF CHASE Co. v. J. S. SHIPMAN.

January Term, 1875.

Taxation: Homestead Claims not Taxable. Improvements made on government lands settled upon and occupied as a homestead under the act of congress of March 20, 1862, are not taxable before final proof of settlement and cultivation is made.

Error from Chase district court.

Injunction brought against the board of commissioners and county treasurer, by Shipman and another, to enjoin the collection of taxes levied upon an alleged illegal assessment. The petition charges that the assessor of Diamond Creek township assessed to plaintiffs, *as personal property*, "a grist-mill and saw-mill, mill-dam and mill privilege, situate on the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 26, township 19, range 7 east," and valued the same at \$5,225, and that the tax levied on this assessment was \$172.42. The petition also alleged that "the title to said S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of said section 26 is in the United States, and not in the plaintiffs, and that one Mary Sloper has a homestead claim upon said land." The plaintiffs prayed that said taxes might be decreed illegal and void. The defendants demurred. The district court, at the May term, 1874, overruled the demurrer, and decreed a perpetual injunction.

F. P. Cochran and Ruggles & Sterry, for plaintiffs in error.

The district court held that as the improvements of Shipman & Doolittle assessed and taxed were situated upon lands the title to which was in the United States, that neither the land itself, nor any claim or possessory interest therein, or improvements thereon, could be legally assessed or taxed. Can this be the law? The question involves important and wide-spread interests. Vast amounts of property of great value, scattered all over the state, are held, occupied, and enjoyed by settlers and occupants of homesteads, which, if

*533 this position is tenable, wholly escape the burden of taxation.

That which is property everywhere else ceases to be property, for all practical purposes of governmental use, if it is the law that time, labor, and money may be expended upon, and extensive and valuable improvements attached to, the soil, that can neither be taxed as real estate, nor in any other manner.

We do not claim that lands taken under the "homestead act," while their title remains in the United States, can be taxed by the state, or by any governmental subdivision thereof. Such taxation would be illegal and void, not because of any lack of power so to do as a state, but because of the compact contained in the act of congress admitting the state into the Union, and the acceptance and ratification thereof by the territorial legislature. But we do hold that *the possession* of such lands, and *the improvements* erected thereon and at-

tached thereto, are subject to taxation, and should be assessed with other property for that purpose. The general proposition that they should be subject to taxation has been sustained by legislative enactments, and the decisions of courts; and we apprehend there would be no doubt of the correctness of this position were it not for the language and reasoning used by this court in the latter part of its opinion in the case of *Parker v. Winsor*, 5 Kan. *362. If the court in that case intended to decide the broad proposition that improvements on lands, the title to which is in the United States, could not be taxed by the state, we ask this court to review that decision. In that case the court first decides that, the title to said lands (part of the Kickapoo lands) being in the government, the land could not be taxed; and then (so the court in the case below assumed) decides that the improvements, being part of the real estate, cannot be taxed because the realty cannot. But is not such reasoning somewhat delusive? The occupant has no title to the realty; but has he not a property in the improvements he has erected, and even in the possession he has acquired? Does the mere fact that a building is attached to land make it realty too? Certainly not; for it *534 has been held again and *again that when one person erects a building upon the land of another, with that other's consent, it does not become a part of the realty. It belongs to the erector. Is it real estate? No; because he has no title to the land on which it stands. It is personal property. And in the case at bar this possession, and this class of improvements, cannot be considered real estate, nor has it been considered so by the legislature of this state, or by this court. If it is real estate, it belongs to the United States government; for it follows the title, and there is no dispute as to where that is.

That these improvements are not real estate the legislature has declared; for by section 9, c. 21, Gen. St., it has provided that all contracts for the sale or purchase of such improvements shall be deemed valid and may be sued upon as other contracts; and section 10 provides that a quitclaim deed and other conveyances of *improvements* on public lands shall be as binding and effective between the parties. And this court, in the case of *Moore v. McIntosh*, 6 Kan. *39, recognized the validity of this legislation, and declared the sale of a homestead claim, with improvements thereon, a sufficient consideration for a promissory note given in payment thereof. *Hill v. Smith*, 1 Morris, 70; *Clark v. Shultz*, 4 Mo. 236. But it will be asked, as was done by this court in *Parker v. Winsor*, "Is it possible for the legislature to change real estate into personal property?" Is not the question too broadly stated? In one sense, may not the legislature, in effect, do that very thing? *Courts have* done so. Neither legislature nor courts can change the physical characteristics of things or persons; but can they not change, modify, and regulate their legal *status*? *Courts have* repeatedly decided that

things attached to, and which under the common law were *prima facie*, real estate, shall be deemed and taken to be personal property; and legislatures have been equally quick and vigilant in the same direction whenever it became necessary to determine and protect the rights of one class, and enforce the duties and obligations of another. The courts will be ready and vigilant to protect and

*585 sustain the title of the govern*ment whenever the question is legitimately before it; but we suggest that that title is not in issue, and that, as between the occupant who claims the title to the property sought to be taxed and the state, the question as to who has the title to the realty has nothing to do with the case. Does it lie in his mouth to say that it is not his property for the purpose of taxation, when, for his individual benefit and profit, he exercises exclusive ownership over it, and at his pleasure sells and disposes of it? *Prima facie* all is real estate. But this is not uniformly so. The titles to the two may be, and very often are, separate and distinct; and, when so, the improvements are to be regarded and treated as the personal property of the owner thereof. *Curtiss v. Hoyt*, 19 Conn. 154; *Ashmun v. Williams*, 8 Pick. 402; *Doty v. Gorham*, 5 Pick. 487; *Aldrich v. Parsons*, 6 N. H. 555; *Wells v. Banister*, 4 Mass. 513; *People v. Shearer*, 30 Cal. 645; *People v. Black Diamond C. M. Co.*, 37 Cal. 54.

C. M. Foster and *S. N. Wood*, for defendants in error.

The defendants in error are taxed for a grist-mill, saw-mill, mill-dam, and mill privilege situate on certain land occupied under a homestead entry by another party. The title to the homestead is in the United States. What title the defendants in error may claim to the assessed property is not stated in the petition; but, whatever understanding may be had with the owner of the homestead, it is certain that the defendants have no title to said property which can make them the owners thereof in any sense known to the law. A mere license or sufferance by the one holding the homestead entry would not convert a mill, mill-dam, and mill privilege into personal property where the land is owned by the United States. If the occupant of the homestead had erected these mills, and made this dam, there is no doubt, under the decisions of this court, that the same could not be taxed as personal property. *Parker v. Winsor*, 5 Kan. 375. If the improvements could be called personal property, the occupier of a government homestead could be taxed in the same extent, in this indirect manner, as if the land itself were taxable.

*586 *That cannot be done indirectly which cannot be done directly. Whether the defendants in error could lawfully build the mills and erect the dam in question, by consent of the occupier of the homestead, is not a question in this case.

But whether the defendants in error have built these mills and erected this dam rightfully or wrongfully, the state has no jurisdiction over the property. It cannot sell the same, and give the pur-

chaser any title that can be asserted as against any one. To sell the same would be to give the purchaser a right of entry and possession to government land. This cannot be done. The California decisions referred to by counsel for plaintiffs in error have this distinction: mining claims are a species of property recognized by the laws of the United States, and enforceable in the courts. *Atchison v. Peterson*, 20 Wall. 510; *Basy v. Gallagher*, Id. 670. The possession of a homesteader could be protected by the courts, and any person who interfered with it would be liable to him as a trespasser, or, perhaps, might be restrained by injunction. But a mere licensee or trespasser on government land has no such ownership of his improvements as to make them personal property. A mill privilege is only another name for one of the elements of value in government land. It exists in the land itself, and cannot be separated from it, and, of course, cannot be treated as personal property, as against homesteader or trespasser, unless the court holds that the land itself may be taxed under the pretext of its being personal property. If every element and attribute of the realty may be converted into personal property, and taxed as such, the prohibition in the act of admission of the state against interfering with the primary disposal of the soil is nugatory.

VALENTINE, J. The only question presented to us for our consideration and decision in this case is whether the improvements made on government land, settled upon and occupied as a homestead *537 under the act of congress of March *20, 1862, (12 U. S. St. at Large, 392,) are taxable before final proof of settlement and cultivation of the land is made. We must answer this question in the negative. When this state was admitted into the Union, it was agreed between the state and the United States that government lands should never be taxed by the state. See Act of Admission, (12 U. S. St. at Large, 127, § 3, sub. 6;) Joint Resolution of the Legislature of Kansas, (Gen. St. 71.) The word "land" meant and means the land, with all the improvements thereon. This is the legal signification of the term; it is the common-law definition thereof; and it is undoubtedly just what was meant when said act of admission and joint resolution were passed. There are a few exceptional cases where "improvements" on land are not considered a part thereof; but this is clearly not one of those cases. There is nothing to show that the state or United States, at the time of our admission into the Union, considered such improvements personal property; there is no act of congress passed at that time, or before or since, making them personal property; and there is no act of congress attempting to divest the government of the title to them while the government still owns the land, or to place the title anywhere else except in the government. But even if they were personal property, if they belonged to the United States they would not be taxable.

See Act of Admission. There is no act of congress authorizing any person to remove them from the land, and there is no act of congress authorizing them to be taxed. We therefore think it beyond the power of the state to tax them. Calling them by a different name from what they in fact are, does not give the state any additional authority over them. See *Parker v. Winsor*, 5 Kan. *374, *375.

The judgment of the court below is affirmed.

(All the justices concurring.)

*538

*STATE OF KANSAS v. GEORGE W. WHITE.

January Term, 1875.

1. **Criminal Law: Rules of Pleading.** The common-law rules of construing criminal pleadings have been set aside by our Code of Criminal Procedure, and to that Code must we look for the rules to determine the sufficiency of an information or indictment.
2. **Information: Description of Offense.** It is not necessary, in an information, to use the exact words of the statute in charging an offense. It is sufficient if words are used conveying the same meaning. [*State v. Miller*, 25 Kan. 700; *State v. Fooks*, 29 Kan. 427; *State v. Foster*, 30 Kan. 366; S. C. 2 Pac. Rep. 629; *State v. Beverlin*, 30 Kan. 613; S. C. 2 Pac. Rep. 630; *State v. Hart*, 33 Kan. 222; S. C. 6 Pac. Rep. 288.]
3. ———: **Omission of Words.** The omission of the words "on purpose and of malice aforethought" from an information charging an assault with intent to kill, under section 38 of the crimes act, is not fatal, where the information charges that the defendant did feloniously make an assault, and feloniously did shoot and wound, with the intent feloniously and willfully to kill.
4. **Criminal Law: Instructions: Intoxication of Accused.** Upon a trial under such a charge, where there is evidence tending to show the intoxication of the accused at the time of the act, it is proper for the court to charge the jury that intoxication is a matter to be considered by them as bearing upon the state of defendant's mind, and therefore as evidence upon the question of the intent to take life. But it is seldom, if ever, the duty of the court to go further, and instruct that the jury may, from the intoxication alone, infer the absence of any such intent, and the consequent innocence of the defendant of the specific offense charged. At least, in the absence from the record of the evidence in the case, it is impossible for an appellate court to hold that there was any error in the rulings of the trial court refusing the latter and giving the former instruction.¹
5. ———. The fact of intoxication, no matter how complete and overpowering, is not conclusive evidence of the absence of an intent to take life.

Appeal from Allen district court.

¹See the full note of cases on the effect of drunkenness or intoxication in civil and criminal cases, to *State v. Tatlow*, 8 Pac. Rep. 271.

Information charging that defendant White, "on the thirteenth of September, 1874, at the county of Allen, with force and arms, in and upon the body of one James Black, then and there being, feloniously did make an assault on him, the said James Black, with a certain pistol loaded with powder, ball, and cap, which he, the said George W. White, in his hand then and there held, the said pistol being a deadly weapon, feloniously did shoot and wound, with intent *539 him, the said James *Black, then and there feloniously and willfully to kill." Plea, not guilty. Trial at the November term, 1874. Verdict, guilty, and defendant was sentenced to four years' imprisonment in the penitentiary.

L. W. Keplinger and H. D. Smith, for appellant.

James C. Murray, Co. Atty., for the State.

BREWER, J. Defendant was convicted of an assault with intent to kill, and brings his case here by appeal. The questions presented are on the sufficiency of the information, and the instructions upon the effect of intoxication.

The information charged that the defendant did feloniously make an assault, and feloniously did shoot and wound, with the intent feloniously and willfully to kill. It did not, in the language of section 38 of the crimes act, charge that defendant, "on purpose and of malice aforethought," did assault, etc. Was the omission of these words fatal to the information? The authorities cited by the learned counsel doubtless sustain his claim that it was. But those decisions were made where the strictness of the common-law rules in reference to indictments obtained. But, as said by Chief Justice Cobb in reference to two sections of the Code of Criminal Procedure: "These two sections divest the indictment of all artificial and technical construction, and give to its language its natural and ordinary meaning." *Smith v. State*, 1 Kan. *365. While it would doubtless be sufficient to follow the language of the statute in charging a crime, it is not necessary so to do. It is enough if the language used, according to its ordinary and natural meaning, states clearly an offense within the statute according to the same manner of interpretation of its language. Tried by this rule, we think the information sufficient. It charges an unlawful assault,—an assault with intent to kill. Of course, if a party made an assault with intent to kill, it neces- *540 sarily was not an *accidental or unintentional assault. An accidental or unintentional assault with intent to kill is an impossibility. The information clearly, therefore, charges an assault on purpose. So, also, if an assault is willful, felonious, and with intent to kill, it is of malice aforethought; for malice aforethought is nothing more than an unlawful or wicked intention. A felonious intent to kill, is an unlawful and wicked intent. All the elements, therefore, of the crime, as defined in the statute, are embraced in this information, and it is sufficient. In reference to the general

rules for determining the sufficiency of criminal pleadings, see *Crim. Code*, §§ 101, 103, 107, 108, 109, 110; *Gen. St.* 837, 838.

The other error assigned arises upon the instructions given and refused. Some testimony was introduced by defendant tending to show that he was insane at the time of the offense, and some by the prosecution tending to show that he was intoxicated. Upon this defendant asked this instruction: "To constitute the specific offense charged, it is not sufficient that the commission of the act be proven, but it must be affirmatively shown that the act was done with the particular intent of killing or maiming the prosecuting witness. The jury may infer from the fact of defendant's being intoxicated at the time of the commission of the act charged (if such intoxication be proven) that the act was not done with the particular intent necessary to constitute the specific offense charged;" and another to the effect that such intoxication was evidence from which the jury might infer his innocence of the particular offense charged. These the court refused, but charged the jury that "intoxication—drunkenness—is not regarded in law as any excuse, in itself, for crime, but may always be shown, and should be considered in all cases where the intent, as in this case, is of the essence, or is an indispensable ingredient of the offense, to show the state of mind of the person accused."

Was there error in this? The difference between the instruction refused and that given, is that by the first the court was asked to select drunkenness as a single circumstance, and say to the
 *541 *jury that from that alone they might infer the defendant's innocence of any intent to kill, while by the other the court charged them that they might consider drunkenness, along with the other facts of the case, in determining the defendant's state of mind at the time of the act. The testimony in the case is not preserved in the record; so we do not know what the circumstances of the case were,—what evidence there was of the intent to take life, or how great was the intoxication of the defendant. Now, there may be cases in which there is such a dearth of other testimony bearing upon the question of intent, and such a complete and stupefying intoxication shown, as to justify a court in singling it out and telling the jury that they may infer therefrom the absence of any intent to take life. But all that a court ought ordinarily to do is to state to the jury that drunkenness is one of the circumstances tending to show the state of defendant's mind, and thus bearing upon the question of the presence or absence of an intent to take life; and probably in no case would it be error to refuse to go further, or give any more specific charge. The fact of intoxication is not conclusive against the existence of such an intent. The intent may have been formed before the intoxication commenced. It may exist concurrently with it, at least until the intoxication comes to be so great as to be stupefying. So that it is impossible, at least in a case in which the whole testimony is not present, when the court has referred in its instructions to intoxication as

one of the facts bearing upon the question of intent, to hold that it erred in not going further, and giving special stress to that circumstance. We are not advised as to the instructions given by the court other than upon this matter of drunkenness. We must therefore assume that they were correct and sufficient; that they stated the elements of the crime, and the necessity of proof as to the existence of each element, and the kind of evidence applicable to each element. *Millar v. State*, 2 Kan. *174. It does not appear, therefore, that the court erred in the instructions given and refused in this case.

*542 It perhaps should be remarked, in order to *guard against any misconception as to the relation of drunkenness to crime, that the charge in this case is one which requires something more than a general malevolent feeling, and where there must be a specific intent to take life; so that nothing herein contained conflicts with the general doctrine that drunkenness neither excuses nor extenuates crime. See, upon this general subject, 1 Bish. Crim. Law, c. 27, §§ 397-416.

The judgment of the district court will be affirmed.

(All the justices concurring.)

L. M. RUMSEY & Co. v. HENRY SCHMITZ and another.

January Term, 1875.

Bills and Notes: Defenses to: Payment to Wrongful Possessor. Payment of a past-due negotiable note drawn to the order of the payees, and undorsed, made to a stranger, who is in fact no agent of the owners, and without authority to receive payment, but who has surreptitiously obtained possession of the note, and whose only evidence of authority is the possession of the note, and the general business card of the payees, and where there has been no laches on the part of the owners, and nothing in the prior transactions between the parties to induce credence in the authority of such stranger, is no defense to an action by the owners on such note.¹

Error from Wabaunsee district court.

Rumsey & Co., merchants at St. Louis, Missouri, brought suit against Henry Schmitz and August Meyer, alleging that defendants, "on the twelfth of August, 1872, made their certain promissory note in writing, of that date, and then delivered the same to plaintiffs, and thereby promised to pay to plaintiffs, or order, the sum of

¹Defense to notes, burden of proof, *French v. Gordon*, 10 Kan. 379, and note; indorsement of, *Fuller v. Scott*, 8 Kan. 27, and note; notice, presentment, and protest, *Hume v. Watt*, 5 Kan. 28, and note; deposit of money to pay, see note to *First Nat. Bank v. Tree*, 24 N. W. Rep. 566; gratuitous payment by third party, *Martin v. Victor Min. Co.*, 8 Pac. Rep. 171; alteration of note, *Fuller v. Green*, 24 N. W. Rep. 911.

\$465.53 in thirty days after date thereof, with ten per cent. per annum from date; that after the giving of the said promissory note, and before it became due and payable, plaintiffs lost said note; that plaintiffs had never indorsed said note to any person or persons whatever; that afterwards, when said promissory note became due and payable, plaintiffs notified the defendants that the same had been so lost by plaintiffs, and then requested defendants to pay said sum of \$465.53 named in said promissory note, which defendants refused and neglected to do; that, by means for which plaintiffs cannot account, defendants obtained and now have possession of said note, but plaintiffs aver they never received any compensation for said note from defendants, nor from any other person whatever." Plaintiffs demanded judgment for said principal sum, with interest. Answer, payment. Trial at the September term, 1873, without a jury. Finding and judgment in favor of defendants.

R. M. Ruggles and Bertram & Nicholson, for plaintiffs, urged that this was a note negotiable in form, but was never indorsed or negotiated, and the holder thereof had no right to demand payment of the same, nor ought defendants to have paid it without being legally compelled; and, if they did pay it, they paid it at their risk and peril, no matter if the holder represented it to be his own; citing *Johnson v. Windle*, 32 E. C. L. 325; *Forster v. Clements*, 2 Camp. 17; *Mead v. Young*, 4 Term. R. 32; *State Bank v. Fearing*, 16 Pick. 534; *Chit. Bills*, 396, 197, note c; 2 Pars. Notes, 256. And it would have made no difference if the note had been indorsed by plaintiffs, for the thief to whom defendants made payment never claimed to own the note. The defendants never gave credit to the note, (or indorsement, had there been one,) but wholly relied upon the representations of the thief; and the rule that the holder is *prima facie* the owner of a bill transferable by delivery does not apply, for the person or thing to whom we give credit we must stand or fall by; and herein defendants were guilty of negligence in not ascertaining whether the thief were agent of plaintiffs or not. Attwood

*544 *v. Munnings, 7 Barn. & C. 278; *Alexander v. Mackenzie*, 6 C. B. 766; *Fitzherbert v. Mather*, 1 Term. R. 12; *Chit. Bills*, 29, 269, 391; *Roper v. Bumford*, 3 Taunt. 76; *Dick v. Leverich*, 11 La. 578.

A. H. Case, for defendants.

BREWER, J. This was an action upon a note, and the sole defense was payment. The facts are these: The defendants, doing business at Alma, Kansas, executed their note, dated August 12, 1872, due in thirty days, and payable to the order of plaintiffs at the Boatman's Savings Institution in St. Louis. This note was duly received by the plaintiffs in St. Louis, and placed with their other valuable papers. These papers were, according to the testimony of J. J. Ostrander,

their book-keeper and treasurer, kept at night locked in their safe, and during the day in a drawer in the witness' desk, and were all the time under the sole charge of said witness. Both safe and desk were in the office, which is in the second story of the building occupied by plaintiffs, and separated from the rest of the story by a glass partition. This office was occupied only by the witness and two book-keepers. The witness was absent about an hour at noon of each day, but then locked the drawer where the notes were, and left the key in a drawer of the desk of Moses Rumsey, in another room. When the note became due, it was missed, and, after about a week's delay, notice of the loss was sent to the defendants. At about the time the note became due, plaintiffs discharged their shipping clerk, who, however, according to the testimony, continued in St. Louis. In response to the notice of loss, and on October 20th, defendants wrote a letter requesting plaintiffs to forward the note to certain bankers in Wamego, and it would be paid. This was the only note they had ever given plaintiffs. The plaintiffs never received anything on account of the note. On the other hand, the defendants showed by August Meyer, one of the partners, that on the thirtieth of September a party *545 came into their store at Alma, *and, handing them the business card of plaintiffs, said, "Anything you want in our line?" They gave him an order for goods, which they never received. After taking the order he presented the note, and they paid it. They produced the note in court, and it was unindorsed. They did not know the agent; they had never dealt with him before. Their prior purchases had been by mail. He said nothing about the plaintiffs, but simply presented their card, took the order for goods, presented the note, and received payment. This was on the thirtieth of September. Two days afterwards they received a notice from plaintiffs that they wanted money. Witness wrote the letter of October 20th, thinking that plaintiffs might have another note of theirs signed by his partner, Schmitz, who had signed this. Upon the testimony the court found for the defendants; and the only question is whether the evidence warrants such finding; or, rather, whether it is so clearly against such finding that it is the duty of this court to reverse the judgment.

Two things are evident: *First*, that the plaintiffs have never received any pay for the note; and, *second*, that the defendants have paid the full amount of it. It is hard for the plaintiffs not to receive the money due them, and it is equally hard for the defendants to pay a second time. It is also clear that there was no intentional wrong on the part of either. The possession of the note by the party receiving payment is the fact upon which the defendants must and do rest their case. The possession of the plaintiff's business card, which is intended for general circulation, amounts to little or nothing. And the question really presented is whether the mere possession of a negotiable instrument, unindorsed, protects the maker in payment, notwithstanding that the possessor is in fact unauthorized

to receive payment, and has improperly obtained possession. It is undeniably true that the possession of the instrument is often a decisive fact in determining whether the payment to the agent is a protection to the payor. To that extent are the authorities cited by the learned counsel for the defense. And in Story, Ag. § 104, it *546 is said: "And generally *the possession of a negotiable instrument is deemed sufficient *prima facie* evidence of the title of the possessor to secure payment of it." See, also, Doubleday v. Kress, 60 Barb. 181; Tappan v. Morseman, 18 Iowa, 499; Williams v. Walker, 2 Sandf. Ch. 325. In these last two cases the absence of the instrument was considered decisive against the power of the agent, though in the one case the owner had given the defendant to understand that he would place the matter in the hands of the supposed agent, and in the other the supposed agent had in fact negotiated the loan, had possession of the instrument, and had properly received some payments. In this last case quite an examination is made into the English authorities, and a number of cases cited in which a party negotiating a loan has afterwards received payment of principal or interest, and the general conclusion appears to have been that the borrower was protected in such payments only when the party receiving had the instrument still in his possession. But in this class of cases it must be noticed that the party receiving payment had been the agent of the owner, and the question was as to the duration and extent of his authority. The fact that the owner permitted him to retain possession of the instrument was deemed sufficient evidence of a continuation of his authority in the premises, and of his right to receive payment according to the terms of the instrument. The distinction between those cases and the present is obvious. Here the possessor had never been the agent of the owners in this transaction; had never had any connection with it, or dealings with the defendants. He had never had any rightful possession of the note, but had somehow improperly obtained it. The possession of the note was the sole evidence of the fact of agency, as well as the extent of authority. The defendants pay to a stranger a debt they owe to the plaintiffs, and the sole protection they present for such payment is the fact that this stranger had possession of the evidence of such indebtedness. There had been nothing in their prior dealings with the plaintiffs to justify such confidence. They had had *547 no *dealings with any runners for them. Their purchases had been by mail. They were wholly unacquainted with the party to whom they made payment. He bore no credentials from the plaintiffs, other than such as can be picked up in any hotel. He presented a note payable to the order of plaintiffs, and unindorsed by them. Yet this unindorsed note they pay to this stranger wrongfully in possession, and having actually no authority to bind the plaintiffs in any way. We cannot think a payment thus made discharges the debt.

This proposition may be laid down as correct: Payment of a past-due negotiable note, drawn to the order of the payees, and undorsed, made to a stranger who is in fact no agent of the owners, and without authority to receive payment, but who has surreptitiously obtained possession of the note, and whose only evidence of authority is the possession of the note and the general business card of the payees, and where there has been no laches on the part of the owners, and nothing in the prior transactions between the parties to induce credence in the authority of such stranger, is no defense to an action by the owners on such note.

We are aware of the rule which forbids the court to set aside a finding of fact made by a district court upon conflicting testimony; but here there seems to be no conflicting testimony. The manner of payment, as stated by the witnesses for the defendants, is taken as strictly true. Indeed, full credence is given to their entire testimony, and it is rather a conclusion of law to be drawn from undisputed facts, than a finding of fact from conflicting testimony.¹

The judgment will be reversed, and the case remanded for further proceedings in accordance with the views herein expressed.

(All the justices concurring.)

***548. *JONAS H. COOK v. OTTAWA UNIVERSITY and others.**

January Term, 1875.

1. **Trials: Opening Case after Being Submitted: Discretion of Court.** Granting or refusing applications for leave to open a case, after it has been submitted to the court or jury for decision, and offer additional testimony, is largely within the discretion of the trial court, and presents no ground of error unless such discretion has been abused.²
2. **—: Incompetency of Testimony on Application.** Such applications should always be overruled where the testimony sought to be introduced is incompetent under the pleadings, and no application made for their amendment.
3. **Mortgages: Mortgagee's Rights and Liabilities.** A mortgagee in possession is responsible for the rents and profits, is allowed for the ordinary repairs, but not for permanent improvements placed upon the mortgaged premises merely for his convenience.

Error from Franklin district court.

Foreclosure, brought by Cook (as assignee of one Libby, the mortgagee) against the Ottawa University and two others. The note for which the mortgage was given as security was for \$2,000, with interest at 20 per cent. from date. The case was tried before A. W.

¹See *Durham v. Carbon Coal & M. Co.*, 22 Kan. 243

²Discretion of court on trial of causes considered, *Mason v. Ryns*, 26 Kan. 464

B., referee. He held the note to be usurious; that the principal only could be recovered; and he reported that plaintiff, Cook, since going into possession of the mortgaged property, had, for his own convenience, made permanent improvements or betterments thereon to the value of \$792.61, and had made necessary repairs and improvements to the value of \$230.23, and that Cook was chargeable with \$1,158.50 for rents and profits. In stating the case for judgment the referee allowed Cook the face of the note, \$2,000, and said \$230.23 for necessary repairs, etc., amounting to \$2,230.23, and charged him with said sum of \$1,158.50 for rents and profits, leaving balance in his favor, and against the Ottawa University, of \$1,071.73, for the payment of which he decided that a sale of the mortgaged premises should be ordered. The district court, in confirming the re-
 *549 port of the referee, and on the basis of his decree, *allowed defendants further rents and profits, from the date of the report to the confirmation, to the amount of \$250, leaving due Cook the sum of \$821.73. The report of the referee was confirmed by the district court at the March term, 1873. The action below was commenced by Sears & Maxwell, as attorneys for plaintiff, but Mr. Maxwell alone appeared, and tried the case on the part of plaintiff before the referee.

Wm. H. Maxwell, for plaintiff, filed an elaborate brief, in which he maintained that Cook, the assignee of the mortgage, entered into possession of the mortgaged premises with the assent of the mortgagor, and under a contract of purchase; that it was error to deny him the right to prove this by direct evidence; that it was error to adjudge rents and profits against him, and not allow him for permanent improvements or betterments of the property; that it was error to exclude evidence offered by him, being thus in possession, of his having purchased an outstanding title, lien, or incumbrance; that it was error to deny him the right to introduce in evidence a tax title, perfected by lapse of time, acquired of the property in dispute under a sale for taxes, the payment of which, as a duty, was imposed by law on the mortgagor; and that a purchaser pending the litigation takes his title subject to any future decree that may rightfully be pronounced in the cause.

John W. Deford, for defendant, submitted that there was no error in the refusal of the referee to "open the case," and receive evidence of title in Cook, derived from certain conveyances of the mortgaged premises to him, and from two tax deeds. It was not error "to adjudge rents and profits against plaintiff, and not allow him for permanent betterments of the property." Necessary repairs are to be allowed in such cases, but they must be strictly *necessary* to continue the mortgaged premises in the condition in which they were
 *550 when received by the mortgagee, and not to extend or im*prove them. Improvements made by him while in possession, without the knowledge or consent of the mortgagor, or his assignees, can-
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not be allowed for, however substantial, lasting, beneficial, or valuable they may be. *Russell v. Blake*, 2 Pick. 505; *Woodward v. Phillips*, 14 Gray, 133; 1 Hil. Mortg. 460, § 22; *Lash v. Lambert*, 2 Amer. Rep. 144; 2 Daniell, Ch. 1239. The note was usurious, and no interest was recoverable. *Jenness v. Cutler*, 12 Kan. *500.

BREWER, J. This was an action on a note and mortgage. The petition alleged that the Ottawa University executed a note and mortgage to one Washington Libby; that the latter duly assigned the same to plaintiff; that the note was unpaid; and that the other defendants, John T. and Jane K. Jones, claimed some interest in the mortgaged premises; and prayed a decree of foreclosure and sale. The university answered, pleading usury in the note, which upon its face drew 20 per cent. interest, and admitting the answers of its co-defendants. The other defendants filed separate answers, admitting the execution of the note and mortgage, and the assignment thereof to plaintiff, but alleging subsequent conveyances to themselves from the university of the mortgaged premises, and pleading usury; and, further, that without the knowledge or consent of either of the defendants, and without any rightful authority, the plaintiff had, subsequently to his purchase of the note and mortgage, entered into possession of the mortgaged premises, and received the rents and profits thereof, which they asked might be applied in payment of the principal of the note. To these answers the plaintiff filed a general denial. Upon these pleadings the trial was had. The defendants called the plaintiff, who admitted taking possession of the property, upon which were two houses, one of which he occupied himself and the other rented. He testified to making some repairs, and some permanent improvements. He also testified, upon cross-examination, to a conversation with Mr. Atkinson, the managing officer of the university, prior to taking possession, and in relation *551 thereto, as follows: * "Went to see Mr. Atkinson about buying the property. He had before that time offered it to me for sale. Mr. Atkinson said if I bought the property he would see that I got possession. Told him that I wanted possession immediately. Atkinson said he could give possession at any time. Told him that Zimmerman was in possession under a lease until next spring, and that he would have to be paid something to go out. Atkinson said that Z. had not got it for any certain time, but went and hunted up the lease, and found that Zimmerman did have a lease for it until spring. Atkinson then said: 'I think I can make an arrangement; if you buy the property, you shall have possession any way.' This was all that was said about possession, and was before I purchased the note from Washington Libby. I last saw the lease of Zimmerman in Mr. Atkinson's office at the university building. Zimmerman went out of the property, and I immediately went into possession. This was two weeks after the conversation with Atkinson."

No other testimony was given as to the manner of acquiring possession. He had prior thereto been asked if he had had any conversation with Atkinson about the purchase of the property, but an objection had been sustained to this question. Upon the whole testimony, the note calling for 20 per cent. interest was held usurious, and only the principal collectible. Cook, as mortgagee in possession, was charged with the rents and profits, and allowed for the repairs, but not for the permanent improvements placed upon the premises for his own convenience.

After the case had once been closed, Cook moved for leave to open the case to enable him to introduce two tax deeds under which he claimed title, but the motion was overruled. He also moved for leave to open the case to offer some title papers to part of the premises, but this motion was also overruled. No application was at any time made for leave to amend the pleadings, though the intimation is given by counsel in his brief that if the judgment be reversed the case would not be tried again upon the same pleadings. We have given the case careful attention, and are constrained to say that we find nothing to justify a reversal of the judgment. So far as the applications to open the case are concerned, such matters are *552 *largely within the discretion of the trial tribunal, and an abuse of that discretion should appear before a reversal will be ordered. In this case the trial was had before a referee. The petition was filed in January, 1870. On December 13, 1870, the case was referred, and the report of the referee filed August 2, 1872. The trial commenced November 1, 1871, and the applications for leave to open the case were made May 7 and July 13, 1872.

Where a case has been protracted, as this was, for such a length of time, there should be very urgent reasons presented to justify the opening of the case for additional testimony. No showing was made when the tax deeds were sought to be introduced, and the only reason offered on the other application was that plaintiff supposed his title papers were already in evidence, and that the counsel employed in the commencement of the action had not been present at any of the hearings before the referee. We should hardly think the ruling of the referee was other than correct upon this application, if the testimony had been competent and of vital importance. The absence of counsel, when a party is represented by one so able and competent as the learned gentleman who did conduct the trial, is rarely sufficient to justify the opening of a case after the evidence is in and the findings announced. But this testimony was clearly incompetent under the pleadings. The plaintiff sued as mortgagee. He made no claim of title, but sought, by a decree of foreclosure and sale, to divest the defendants of the title he conceded to be in them, or some of them. Under such pleadings he could not show title in himself, whether derived from tax deeds or otherwise. On both grounds, therefore, the rulings would have to be sustained. For the rea-

son last above given there was no error in ruling out the question asked as to conversations about the purchase of the property. No question is made as to the ruling upon the matter of usury. None could be. Nor can there be any question as to the ruling charging the mortgagee in possession with the rents and profits, allowing him for repairs, and disallowing for all permanent improvements *553 placed upon the premises merely *for his own convenience.

Woodward v. Phillips, 14 Gray, 132; Mickles v. Dillaye, 17 N. Y. 80; McCarron v. Cassidy, 18 Ark. 34; 1 Hil. Mortg. 460, § 22; 2 Daniell, Ch. 1239.

The judgment will be affirmed.

(All the justices concurring.)

PLANT SEED Co. v. LUTHER HALL and others.¹

January Term, 1875.

1. **Sales; Contract: Offer: Acceptance.** Where negotiations are entered into for the sale of goods, there must be an unconditional acceptance of the offer, or no contract is consummated. Thus, where negotiations were carried on by letter, and the one party, residing in St. Louis, wrote a letter offering \$3.50 per bushel for certain goods delivered in St. Louis, and the other party, residing in Junction City, seventeen days thereafter, shipped the goods to St. Louis, and at the same time wrote a letter, the first since the offer, announcing the shipment, making no acceptance of the offer, and stating that they should expect the highest market price: *held*, that no contract was consummated, and that the consignee was not bound to accept and pay for the goods; and, further, that the court, construing the letters, should have so instructed the jury.
2. ———: **Consignee not Liable for Goods.** Where a party to whom, under such circumstances, goods are consigned, refuses to receive them, and turns the bill of lading over to a responsible commission merchant in St. Louis, to dispose of as the goods of the consignors, *held*, that the consignee, acting in good faith, and with reasonable prudence, was not liable for the goods.

Error from Davis district court.

The Plant Seed Company brought suit against Hall & Porter to recover a balance of \$168.51 on an account for merchandise. De-

¹Implied warranty in sales, see notes to Downing v. Dearborn, 1 Atl. Rep. 408; Cunningham v. Judson, 2 N. E. Rep. 931; Hoult v. Baldwin, 8 Pac. Rep. 443; misrepresentations and fraudulent representations, see notes to Hunter v. Lee, 11 Kan. 225; Taylor v. Saurman, 1 Atl. Rep. 44; delivery to comply with statute of frauds, Jamison v. Simon, 8 Pac. Rep. 502, and note.

defendants answered, claiming a set-off to amount of \$325.73 for certain goods alleged to be sold by them to plaintiff. Trial at *554 the March term, 1874, of the *district court. Verdict in favor of defendants, and against plaintiff, for \$127.94, of which defendants remitted \$39.40, and judgment was given for the residue, \$88.54.

H. H. Snyder and McClure & Humphrey, for plaintiff.

Charles G. Cox, for defendants.

BREWER, J. The only ground of error pressed for our consideration is that the verdict is against the evidence; and the question arises in respect to the counter-claim of defendants. Some correspondence passed between the parties in March, 1873, in consequence of which defendants shipped some onion sets to plaintiff, at St. Louis. On receiving the bill of lading the plaintiff, claiming not to be in the commission business, turned it over to a commission merchant, who received the onions, and sold for much less than defendants claim they had sold them to plaintiff for. The negotiations between the parties were by letter. These letters, and the conduct of the plaintiff on receipt of the onions, constituted all the evidence of a contract. The following is the correspondence in the order in which it passed, defendants writing from Junction City, Kansas, and plaintiff from St. Louis, Missouri: Defendants to plaintiff: "What will you give us for 40 barrels onion sets, *choice*, on board cars here?" Plaintiff to defendants: "We will give you \$3.50 per bu., delivered here, for choice top onion, *if they are the right kind*; would prefer to see a sample." Defendants to plaintiff: "Our onion sets came from Indiana, and are *choice sifted* sets,—no chaff or dirt,—and are the best sets we ever saw. We want \$3.50 per bu. here, on cars. Freight will be 70c. per 100 lbs., although we may get a lower rate. Can't you stand it?" Plaintiff to defendants: "We cannot pay more than \$3.50 per bushel for onion sets delivered here, and would not care to buy at that now, as we have a large lot on hand." Defendants to plaintiff: "We ship you to-day, per M., K. & T. *555 *road, 25 bbls. onion sets. We hope they will reach you safely and in good order. They are in good condition now. As soon as received, please send us statement. We shall expect the highest market price." Upon receipt of the onions the plaintiff disposed of them as stated above, and notified the defendants thereof, who objected to the disposition made, and claimed a sale to plaintiff. Upon this the jury found that there was a sale.

Will the evidence sustain the verdict? It is clear that up to the time of the shipment of the onions no contract had been closed between the parties. The only offer made by the plaintiff had not been accepted by the defendants. Their minds had not come to any point of agreement. The one had offered \$3.50 in St. Louis; the other, not accepting that, demanded the highest market price. Clearly,

then, they had not agreed. The plaintiff, therefore, notwithstanding the prior negotiations with a view to purchase, was at liberty, on receipt of bill of lading, to withdraw its offer, decline to purchase, and refuse to receive the goods. How far did the subsequent conduct of the plaintiff render it liable as on a purchase? What a consignee, under the circumstances indicated, may do with the consignment, must be viewed in the light of the prior negotiations. It was made, not to a stranger, but to one with whom the consignors had had prior dealings, and made in pursuance of negotiations with reference to the sale of the very articles shipped. Clearly, the consignee might refuse to receive the consignment, and suffer the carrier to make such disposition as it saw fit. So doing, he would place himself under no liability to the consignor. Or he might place the goods in some ordinary and safe place of storage, either in his own warehouse or elsewhere, and notify immediately the consignor the place of storage, and that they were subject to his (the consignor's) order. And where the goods are of a perishable nature, and liable to total loss unless immediately cared for, the consignee may, acting in good faith, and with ordinary and reasonable prudence and care, place them, as the goods of the consignor, in the hands of a responsible commission *556 merchant for immediate sale. *And in this, although the goods might not properly perhaps be classed as perishable goods, still we think the consignee, if acting in good faith, and with reasonable prudence, would not be responsible as purchaser, if it turned the bill of lading over to a responsible commission merchant. They were shipped with a view to a sale. The highest market price was expected. The consignors knew that they had not accepted the offer of the consignee, and that, no contract having been consummated, the latter was not bound to receive or pay for the goods. The consignee was but carrying out the expressed wishes of the consignors in placing the goods where they would be most likely to realize the highest market price. So doing, and acting in good faith, it does not seem just that it should be held responsible as purchaser.

The case seems to have been tried in the district court upon the supposition that the jury might, from the correspondence and the shipment, infer a contract; for included in the shipment were some goods not spoken of in the prior correspondence, and, though the jury found for the defendants as to these also, the district court compelled a *remitter* of this amount as a condition of judgment. Plainly, therefore, the learned court did not consider that the conduct of the plaintiff in St. Louis, by itself alone, rendered it responsible. The same thing also is evident from the instructions. But in this supposition the court erred. It was its duty to construe the writings, and it should have charged the jury that by those letters no contract was consummated between the parties. However, as no exception was taken to the instructions, any error in them was doubtless waived.

Counsel has urged, and we are not insensible to, the rule that for-

bids us to disturb the verdict of a jury which has any testimony tending to establish all the essential facts to sustain it. But that rule is scarcely applicable. Here was a case tried upon an erroneous theory of the law. If that theory were correct, there was some testimony to sustain the verdict. But, that theory being incorrect, both the district court and this court concur in holding there was *557 no testimony to sustain *it. The district court, acting upon this erroneous view of the law, upheld the verdict in part. This court takes the view of the testimony which the trial court took, and applying to it the law, as rightfully construed, finds that the entire verdict should follow the part rejected by that court. In this way justice between the parties will be more certainly reached, for upon a second trial any testimony tending to show bad faith, or want of reasonable care on the part of the consignee, can be introduced.

The judgment will be reversed, and the case remanded for a new trial.

(All the justices concurring.)

MISSOURI, K. & T. RY. CO. v. M. G. BROWN.¹

January Term, 1875.

1. **Bill of Particulars: Statements in.** It is sufficient if a bill of particulars, in case before a justice, states the essential facts, no matter how rudely and inartistically, yet so that the defendant is not misled, but clearly informed of the exact claim made upon him.
2. **Contract: Contracting Party: Memorandum: Unnamed Principal.** Where the general manager of a railroad company directs an assistant to have certain work about the railroad done, and in pursuance thereof the assistant makes a contract with a third party to do the work, and a memorandum of the contract is reduced to writing, in which it is simply recited that such third party will do the work, without mentioning for whom, for a certain sum, under the direction of the engineer of the company, which memorandum is signed by the third party, and by the assistant, without any designation of his office, or the capacity in which, or the party for whom, he makes such contract, but also without any express assumption of personal liability, *held*, that it was the contract of the company.
3. **Railroads: Laborers on: Statute of 1872.** Chapter 136 of the Laws of 1872, to protect laborers, mechanics, and others in the construction of

¹This case referred to, *Missouri, K. & T. Ry. Co. v. Baker*, *post*, *566. See *Atchison, T. & S. F. R. Co. v. Cuthbert*, *ante*, *212, and note.

railroads, applies not merely when a railroad company is engaged in the construction of its first and main track, but also wherever it is enlarging its road by the addition of side tracks.

- *558 *4. ———: Bond: Liability of Company. A railroad company failing to take the bond required by said statute is liable, not merely to the laborers personally, but to any persons to whom they may transfer their claims.

Error from Labette district court.

Brown brought suit in his own name as plaintiff against the Missouri, Kansas & Texas Railway Company, as defendant. The following is plaintiff's bill of particulars, originally filed in a justice's court:

"[Title.] The plaintiff, M. G. Brown, says that the Missouri, Kansas & Texas Railway Company was, on the eighteenth of November, 1872, and has been ever since, and is now, a corporation, duly organized under the laws of the state of Kansas, and was then, and has been ever since, and is now, doing business as such corporation in the county of Labette and state aforesaid; that said railway company did, on the eighteenth of November, 1872, contract with one McLeod to construct a certain part of its road in said county and state, to-wit, the grading between and for certain tracks or parts of said company's road, hereinbefore stated; and for such construction the said defendant company did agree to and did pay to the said McLeod a large sum of money, to-wit, 21 cts. per cubic yard, and one cent per yard overhaul, amounting to \$——. The defendant company failed to take, and did not take, from said McLeod, a good and sufficient bond, as required by law, or any bond, conditioned that he would pay all laborers, mechanics, and material-men, and persons who might supply such contractor with provisions or goods of any kind, all just debts due to such persons, or any person to whom any part of such work is given, incurred in carrying on such work. The plaintiff further says that said W. B. McLeod did draw on him certain orders in favor of certain persons, for goods and provisions for said McLeod, and used by said McLeod in constructing said defendant's road, or part of said road, named therein, which persons, performing labor on the grade and works hereinbefore stated, and others with them, were furnishing provisions to said McLeod and the men in his employ. The following are copies of said orders, and are attached hereto, and made a part hereof, marked 'A.' " Here follow copies of seven orders on Brown signed "W. B. McLeod," and one note, payable to S. G. Beekman, also signed by McLeod; after

- *559 which the bill of particulars proceeds: "Plaintiff says *that he paid for said note in goods and provisions; that said Beekman was a laborer in the employ of the defendant McLeod in constructing the grade for defendant company hereinbefore stated, and that it remains wholly unpaid, and said McLeod refused to pay the amount justly due him on said note; that the plaintiff paid to said

persons named in said orders the amounts thereof in goods and provisions; and that none of said orders have ever been paid to this plaintiff by said McLeod, nor by the persons therein named. Wherefore plaintiff prays judgment against the defendant for \$19.50, with interest thereon from the ninth of April, 1873, and for \$40.35, with interest thereon from March 25, 1873."

The action was tried in the district court, on appeal, at the March term, 1874. Judgment in favor of Brown.

David Kelso, for plaintiff in error.

No contract was made by the railway company with any one, and certainly not with Brown, nor with McLeod. If there was a contract at all, it was a contract made by the general manager to let a contract to Stevens to grade the grounds about the passenger depot at Parsons, fill up the low places between tracks, and round the grounds, so as to give better drainage. This contract Stevens sublet to one McLeod, who did the work, and got his pay for it. The memorandum of agreement made by Stevens and McLeod shows that the work was simply for "grading between tracks." It would seem to be an outrage on the English language to construe that contract to have the effect of one to build a railroad, or part of one, or that it was a contract between the railroad company and McLeod. Again, Brown was not a laborer, a mechanic, or a material-man; nor did he supply McLeod (the supposed contractor) with provisions or goods. He paid some of McLeod's personal orders, and bought a note given by McLeod for his own debt. The laborers, mechanics, and material-men were all paid. There was no contract, nor privity of contract, between Brown and the plaintiff in error, and under no just construction of the act of 1872 (chapter 136, p. 286) can Brown maintain his action against the railway company for any omission by the company to take a bond of indemnity from McLeod.

Davis & Talbot, for defendant in error.

The goods or provisions furnished by Brown were so furnished by him to the men *who at that time were actually engaged* in the construction of a "part" of the company's railroad. When Brown supplied Contractor McLeod's employes or laborers with "goods and provisions," at his request, he, in contemplation of law, supplied the contractor himself. Stevens had the authority, as agent of the railway company, to make contracts for the work, and the contract he made with McLeod was the contract of the company. The action is within the act of 1872. Brown's claims are "just debts due him."

BREWER, J. This was an action originally commenced by Brown before a justice of the peace, seeking to hold the railway company for debts created by one W. B. McLeod, under and by virtue of chapter 136 of the Laws of 1872. That act is entitled "An act to protect laborers, mechanics, and others, in the construction of railroads,"

and provides that a railroad company shall take a bond, with certain conditions, from any person to whom it lets a contract for the construction of its road, or any part of it, or become itself liable to the laborers employed by him. Four principal questions are presented by counsel for the company: *First*, was the bill of particulars sufficient? *second*, was there any contract between the company and McLeod for the doing of any work? *third*, if there was a contract, was the work contracted for such as is embraced within the terms of the act? and, *fourth*, were the debts also within its terms? Of these in their order.

1. Was the bill of particulars sufficient? It must be remembered that pleadings in a justice's court are not to be subjected to the same strictness of construction as those in the upper courts, *561 (Lobenstein v. McGraw, 11 Kan. *645; Kaub v. *Mitchell, 12 Kan. *57;) so that if the essential facts are stated in such a way that the defendant cannot be misled as to the real claim against him, the bill must be taken as sufficient. Tried by this rule, the bill is plainly sufficient. Indeed, we think it would stand a stricter test. It alleges a contract between the company and McLeod; that the company failed to take any bond; that for work done under that contract McLeod drew certain orders in favor of the laborers upon plaintiff, which he filled, and also gave to one of such laborers a note, which plaintiff bought, and gives copies of the orders and note; and alleges that neither the orders nor the note have ever been paid. It is true, the paragraph which alleges the drawing of the orders is a little bungling and confused, (though perhaps that may be due to an error of the copyist,) but the criticism to which it is properly subject is grammatical rather than legal.

2. The evidence of a contract was clear and abundant. E. B. Stevens, who testified that he was in the employ of defendant, and styled "Superintendent of Buildings and Bridges," was directed by the general manager of the defendant to have certain work done, and made a contract with McLeod to do it. The written memorandum of this contract was in evidence, and is as follows:

"W. B. McLeod agrees to do grading between tracks south of passenger depot, in Parsons, under the direction of the engineer of the M. K. & T. Railway Company, for 21 cents per cubic yard, (one cent per yard overhaul;) the work to be done to the acceptance of engineer within 80 days.

W. B. McLEOD.

"E. B. STEVENS."

Now, while the defendant does not appear upon the face of this agreement as party thereto, yet the testimony of Stevens above given shows that he was simply the agent of the company, and, as such agent, made the contract with McLeod. Upon such testimony McLeod would have had no difficulty in recovering from the company

for the work he did under said contract. It was plainly its contract.

3. The work contracted for was "grading between tracks *562 *south of passenger depot, in Parsons." The extent of the work does not appear, but it was stated by the witness Stevens that side tracks had been laid on this grade, and that a portion of the main track ran over it. His testimony as to the instructions given him, and in pursuance of which he made the contract with McLeod, was as follows: "He [the general manager] and I were walking over the ground between the tracks just south of the passenger depot. He said to me: 'I want you to go and have this ground graded to that cut on the hill, about 100 yards from where the freight depot now stands, and have the cut widened, and haul the dirt up, and fill it between the tracks,—fill up the hollow places, and round off the ground, so as to give drainage.'" And upon cross-examination Stevens further testified as follows: "The object of the work was, to fill up hollow places between the tracks, to finish and round off the grade in the yard, so as to give better drainage, and to give room for additional side tracks, when wanted."

This was all the testimony tending to show the character of the work. The language of the statute is: "Whenever any railroad company shall contract with any person for the construction of its road, or any part thereof, such railroad company shall take," etc. Laws 1872, p. 286. And the contention of counsel is that the act only applies to the original construction of the road, and not to work done in repairs and improvements,—“not in repairing one already built, nor throwing up an embankment to protect one already built, nor in filling between tracks so as to give drainage to the road-bed, and protect it from being washed by heavy rains.” Now, whatever may be the exact limitations of this act, we think there was sufficient testimony to sustain the finding that the work done was in the construction of a part of defendant's road. The act does not cease to be applicable when a single track has been completed, but applies whenever the company enlarges its road by the extension of its single track, or the *addition* of side tracks. Here was something more than repairs,—something more than embankment to protect track, or filling for purposes of drainage. Evidently, addi-
*563 tions to the road were contemplated. Side tracks were to *be graded for. A part of the road was to be built; and the act was applicable.

4. The debts were all originally to laborers, and for work done on this grade. But the present plaintiff was not the original creditor. The note he purchased, and the orders were drawn on him by the contractor. In this way the original creditors—the laborers—have received their pay, and transferred their claims to the plaintiff. But the debts have not been paid by the debtor,—the contractor. The language of the act is: "And if such railroad company shall fail to

take such bond, such railroad company shall be liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor." This responsibility of the company stands in lieu of the bond, and is security for the debt; and when the debt is assigned it carries the security. We do not understand the expression, "liable to the persons herein mentioned," as making the security purely personal and non-assignable, but simply as imposing a direct and original liability, and independent of the amount remaining due by the company to the contractor.

Upon the whole case we think the judgment of the district court must be sustained.

(All the justices concurring.)

MISSOURI, K. & T. RY. CO. v. A. J. BAKER.

January Term, 1875.

Railroads: Laborers on: Time-Keeper: Superintendent: Act of 1872
 Construed. One who is in the employ of a contractor with a railroad company simply as time-keeper and superintendent is not a laborer in the sense in which that term is used in chapter 136 of the Laws of 1872, and cannot recover of the railroad company the amount due him therefor by the contractor, notwithstanding the company failed to take the bond required by that statute.¹

*564 *Error from Labette district court.

Baker sued the railway company before a justice of the peace to recover a balance of \$104.13 due him "for labor as time-keeper on work of grading in the city of Parsons," on defendant's railroad. The bill of particulars, except as to the nature of plaintiff's claim, is very like that in Brown's Case, *ante*, *558. The case was removed to the district court, and there tried at the March term, 1874. Finding and judgment in favor of the plaintiff.

David Kelso, for plaintiff in error.

Baker represents that defendant entered into a contract with one McLeod to construct a part of its road, and that plaintiff served said McLeod in the capacity of "time-keeper," and occasionally as "superintendent" of the work, and that McLeod failed to pay him for such service the whole amount due him. He seeks to make the railroad company liable under the statute of 1872. The statute in question is entitled "An act to protect laborers, mechanics, and others in the construction of railroads," and provides, *inter alia*, that in case the railroad company shall fail to take the bond required by that act it shall be liable to the persons mentioned, viz., *laborers, mechanics, and*

¹See Atchison, T. & S. F. R. Co. v. Cuthbert, *ante*, *212, and note; Missouri, K. & T. Ry. Co. v. Brown, *ante*, *557.

material-men, to the extent of the indebtedness due them, or either of them, from the contractor. It is nowhere alleged in the plaintiff's petition that he served the contractor, McLeod, either as *laborer*, *mechanic*, or *material-man*. The terms "laborer" and "mechanic" are not to be taken in their generic sense. The service of the physician who healed the wounds and cured the malady of the contractor, or the service of the attorney who drafted the contract between the employes and the contractor, or the service of the clerk who kept the time the employes worked, is not that class of work which the legislature intended should be paid for, within the meaning of the statute. Words are to be construed as the legislature intended to use *565 them, which intent is to be gathered from the context. *Fitzpatrick v. Gebhart*, 7 Kan. *35; *Parkinson v. State*, 14 Md. 184; *New Orleans, J. & G. N. R. Co. v. Hemphill*, 35 Miss. 17. In section 6, c. 38, Gen. St., it is evident that the legislature did not intend that the services of a clerk and a laborer or a mechanic were synonymous; and we think it is equally certain that the legislature, by the passage of chapter 136, Laws 1872, did not intend to protect the service of a clerk or time-keeper. The act itself is *strictissimi juris*, and its terms should not be enlarged so as to defeat the ends of justice, and require the corporation to pay their debts a second time, simply because it is a railroad corporation.

Davis & Talbot, for defendant in error.

Baker's services were rendered as "time-keeper." He was on the ground all the time, and had charge of the men. The statute does not in express terms name a time-keeper, or superintendent of work, but it was surely the intention of the legislature to protect all persons who contributed to the construction of the road. The statute is remedial, and should be liberally construed. The word "laborer" should not be construed in the strict sense claimed by plaintiff in error. That might be correct in the light of the decisions of some of the states in construing the term "laborer" in certain statutes, where the courts have held that the object of the statute under consideration was the relief of "a class who usually labor for small compensation, to whom the moderate pittance of their wages is an object of interest and necessity, and who are poorly qualified to take care of their own concerns, or look sharply after their employers." *Coffin v. Reynolds*, 37 N. Y. 642. On the contrary, it is evident, from the express language of the statute under which this suit is brought, that the object is not the protection of such alone as perform toilsome manual labor; for the merchant, though he be a millionaire, is protected, as is also the subcontractor. There would be no great violence done to the English language if the court should say that the services of Baker were done as "laborer;" nor can it be said that keeping the *566 time *of the hands, and superintending the work, was not a "part of the work given" by the company to McLeod. The statute should not be so construed as to require defendant below to

pay its debts a second time simply because it is a railroad corporation, but it should be so construed as to protect the citizens against the gross negligence of defendant below in failing to take a bond as required by law.

BREWER, J. This case resembles in many respects the one of the same plaintiff in error against M. G. Brown, just decided, *ante*, *557. The contractor, and the work contracted for, were the same. There is, however, one material difference between the two cases,—a difference which is fatal to the claim of the defendant in error. The debts for which Brown's action was brought were debts to laborers. Baker sues for services rendered the contractor as "time-keeper" and "superintendent." Is such a debt one within the scope of the act? We think not. The act provides that the railroad company shall take from the contractor a "bond, conditioned that such person shall pay all laborers, mechanics, and material-men, and persons who supply such contractor with provisions or goods of any kind, all just debts due to such persons," etc., and, in case of a failure to take such bond, that the company "shall be liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor." Laws 1872, p. 286, § 1. This act does not provide that the company shall be responsible for *all debts* contracted by the contractor, but only those to certain classes of persons. Now, the only class in which Baker can by any sort of construction be placed is described by the term "laborers." Doubtless this term is often used in an enlarged sense, as embracing all persons who perform any kind of labor, physical or mental. In that sense any professional or literary man is a laborer; and in that sense Baker, as "time-keeper" and "superintendent," was a laborer. But it is very apparent that *567 it is not used in any such sense here. If it *were*, the succeeding term of description, "mechanics," would be superfluous, for a mechanic is in that sense unquestionably a laborer. Indeed, the terms of description associated with this clearly indicate its meaning. *Noscitur a sociis*. These show that it is here used in its more common acceptation, and in accordance with the definition given by Webster, as follows: "'Laborer.' One who labors in a toilsome occupation; a man who does work that requires little skill, as distinguished from an artisan; sometimes called a 'laboring man.'" We find the terms "laborer" and "mechanic" used elsewhere in the statute in conjunction, and with the same meaning. See the exemption act, (Gen. St. 474, § 6,) where it is provided that no personal property "shall be exempt from attachment or execution for the wages of any clerk, mechanic, laborer, or servant." Counsel contends that this is a remedial statute, and should be liberally construed. But it is also a statute imposing an additional liability, and under which it is sought to make the company responsible for a debt it never contracted. Such a statute should never be extended beyond the fair

import of its terms. If the legislature had intended to give all employes of a railroad contractor the benefit of its provisions, it could have expressed that intention in fewer words, and leaving no room for doubt. Designating classes, it intended that only those classes should be thus protected; and it could hardly have used terms more apt to exclude clerks, time-keepers, superintendents, and that kind of employes, than those actually used. *Ericsson v. Brown*, 38 Barb. 390; *Aikin v. Wasson*, 24 N. Y. 482. See, upon this general question, *Coffin v. Reynolds*, 37 N. Y. 640.

We think, therefore, the railroad company was not liable for the demand sued on in this action, and the judgment must be reversed. (All the justices concurring.)

*568

*GILBERT U. PIPER v. UNION PAC. RY. CO.

January Term, 1875.

Title to Lands: Condition Subsequent: Breach of Condition: Action for Damages does not Pass to Grantee of the Land. On December 24, 1863, Alice Broome was the owner of a certain quarter section of land in Leavenworth county. A proceeding was then pending in the district court of said county, instituted by the railway company, for the purpose of obtaining a certain strip of said land one hundred feet wide for railroad purposes. On that same day said court, with the consent of both parties, rendered a judgment investing the railway company with the title in fee to said strip of land, upon condition that the railway company should immediately pay therefor to said Alice Broome \$400, and, before May 1, 1864, make certain improvements thereon, and afterwards keep said improvements in repair. Said sum of \$400 was immediately paid, but the improvements have never been made. On March 26, 1864, Alice Broome sold and conveyed said quarter-section of land to David F. Laughlin. On July 25, 1864, Laughlin sold and conveyed the north half thereof to Gilbert U. Piper, (the deed being recorded July 30, 1864,) and on October 27, 1865, Laughlin sold and conveyed the other half of the same to Piper, (the deed being recorded November 25, 1865.) *Held*, in an action brought by Piper to recover damages from the railway company because said improvements have not been made, that Piper cannot maintain such an action; that the obligation imposed upon the railway company by said judgment in favor of Alice Broome is not such an obligation as will continue to run with the land; that Broome's grantee, merely as owner of the land, whether before or after the obligation was broken, acquires no right to recover damages for a breach of such obligation.¹

Error from Leavenworth district court.

Piper commenced his action against the railway company, seeking to recover damages for a breach of a judgment obligation, and also

¹See *Roberts v. Mullenix*, 10 Kan. 26, and note.

to recover possession of the strip of land concerning which the judgment imposing such obligation was rendered. Said judgment was rendered by the district court of Leavenworth county on the twenty-fourth of December, 1863, in an action or proceeding wherein the now defendant, the Union Pacific Railway Company, Eastern Division, was plaintiff, and James A. Broadhead, Alice Broome, and others were defendants; said proceedings being commenced and *569 prosecuted by the railway company under the provisions of sections 8, 9, c. 86, Terr. Laws 1855, pp. 916, 917, to have its right of way condemned through the lands of said defendants. Said judgment is as follows:

"Leavenworth District Court. November Term, 1863. Present: Hon. Wm. C. McDowell, Judge; Alexander Repine, Sheriff; and John E. Blaine, Clerk. Thursday, December 24, 1863.

"The Leavenworth, Pawnee & Western Railroad Company, otherwise known as the Union Pacific Railway Co., Eastern Division, Plaintiff, v. James A. Broadhead, Alice Broome, and others, Defendants.

"And now on this day this cause came on for trial, upon the objections of Alice Broome filed herein to the report of the persons heretofore appointed herein to view certain lands, and assess certain damages to the same; and the court, having heard the evidence, and being well advised in the premises, finds for the objector, Alice Broome; and at the request and with the consent of both said plaintiff and said objector, Alice Broome, the court doth order, adjudge, and decree that the title in fee-simple of the strip of land one hundred feet in width, across and through the following described tract of land situate, lying, and being in the county of Leavenworth and state of Kansas, namely, the N. E. $\frac{1}{4}$ of section 36, in township 9, of range 22, described as follows, namely, a strip of land 100 feet in width, with the center of the width of the same being on a line running along the center of the railroad track now graded through said quarter-section of land, be, and the same is hereby, vested in said plaintiff, in consideration and on the condition that the said plaintiff shall and does comply with and perform all the following judgments, orders, and decrees.

"And upon the further consent and request of both said plaintiff and said objector, Alice Broome, it is further ordered, adjudged, and decreed that said plaintiff shall, before running any train of cars, and on or before the first day of May, 1864, erect a good, suitable, and sufficient lawful fence on and all along each side of said strip of land, except at the crossings hereinafter specified; and that said plaintiff shall immediately erect and construct, and put in good and sufficient condition for use, two crossings, over and across said railroad track, and said strip of land, in such manner and condition as that the *570 same can be conveniently used in, by, and for the purpose of crossing said strip of land, including the railroad track, forever, with loaded and other teams, wagons, stock, and people; that one of

said crossings shall be at the point where the old military road crossed the place where said track now is, and the other of said crossings shall be at some reasonable point on that part of said strip of land which lies along where said company has cut a new channel for Nine-mile creek to run in along-side of said track; and that said plaintiff shall also immediately construct and make a good and sufficient bridge, of at least twelve feet in width, over said creek where said new channel has been so cut, at the proper place, for use in connection with the last-mentioned crossing; and that the said plaintiff shall immediately construct and place in their places a good and sufficient flood-gate at each place where said Nine-mile creek shall or does cross either of the boundary lines of the strip of land first above mentioned, and also at such other points and places as shall or may be necessary to protect the remainder of said quarter section of land from stock of any kind which may get on said strip of land, or to keep all and any stock which may be on any other part of said quarter section of land from passing onto said strip of land in the channel or bed of any creek; and that the said plaintiff shall immediately construct good and sufficient gates at said crossways, and at all such points and places as shall or may be necessary, to keep all kinds of stock from passing over either or any part of either of the said boundary lines of said strip of land, at any place where such fence is not constructed; and that the said plaintiff shall forever hereafter keep said fence, crossways, flood-gates, bridge, and gates in such good order and condition so that they will at all times reasonably and safely answer and serve the purposes and use for which they are intended.

"And upon the further consent and request of both said plaintiff and said objector, Alice Broome, it is further ordered and adjudged that the said plaintiff shall immediately pay to said objector, Alice Broome, the sum of \$400, and that the said objector, Alice Broome, have and recover of and from said plaintiff said sum of \$400, and her costs herein expended, and that execution issue therefor.

The petition of Piper set forth this judgment, and alleged that the railway company had taken possession of said strip of land, and had used it for its track and other railroad purposes, and was still *571 so using it, claiming the right to hold, *use, and possess the same under said judgment, but had wholly failed to make any of the improvements mentioned in and required by said judgment; that plaintiff is the owner of said quarter section of land by purchase from one Laughlin, who purchased the same from said Alice Broome; and claiming to recover damages from defendant for a breach of the obligations imposed by said judgment, and to recover possession of the land on the ground of forfeiture. The defendant demurred because of a misjoinder of causes of action. The court sustained said demurrer, and gave plaintiff leave to separate his action into two, and to file two petitions. This was done; and thereafter this action proceeded upon the petition for damages for failure to construct and

maintain the improvements mentioned in said judgment.¹ To the petition in this case the railway company answered, setting up three defenses: *First*, a general denial; *second*, the statute of limitations,—that said cause of action did not accrue within three years next before the commencement of the action; and, *third*, the pendency of the action of ejectment for the recovery of the land, as a plea in bar or abatement. Reply, a general denial. Trial at the February term, 1868. Verdict and judgment in favor of the railway company.

Clough & Wheat and Green & Foster, for plaintiff.

We suppose this case will be determined upon the effect of the judgment rendered on the twenty-fourth of December, 1863. The plaintiff is the owner of the lands described in the petition, except only and unless defendant *became and continued* the owner of the 100-foot strip by virtue of said judgment. Defendant had been, from the fourth of January, 1866, using said strip of land; and running its cars regularly thereon. The action was first commenced on the twenty-fifth of February, 1867; hence the three years relied on by defendant had not elapsed.

*572 *The evidence shows, and the jury find, that defendant had not performed any of the conditions of said judgment of December 24, 1863, and that the reasonable costs of putting upon the premises the improvements required by said judgment, on the first day of May, 1864, would have been \$2,500. We submit that the making of those improvements was part, and a *principal* part, of the consideration for which defendant was to have the right of way over that strip, and that, unless the agreement shown by that judgment is binding and obligatory against defendant, the whole judgment amounts to nothing, and therefore defendant had no right of way over the land, or right to said strip. That said agreement is obligatory on defendant, (unless said judgment is void,) see *Fletcher v. Holmes*, 25 Ind. 458; *Potter v. Parsons*, 14 Iowa, 287; *Crawford v. White*, 17 Iowa, 561; *Blake v. McKusick*, 8 Minn. 341, (Gil. 298;) *Swinfen v. Swinfen*, 86 E. C. L. 503; *Ewing v. Filley*, 43 Pa. St. 384. Of course, the making of those improvements should be considered and stand as and for part of the damages to the land by reason of the right of way taken. The making of those improvements, or paying the value thereof, (said \$2,500,) and also paying said \$400, stand, in substance, in place of such an assessment of damages as should have been made after sustaining the objections of *Alice Broome*, under section 9, p. 917, *Laws 1855*, (or sections 52-66, pp. 376-382, *Comp. Laws 1862*;) and as the making of such improvements would have been for the benefit of the land, and, if made, would have been appurtenant thereto, of course the right to have them made passed with the conveyances of the land to the plaintiff. *Spencer's Case*, 1 Smith, Lead. Cas. 115.

¹ Action of ejectment, for the recovery of the 100-foot strip, is reported. *post*, *574.

Hurd & Stillings, for defendant.

VALENTINE, J. Upon no theory can this action for damages be maintained. If said judgment upon which the action is founded be considered as creating an estate upon condition, in favor of the railway company, and not as creating an obligation in the nature *573 of a covenant, then the action, in whose*soever name it might be brought, should be for the recovery of the strip of land, and not for the recovery of damages. But if we consider such judgment as creating an obligation on the part of the railway company to make said improvements, in the nature of a covenant, then the action is certainly not commenced by the proper person. The judgment, so far as it imposes any obligation upon the railway company, is in its terms purely a personal judgment in favor of Alice Broome, and in favor of her alone. It does not purport to be in favor of her assigns, and the judgment has never been in fact assigned. And the mere sale and conveyance of the land mentioned in the judgment cannot work an assignment of the judgment. If we consider the obligation imposed upon the railway company by the judgment merely in the nature of a covenant, and not in the nature of a condition upon the breach of which the title of the railway company to said strip of land may be forfeited, then such obligation will have no connection whatever with the title to the land, or with the possession thereof, or with any estate therein; nor will anything to be done under such obligation have anything to do with either the title, or the possession, or the estate, or, indeed, with anything in existence at the time said judgment was rendered, connected in any way with such estate, title, or possession. The obligation was simply to create *new* improvements on the company's own land, and then to keep these *new* improvements in repair. It has never been understood that such an obligation would run with the land. See *Spencer's Case*, 1 Smith, Lead. Cas. 115 *et seq.* But even if this obligation, when first created by the judgment, was such an obligation as would run with the land, still the obligation was violated, and therefore converted into a mere personal chose in action, not assignable by a mere conveyance of the land, long before Piper obtained any interest in the land. Piper obtained his first interest in said land on July 25, 1864, (the deed was recorded July 30;) but all said improvements were to have been made before the first day of May of that year. And Piper *574 *did not purchase the south half of said quarter section till October 27, 1865, (the deed was recorded November 25.) Under this state of the facts Piper could not maintain any action for a breach of the said obligation. *Spencer's Case*, *supra*; *Rawle*, Cov. (4th Ed.) 318-322, and cases there cited. A covenant, when broken, becomes a personal chose in action, and never afterwards runs with the land. There is no claim that this judgment obligation, which is in its terms personal, has any greater power to run with the land

than a covenant which is usually made in express terms to the assigns of the covenantee as well as to the covenantee himself.

The judgment of the court below is affirmed.

KINGMAN, C. J., concurring. BREWER, J., not sitting in the case.

GILBERT U. PIPER v. UNION PAC. RY. Co.

January Term, 1875.

Title to Lands: Condition Subsequent: Breach: When Right to Demand Forfeiture of Estate is not Assignable. On December 24, 1863, Alice Broome was the owner of a certain quarter section of land in Leavenworth county. A proceeding was then pending in the district court of said county, instituted by the railway company, for the purpose of obtaining a certain strip of said land, one hundred feet wide, for railroad purposes. On that same day said court, with the consent of both parties, rendered a judgment investing the railway company with the title in fee to said strip of land, upon condition that the railway company should immediately pay therefor to said Alice Broome \$400, and before May 1, 1864, make certain improvements thereon, and afterwards keep said improvements in repair. The said sum of \$400 was immediately paid, but the improvements have never been made. On March 26, 1864, Alice Broome sold and conveyed said quarter section of land to David F. Laughlin. On July 25, 1864, Laughlin sold and conveyed the north half thereof to Gilbert U. Piper, and on October 27, 1865, Laughlin sold and *575 conveyed the *other half of the same to Piper. *Held*, in an action brought by Piper to recover from the railway company said strip of land, that Piper has no legal right to demand that said improvements shall be made, or that because the same have not been made that the railway company shall forfeit said strip of land to him. And *further held*, that the railway company by said judgment obtained an estate upon condition subsequent in said strip of land, and that the right to demand a forfeiture of the estate for condition broken is not so far assignable that whoever may own the quarter section of land, whether he purchased it before or after condition broken, may demand the forfeiture.

Error from Leavenworth district court.

Ejectment brought by Piper. This action was originally joined with the preceding action between these same parties. See, *ante*, *568, where a full statement of the facts, and the judgment under which the railway company claims title, will be found. Upon a separation of the causes of action, as there stated, Piper filed in this case an ordinary petition in ejectment for the recovery of said 100-foot strip. Defendant answered—*First*, a general denial; *second*, title in fee in defendant; and, *third*, the pendency of the other action for damages. Second trial at the November term, 1870. At the close of the testimony the court instructed the jury as follows: "In

the view of this case taken by the court, it will be your duty to return a verdict for the defendant." Verdict for the defendant.

Clough & Wheat and Hurd & Stillings, for plaintiff.

The evidence and admissions in the case show title to the land in controversy in plaintiff, unless the condemnation proceedings commenced in 1863, and the judgment of twenty-fourth December, 1863, vested the title thereto in the railway company. We claim those proceedings are void for want of jurisdiction thereof by the court which acted thereon. The charter of the Leavenworth, Pawnee &

Western Railroad Company (which is on pages 914-920, Laws *576 1855) was given in evidence *on the trial. The condemna-

tion proceedings, which include the above-named judgment of the twenty-fourth of December, were had under said charter, notwithstanding the enactment of sections 52-66, pp. 376-382, Comp. Laws 1862; subsequently to the enactment of said charter, which required different proceedings, before different parties, to condemn a right of way, than those shown on said trial. That the mode of condemning a right of way provided for in said charter was merely matter of remedy, see *Baltimore & S. R. Co. v. Nesbit*, 10 How. 395.

But if the court had jurisdiction to render said judgment, still we claim that until compensation was made for the right of way, or said strip of land, the defendant had not the right of possession thereof. See section 4, art. 12, Const. See, also, *Spaulding v. Hallenbeck*, 35 N. Y. 206; *Carpenter v. Oswego & S. R. Co.*, 24 N. Y. 655; *Wager v. Troy Union R. Co.*, 25 N. Y. 526. The railroad track was laid on said strip in 1866, which was after plaintiff became owner of the quarter section, and he was in possession of the strip when the railroad company commenced to lay the track. Alice Broome remained in possession of the strip in controversy until she delivered same to Laughlin, her grantee; and Laughlin continued in possession thereof until he delivered same to plaintiff, his grantee; and the improvements required by said judgment have not been made. We submit that the common-law rule in relation to who can or cannot take advantage of conditions subsequent have nothing to do with this case, or a proper construction of said judgment, because the making of the improvements was part of the compensation required to be made to entitle the railroad company to have or use the land. As the evidence showed that Alice Broome remained in possession until she conveyed to Laughlin,—a period of 92 days, time enough for the railroad company to have made the improvements several times,—and as her continuing so in possession prevented her from making a re-entry for breach of condition subsequent, (if making the improvements was a condition subsequent, which we deny,) the law does not require her to attempt an absurd act, to-wit, that of *577 entering upon a tract of land of which *she was already in possession; and therefore the failure of the railroad company to make the improvements can be relied on by plaintiff as breach of

a condition subsequent. *Lincoln & K. Bank v. Drummond*, 5 Mass. 321; *Hamilton v. Elliott*, 5 Serg. & R. 375; *Andrews v. Senter*, 32 Me. 394; 2 Coke, Litt. 218a.

As the two actions were commenced under section 99 of the Code of 1859, after the demurrer for misjoinder was sustained, in pursuance of leave given so to do, we suppose it clear that neither could be pleaded in bar of the other; and we submit that even if the said judgment of twenty-fourth December, 1863, is valid, that plaintiff is entitled to recover and retain possession of said strip until said judgment is complied with by the railroad company, and; to do so, to remove defendant therefrom by process of ejectment.

Hurd & Stillings, for defendant.

After default of defendant to comply with and perform the other conditions, Mrs. Broome conveyed part of the land to plaintiff, and part to Laughlin, who afterwards conveyed to plaintiff. The road was completed and commenced running in 1865, and the plaintiff witnessed the laying of the track and completion of the road. After the company had commenced running the road, Piper demanded that the judgment should be performed by the company. The questions which arise upon this judgment, and the facts thus admitted by the plaintiff, are—*First*, whether there was any remedy to any party but Mrs. Broome on this decree, after the failure of defendant to make the improvements before the first day of May, 1864; *second*, whether plaintiff acquired any right growing out of that decree by a mere conveyance of the land; and, *third*, whether plaintiff can sustain this action for the recovery of the land, and thereby interrupt the running of the road for a failure to perform those conditions.

That Mrs. Broome could have sustained an action for damages on the second day of May, 1864, we think could not be questioned. *Masterton v. Brooklyn*, 7 Hill, 62; *Nicoll v. New York & E. R. Co.*, 12 N. Y. 122; *Beddoe v. Wadsworth*, 21 Wend. 121; *Hamilton v. Wilson*, 4 Johns. 72; *Underhill v. Saratoga & W. R. Co.*, 20 Barb.

*578 455; 1 Smith, Lead. Cas.*141, 158, 190; 4 Kent, Comm. 471;

Tayl. Landl. & Ten. 665; *New Jersey C. R. Co. v. Hetfield*, 29 N. J. Law, 206. And in such case she had a right to recover, not only the value of such improvements for present use, but their value to the farm as fixtures thereto, with the obligation with them to keep them in repair. Conceding that she might have entered for the non-performance of these conditions, which were in their nature conditions subsequent, yet the right of entry was her personal privilege, and did not pass with her conveyance of the fee. *Nicoll v. New York & E. R. Co.*, 12 N. Y. 121; 1 Smith, Lead. Cas.; 4 Kent, Comm. 471; *Wilder v. Seelye*, 8 Barb. 413; *Ludlow v. New York & H. R. Co.*, 12 Barb. 440; *Underhill v. Saratoga & W. R. Co.*, 20 Barb. 455. That a mere conveyance of the land transfers no right of action for broken covenants or agreements, we refer to the cases in 4 Johns. 72. A right of action never passes by deed of conveyance of land merely, except where

it is on a covenant running with the land. To be a covenant running with the land, it must, in such case as this, have been one to keep in repair or maintain something that had become a fixture to the land. A covenant to build a house is not a covenant running with the land, but a mere personal covenant. When the house is built, and becomes a part of the realty, it would then be competent to make a covenant to keep it in repair. That would be a covenant running with the land. 1 Smith, Lead. Cas. 141, 190, 206; Hamilton v. Wilson, 4 Johns. 72; 4 Kent, Comm. 471. What, then, were the rights of the parties when the title to the quarter section vested in the plaintiff? Mrs. Broome had parted with the right of the strip in dispute, for which she held the defendant bound to do certain things. The defendant had failed to perform certain agreements which had been reduced to a decree. Mrs. Broome had a clear right of action against defendant for all the damages to her, or the less value of her estate by reason of the failure. It could hardly be contended that she could recover the entire value on this agreement, and yet the plaintiff recover the land.

The question as to the mode of proceeding is immaterial. The form could make no difference, as the subject-matter and parties were before the court, and the decree was entered by consent, *579 without regard to the form of the pleadings. If the *district court could in any form have jurisdiction, the judgment entered by consent is binding. Lessee v. Thompson, 3 Ohio, 272; Carter v. Walker, 2 Ohio St. 339; Castleton v. Miner, 8 Vt. 208; Robinson v. West, 1 Sandf. 19; Malone v. Clark, 2 Hill, 657; County of Randolph v. Ralls, 18 Ill. 29; Wells v. Scott, 4 Mich. 347.

VALENTINE, J. This case and the one just decided (of this same title) arose out of the same transactions, and the facts of the two cases, up to the amendment of the original petition in the court below, separating that case from this, and filing a new petition for each case, are identical. Both cases are founded upon, or at least connected with, a certain judgment of the district court of Leavenworth county, rendered December 24, 1863. At the time said judgment was rendered Alice Broome owned the N. E. $\frac{1}{4}$ of section 36, in township No. 9, of range No. 22, in Leavenworth county. At the same time the defendant in this case, the railway company, had possession of a strip of said land, one hundred feet wide, running through said quarter section, which it was grading, and intending to use for railroad purposes; and the proceeding in which said judgment was rendered was a proceeding instituted by the railway company for the purpose of obtaining the title to said strip of land for railroad purposes, under the power of eminent domain, and was pending in said district court when said judgment was rendered. The judgment in said proceeding was finally rendered by the consent of both parties, and was, in substance, as follows: The railway company was in-

vested with the title in fee to said strip of land upon condition that it pay for the same, to Alice Broome, \$400, and make certain improvements thereon, and afterwards keep said improvements in repair. All these things were to be done by the railway company before the first day of May, 1864. The railway company immediately paid said \$400, but they have failed up to this time to make said improvements, although they have been operating their road over said strip for several years. This action, since its separation from the *580 other action, has been for the recovery of *said strip of land.

The other action, since its separation from this, has been for the recovery of damages for the failure of the railway company to make said improvements. The verdict of the jury and the judgment of the court below in this case were for the defendant, and the plaintiff, Piper, now brings the case to this court.

The first question raised in this case by the plaintiff is that the original judgment out of which these two cases originated is void for want of jurisdiction in the court rendering such judgment to render the same. This question has already been before this court, and decided adversely to the plaintiff, and we do not now choose to again consider the same. *Union Pac. Ry. Co. v. McCarty*, 8 Kan. *125. The question was there decided in a case involving the validity of a judgment almost precisely like the judgment in question in this case, and which was rendered at the same time that this judgment was rendered, and by the same court, under the same laws, and in the same proceeding; and the case just decided, of this title, (*ante*, *568,) was prosecuted by the plaintiff, and was decided by this court, upon the assumed validity of said judgment, and we shall now follow those cases without further consideration or investigation.

The next question is whether the plaintiff may recover in this action notwithstanding the assumed validity of said judgment. It will be noticed that it is not Alice Broome who prosecutes the action, but it is Gilbert U. Piper. Then, where does Piper get his authority for prosecuting the action? Simply from the following facts: On March 26, 1864, Alice Broome sold and conveyed said quarter section of land to David F. Laughlin. On July 25, 1864, Laughlin sold and conveyed the north half thereof to Piper; and on October 27, 1865, Laughlin sold and conveyed the other half of the same to Piper. Now, are these facts sufficient to authorize Piper to prosecute this action, or, indeed, to prosecute any action, against the railway company? We think not. The judgment itself, so far as it attempts to

impose any obligation upon the railway company, is in favor *581 of Alice Broome alone. *It does not purport to be in favor of her assigns, and it has never been in fact assigned to any one. And the mere sale and conveyance of the land mentioned in the judgment cannot work an assignment of the judgment. In the other action the plaintiff claimed that said judgment created an obligation resting upon the railway company, in the nature of a cove-

nant running with the land, to make such improvements; and in that action it was necessary for the plaintiff to so claim, for under no other theory could he maintain that action. But in this action he substantially claims that the estate vested by the judgment in the railway company for said strip of land was merely an estate upon condition, liable to be forfeited back to Alice Broome, or to her assigns, upon any failure of such condition. And it is as necessary for him to so claim in this action as it was to make the other claim in the other action; for if the estate conveyed were an estate absolute, and the plaintiff had nothing but a mere judgment, or a mere covenant for the erection of said improvements, and no right to claim a forfeiture of the land for condition broken, his only remedy for a failure to make the improvements would be an action for damages, and not an action for the recovery of the land, as in this case. We agree with the plaintiff that the estate conveyed by said judgment was an estate upon condition. But as the estate was, by the very terms of the judgment, to be immediately vested in the railway company, the condition was subsequent, and not precedent. And the right to demand a forfeiture of the estate for condition broken was vested in Alice Broome alone, and not in her assigns. The judgment, in legal effect, we think, vested the whole of the estate in said strip of land immediately in the railway company, subject, however, to be forfeited back to Alice Broome, at her election, upon condition that the railway company did not fulfill the obligations imposed upon it by the judgment. See *Nicoll v. New York & E. R. Co.*, 12 N. Y. 121; *S. C.* 12 Barb. 461.

The railway company failed to fulfill said obligations, but Alice Broome has never elected to demand a forfeiture of said estate.

582 Indeed, it would almost seem from the authorities that, by selling and conveying all her interest in the land before the condition was broken, she waived the fulfillment of the condition, or, at least, waived the forfeiture. *Underhill v. Saratoga & W. R. Co.*, 20 Barb. 455; *Rice v. Boston R. Co.*, 12 Allen, 142; *Hooper v. Cummings*, 45 Me. 359. But, however this may be, Piper obtained no right to demand a fulfillment of the conditions, or to demand a forfeiture of the estate. See authorities above cited, and *Ludlow v. New York & H. R. Co.*, 12 Barb. 440. The right of a person who has created an estate upon condition to demand a forfeiture of the estate for condition broken is not assignable, (*Washb. Real Prop. c. 14, par. 14*, and the numerous cases there cited,) and certainly not assignable by an ordinary deed of conveyance. In the present case, when Alice Broome parted with her interest in said land there had been no breach of said condition. But before Piper obtained any interest in the land the breach of the condition, if there ever has been any such breach, had become complete. The failure to make said improvements occurred while Laughlin owned the land. When Alice Broome conveyed said land to Laughlin she had no estate in said strip of land, and no present

power of obtaining any such estate. Her right at that time was merely a possible future contingent interest. See *Nicoll v. New York & E. R. Co.*, *supra*. The present and existing estate and interest in said strip of land was at that time wholly in the railway company. Therefore, as Alice Broome had no present and existing estate in said strip of land when she conveyed said quarter section to Laughlin, she, of course, conveyed no interest in the strip to Laughlin, and, as we have before seen, the personal right of demanding a forfeiture does not pass by a deed of conveyance of the land. A party who has no estate cannot convey an estate. But even if she had conveyed some interest in said strip to Laughlin, still Piper has hardly obtained it. The supposed breach of the condition occurred while Laughlin owned said quarter section, and therefore, even if the right to demand *583 a forfeiture for condition broken *was assigned to Laughlin, still the right became personal to him, and he has never exercised it. Even after condition broken the title to the property does not, as a rule of law, pass to the person entitled to receive the same until such person in some proper way demands a forfeiture of the property. 1 Washb. Real Prop. c. 14, par. 13. Now, Laughlin never demanded a forfeiture of the property by entry, suit, or otherwise. After Laughlin sold the north half of said quarter section to Piper, and while Piper owned one-half of the same and Laughlin the other, could one of them have demanded a forfeiture as to that portion of the strip running through his own eighty-acre tract, and both of them have allowed the railway company to retain the strip through the other eighty-acre tract? Could they divide up the forfeiture? Or could one, against the will of the other, have demanded a forfeiture? The fact is, neither of them ever had any right to demand a forfeiture.

The judgment of the court below is affirmed.

KINGMAN, C. J., concurring. BREWER, J., not sitting in the case.

WILLIAM W. ROLLER and others v. JOHN M. SNODGRASS.

January Term, 1875.

Parties: Petition to be Joined as Defendants: Refusal to Grant, not Error. Where an action for the dissolution of a corporation is pending in the district court, said corporation being the defendant, and a stockholder therein being the plaintiff, and the parties, by a written stipulation filed in the case, settle the matters in controversy, but no judgment is yet rendered in the case upon such settlement; and a third party, who is also a stockholder in said corporation, then petitions the court to be made a party defendant in the action, so that he may contest the plaintiff's

cause of action upon its merits, alleging collusion and fraud upon the part of the plaintiff and defendant in seeking to dissolve the corporation; and the court denies such petition, and then, *upon rendering the final judgment in the case, renders the same according to said stipulation, and with the consent of the plaintiff and defendant, in favor of the plaintiff, but for costs only, and does not dissolve the corporation: *held*, that the court below, in denying said petition of said third party, did not commit such an error as will require, or even authorize, a reversal of the judgment.

Error from Franklin district court.

In an action pending in the district court, wherein Snodgrass was plaintiff, and the Ottawa Furniture & Wood-work Company was defendant, Roller and three others sought to be made parties defendant, and filed their petition praying to be so joined. The district court, at the March term, 1873, refused to grant said petition, and gave judgment in said action in accordance with the stipulation of the parties thereto. From such decision and order of said district court, in denying their application to be made parties defendant, Roller and the other petitioners appeal, and bring the case here for review, making Snodgrass only, defendant in error.

Wm. H. Maxwell, for plaintiffs in error.

Mason & Parkinson, for defendant in error.

VALENTINE, J. This action was brought by Snodgrass against the Ottawa Furniture & Wood-work Company, a corporation doing business at Ottawa. Snodgrass was a stockholder in said company. The object of the action was to have the business affairs of the company closed up, and the corporation dissolved. What the entire proceedings were in the court below we cannot tell; for the record brought to this court does not purport to contain all the proceedings, and we know from the record itself that it does not contain them all. We would presume, however, that among the proceedings a receiver was appointed who took charge of the affairs of the company for a time; that afterwards all the questions involved in the case were settled by all the parties *interested therein by a written stipulation filed in the case; that in pursuance of this settlement and stipulation the court afterwards discharged the receiver, and rendered judgment merely for costs in favor of the plaintiff. But the most of this we infer merely from some recitals in a journal entry of the proceedings of the court, for neither the appointment of the receiver, nor the report of his proceedings, nor said stipulation, is contained in the record brought to this court. Both the plaintiff and defendant seem to be satisfied with the judgment rendered in this case, but other parties, to-wit, W. W. Roller, John Roller, Albert Gottschalk, and C. M. Ott, complain, and these parties bring the case to this court. They have not, however, made the Ottawa Furniture & Wood-work Company a party in this court.

Possibly said company would not like to have the judgment below reversed, and have the case remanded for further proceedings. *Ferguson v. Smith*, 10 Kan. *894. Said receiver was discharged on March 29, 1873. At that time, according to said journal entry, said stipulation was on file in the case. The defendant in error says in his brief that said stipulation was a full settlement of all the matters in controversy in this case, and that it was signed by all the parties interested, including these plaintiffs in error; but whether this is so or not we cannot tell from the record. On April 3, 1873, five days after said stipulation is known to have been on file in the case, the plaintiffs in error filed a petition asking to be made parties defendant in the action, alleging that they were stockholders in said corporation, that they were interested in the controversy, and alleging collusion and fraud on the part of the plaintiff and defendant in seeking to dissolve the corporation, and various other things. On April 7th the court below denied said petition, and then, on the same day, rendered said judgment for costs in favor of the plaintiff, Snodgrass, and against the said Furniture and Wood-work Company. What the costs were, what the amount was, or for what items they might be charged, we cannot tell, as the record does not show, and they have never been taxed.

*586 *The first, and about the only, ruling of the court below complained of is the denying of said petition of plaintiffs in error to be made parties to the action. Now, what evidence was introduced, or what other matters were taken into consideration by the court below upon the hearing of said petition, we are not advised. Possibly the evidence introduced on the hearing may have shown that the matters alleged in said petition were not true. This petition was an application on the part of the plaintiffs in error to be made parties defendant, so that they might contest the plaintiff's cause of action upon its merits. But the merits of the action, we must presume from the record, had already been settled, and no judgment upon the merits was rendered in favor of the plaintiff below, and no judgment upon the merits was rendered which could in the least injure any one of the plaintiffs in error. If the plaintiffs in error had been allowed to contest the action, they could not have got any more favorable judgment for the said company, or for their own interests therein, than was actually rendered by the court. They simply did not want the corporation dissolved, and it was not dissolved. It is possible that they might have made some change in regard to the costs, but what change, if any, we cannot tell from the record presented to us. If we had a full record of all the proceedings in the court below, it is possible that we might find that the plaintiffs in error had, by said stipulation, estopped themselves from raising any question, either upon the merits of the action or as to costs. But in whatever light we may view the record, the plaintiffs have lost nothing directly, and but very little, if anything, indirectly, by failing to be made parties to

the action. As we have before said, the only change that they could possibly have made in the judgment by being parties, and contesting the case, would have been as to costs. And as these costs are imposed by the judgment on the Furniture & Wood-work Company, and not on the plaintiffs, the only injury to them is an indirect injury, by tending to depreciate the value of their stock. We should think

*587 that the court would, in cases of *this kind, have some discretion in allowing or disallowing new parties to come in for the purpose of contesting some question in the case; and, if so, it would seem almost like an abuse of discretion for a court to allow a new party, who had no direct, but only an indirect and remote, interest in the matters in controversy, to come in and contest the entire case, merely to save a very small amount of costs (how small we cannot tell) from being imposed upon a corporation of which he was a member, when the corporation itself had ample notice of the suit, and was not unwilling that the costs should be so taxed. The court below clearly did not commit any abuse of discretion. While courts of equity will protect the rights of individuals, yet something must always be left to the discretion of such courts; and while courts of equity will often protect individual stockholders of a corporation from the wrongful or unjust acts of the directors of such corporation, yet some discretion must always be left for the directors to exercise. They must have some power to determine what is for the best interests of the corporation; and courts should not, in doubtful cases, say that they have mistaken the best interests of the corporation, and therefore reverse their action.

We do not think that it is necessary in this case to decide whether the petition of the plaintiff below stated a good cause of action or not; or whether a corporation can answer only under seal or not; or whether the petition of the plaintiffs in error in the court below was sufficient or not, *prima facie*, to make them parties defendant; for neither the plaintiff nor defendant in the action are now complaining, and the only parties complaining are parties who complain merely because some indefinite amount of costs was taxed against a corporation of which they were members. While we do not think that the court below, under the facts of this case, (as we would presume them to be from the record,) committed any error, yet we feel clear that, view the record as we may, no such error was committed as will require, or even authorize, a reversal of the judgment below.

(All the justices concurring.)

*588 *HORACE H. WILCOX v. ARCHIBALD ELLIS, Treasurer, etc.

January Term, 1875.

1. **Taxation: Purchase Money Conditionally Due on Sale of Lands in Another State not Taxable in Kansas.** In the year 1868, W. agreed in writing to sell and convey certain lands in Illinois to L., and L., in consideration therefor, executed his promissory notes to W., which notes were by agreement deposited with certain bankers in Illinois. These were the only instruments executed between the parties. By agreement L. was to make payments on the notes from time to time, paying, at least, the value of eighty acres of the land annually, until all the land should be paid for, and was to receive a deed from W. for each eighty-acre tract of land as he (L.) paid for the same; but, if L. should at any time fail to make said annual payment, he was to forfeit all payments made after the last preceding conveyance. The land was to remain the property of W. until paid for. On March 1, 1872, the value of the land not yet paid for was \$6,000, and the amount of the notes not yet paid was the same. The notes still remained with said bankers in Illinois. At that time (March 1, 1872) said W. was a resident of Butler county, Kansas, and during that year the taxing officers of said Butler county assessed and levied taxes against W. on the said \$6,000 not yet paid on said land. *Held*, that said \$6,000 was not taxable in Kansas.¹
2. ———. Where land is sold and conveyed, and notes given for the purchase money, the vendee may be taxed for the land, and the vendor for the notes received for the purchase money. But where one still owns the land, having only conditionally sold it, as, in this case, he cannot legally be taxed both for the land and for the notes executed and conditionally deposited with a third party for the purchase money.

Error from Butler district court.

Injunction, brought by Wilcox to restrain Ellis, as county treasurer, from collecting the tax levied on \$6,000 assessed as personal property. The agreed statement of facts shows that Wilcox had been a resident of Plum Grove township, in Butler county, for five years previously, and was such resident on the first of March, 1872; that he listed under oath, and returned to the proper assessor, his personal property for that year, shortly after the first of March, and that afterwards the county clerk increased the amount of Wilcox's personal property \$6,000. Wilcox paid all his other taxes,
 *589 and then *sought to enjoin the tax of \$229.50 levied on said \$6,000. The district court, at the September term, 1873, refused the injunction prayed for, entered a decree dismissing plaintiff's petition, and gave judgment in favor of Ellis for costs.

¹Persons residing in this state are not subject to assessment and taxation in respect to business or interests beyond the territory and jurisdiction of the state, and which the laws of the state cannot in any way reach or protect. The maxim of the common law, *mobilia sequuntur personam*, does not always nor absolutely apply for the purpose of taxation to intangible personal property. *Fisher v. County of Rush*, 19 Kan. 414. See *Blain v. Irby*, 25 Kan. 499.

R. M. Ruggles, for plaintiff.

In the year 1868, Wilcox agreed in writing to sell certain real estate in the state of Illinois to one Lovatt, for a price agreed upon between them, and Lovatt gave his notes for the amount; it being agreed that the notes were to be left at a banking-house in Hancock county, Illinois, and as fast as said Lovatt should make payment on said notes, from time to time, the plaintiff should convey to him a proportionate amount of said real estate. No deed was made to Lovatt at the time of the sale. No mortgage was given to secure the payment of the notes. Whenever an amount was paid equal in amount to the value of eighty acres, then a conveyance was to be executed by plaintiff to Lovatt for such eighty acres, and so on until all the land should be paid for. On said contract \$6,000 remained unpaid on the first day of March, 1872, and is the same \$6,000 placed on the tax-roll by the clerk of Butler county in said year.

Were said notes personal property? We claim not. The notes were given with the contract, and constituted a part thereof, both being in reference to the sale of real estate not yet conveyed. The notes by the said agreement were never the property of plaintiff, but were delivered to the bank *in escrow*. They were not to be delivered to plaintiff, but only the proceeds of the notes as fast as paid. It was property over which plaintiff could exercise no control whatever, and, so far as he is concerned, his taxable interest would be the same if no notes had been executed, and there had been merely the agreement in writing to sell. If the plaintiff had agreed to execute a conveyance to the lands as fast as Lovatt paid certain amounts

*590 of money, and the money to be payable *from year to year, but no notes had been executed, it certainly cannot be claimed that plaintiff would have had such an interest in the agreement as would be taxable as personal property; that is, it certainly could not be taxable as a debt due plaintiff. What difference does it make, then, that the notes were executed? They are no more an indebtedness due plaintiff, as they were merely delivered *in escrow*, to be of effect only upon their payment, than the agreement to pay certain sums in the written agreement would be an indebtedness due plaintiff. If the notes were paid, then, as fast as payment was made, plaintiff would have a personal property interest which would be taxable, and not till then.

There is still another reason why this \$6,000 should not be taxable as personal property to plaintiff. Until said notes were paid *the real estate was to remain the property of the plaintiff*. There can be no doubt that the equitable, as well as the legal, title in the real estate, while the notes were unpaid, remained in plaintiff, and he was liable for the taxes on the real estate while such notes were unpaid. Then, if his \$6,000 of real estate was subject to taxation, (as it certainly was,) it cannot be held that the personal property of \$6,000 in notes, which merely conditionally represented the \$6,000 in real estate, was

taxable; for if it is so held, the plaintiff will be taxed for \$12,000 of property, when he is the owner of but \$6,000.

But, if taxable at all, the next question to determine is, where is said \$6,000 in notes taxable? We claim that these notes, if taxable at all, are taxable in the state of Illinois. See St. Ill. c. 89, §§ 45, 46, 48. But if it is claimed that we have no right to refer to the statutes of Illinois, as they were not read in evidence on the trial of the cause in the court below,—which proposition we deny, (*Bradley v. Mutual B. L. Ins. Co.*, 3 Lans. 341,)—then we say that, in the absence of proof to the contrary, it will be presumed that the laws of Illinois upon the subject-matter in litigation are the same as the laws of this state; and, presuming the laws of Illinois to be the same as those of Kansas, would the said \$6,000 (supposing *591 it *to be personal property) be subject to taxation in the state of Illinois? We take it that it would. Every dollar of real and personal property within the state of Kansas is subject to taxation, unless the same falls under the provisions of section 3, art. 2, or section 5, art. 3, of our tax law, (chapter 107, Gen. St.) It cannot certainly be claimed that the \$6,000 in question is included in either of the said sections above named. That such was the intention of the legislature is evidenced by section 10 of article 3 of said chapter 107. Can any one own or possess personal property in any different relation than specified in said section 10? We cannot see how one can. Then, presuming the laws of Illinois to be the same as Kansas, the \$6,000 is certainly subject to taxation in *Illinois*, if subject to taxation at all. But there is still another reason. There is a principle, but one merely of fiction, that *mobilia personam sequuntur*, upon which the defendant entirely relies in this case. This principle (so called) is by no means of universal application, and always yields when justice so demands. Personal property as well as real property has a *situs*; and only for certain purposes (and those very few, and growing fewer as time advances) does the principle that “things movable go with the person” apply. We claim that wherever personal property is *situated*, there is it subject to taxation, notwithstanding the fact of the owner being a non-resident of the state where the same is situated. *Catlin v. Hill*, 21 Vt. 152; *People v. Gardner*, 51 Barb. 352; *Duer v. Small*, 17 How. Pr. 201; *People v. Ogdensburgh*, 48 N. Y. 397; *Hoyt v. Com’rs of Taxes*, 23 N. Y. 228; *McCormick v. Fitch*, 14 Minn. 252, (Gil. 185;) *St. Louis v. Wiggins Ferry Co.*, 40 Mo. 580; *Wilkey v. Pekin*, 19 Ill. 160; *Powell v. Madison*, 21 Ind. 335; *Rieman v. Shepard*, 27 Ind. 288; *St. Louis v. Ferry Co.*, 11 Wall. 430; *Story, Conf. Laws*, § 550. In New York it was held that loans in other states, upon securities taken and held in those states by the agents of the owner, resident of the state of New York, were not within the state of New York, and therefore not taxable there. *People v. Gardner*, *supra*. In Missouri it was held that the personal property of a resident, actually situated beyond the

limits of that state, is without its jurisdiction, and cannot be assessed for taxation within that state; but the property of a non-resident is taxable there, if it be situate within the local jurisdiction, *592 whether in the *hands of its owner or its agent. *St. Louis v. Wiggins Ferry Co.*, 40 Mo. 580; *St. Joseph v. Hannibal & St. J. R. Co.*, 39 Mo. 476; and see *Finley v. Philadelphia*, 32 Pa. St. 381. Let us test the proposition "that things movable follow the person of the owner;" that is, the legal *situs* of personal property is the domicile of its owner. Suppose that a person, resident of this state, dies, the owner of goods, chattel, credits, and effects situate in another state, and an administrator was appointed in this state, can it be claimed that such an administrator can administer upon such personal property beyond the limits of this state, independent of some authority under the law of the state in which it is situated? We think not; but if the principle that the *situs* of personal property is the domicile of its owner, such administrator certainly could administer upon such property, as such property would legally, if not actually, be situated in this state. *Williams, Ex'rs*, 377; *Kent, Comm.* 563, note c.

The notes sought to be taxed were *never in the state of Kansas*, nor out of the state of Illinois, nor in any other place than at the bank in Hancock county, Illinois. Was it the intention of the legislature of this state to impose a tax upon the personal estate of its residents situate beyond its jurisdiction? We think not. The legislature of this state did not, like the legislature of other states, make a provision whereby the owner (resident of this state) of personal property situate beyond its limits might exempt such property from taxation by making affidavit, or giving other satisfactory proof, that such property was subject to taxation in the state in which it is situated. Then, no distinction can be made between personal property without the state, taxed where it is situated, and property without the state, not taxed where it is situated. The legislature did not intend to tax personal property beyond the limits of this state, for such property would be subject to the burden of taxation in two places,—where it is situated, and the domicile of its owner.

We have given the books a thorough examination, and we are unable to find any case deciding that personal property situated beyond the limits of a state is taxable in such state, except in the state *593 of Kentucky, and those cases are decided *upon a peculiarity of the statutes of that state not possessed by the statutes of any other state in the Union, we believe. In that state the statute expressly requires a person to list, on oath, a sum sufficient to cover what he is *worth from all sources*, not computing therein the first three hundred dollars in value, nor lands not within that state, nor other property out of that state subject to taxation by the laws of the country where situate, (*Laws Ky.* 1837,) and at the same time provides a way to ascertain whether such property situate beyond the limits of the

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state is in fact *taxed or not* by the state wherein it is situated, by requiring the person listing to make oath that such property is taxed in said state. Unless such affidavit is made, personal property situate beyond the limits of the state of Kentucky will be taxed to its owners resident within the state. There is no room for doubt as to the intention of the legislature in that state as to taxing personal property situate beyond its limits, and owned by residents of the state, as it expressly says that such personal property shall be taxable in said state, *unless actually taxed where situated*. See, also, *Johnson v. Com.*, 7 Dana, 338; *Com. v. Hays*, 8 B. Mon. 2; *Young v. Harris*, 14 B. Mon. 648. But our statutes say nothing about property beyond the limits of the state in any way, not even providing for the exemption of personal property beyond the state actually taxed where situated, showing conclusively that the legislature never intended to tax property beyond its limits. But even if the legislature had so intended, or had said so in express terms, we contend that such legislation could not have been upheld as a proper exercise of the taxing power. *State Tax on Foreign-held Bonds*, 15 Wall. 300; *St. Louis v. Ferry Co.*, 11 Wall. 430; *Atlantic Monthly*, January, 1874; *Southern Law Rev.* April, 1874, p. 247.

A. L. Redden, Co. Atty., for defendant.

The notes were the personal property of the plaintiff. Though this contract of sale is peculiar in its terms, yet its legal effect can be none other than the same as if a bond for a deed had been given by plaintiff to Lovatt for these lands, with agreement therein to *594 convey the lands by parts, upon the *payment of each respective note. If Lovatt fails to pay any of the notes, plaintiff can tender him a deed for eighty acres, and sue him on the note due, and recover. His remedy thereon would be just the same, and just as effectual, as if a formal bond for a deed had been given. That the notes, by agreement were to be left at a bank, does not affect or control the nature of the transaction, nor abridge any of the plaintiff's rights under the contract, nor as owner of the notes. This was simply a place of deposit, agreed upon for the mutual convenience of the parties. The plaintiff contemplated being, and has been, ever since the summer of 1868, a resident of this state; and Lovatt very naturally made a stipulation for his convenience, so that, wherever plaintiff might be, these notes would be accessible to him when they matured, and he, upon payment, could have them delivered to him. The plaintiff could assign and transfer his right to them just as effectually as if they were in his possession, and his assignee or indorsee would then be entitled to receive the proceeds thereof. Any conveyance of these lands made by Wilcox after this contract of sale would have transferred a title subject to all of Lovatt's rights and equities, just as much as if a bond for a deed had been held by Lovatt, and plaintiff afterwards conveyed to a third party. That the land was to remain the property of the plaintiff till the payments respectively were

made, makes no difference, for it would be the same if notes had been given for the purchase money, and a bond for a deed had been given by the plaintiff, conditioned to convey upon the payment of the notes. Indeed, this contract of sale was a bond for a deed. The mere fact that it was called an agreement in writing to sell, does not change its nature. What else is a bond for a deed than simply an agreement in writing to sell? This agreement was accompanied by notes from the purchaser, just as any bond for a deed would have been, and it is a mere play upon words to call it anything else. Though it is not stated in express terms that Lovatt went into the possession of these lands, yet this is the natural inference from the agreed facts, *595 and the only inference that can be drawn therefrom. These notes, then, are taxable. In the case of *People v. Rhodes*, 15 Ill. 304, it is expressly decided that if A. sells a tract of land to B. for a specified sum, and gives a bond for a deed, and receives but a portion of the purchase money in hand, and takes notes for the payment of the residue in annual installments, and B. goes into the possession of the land, and lists it for taxation, that the said notes of A. must be assessed, and A. must pay the tax thereon. The same principle is decided in *People v. McCreery*, 34 Cal. 432. Plaintiff argues that these notes, being given with the contract in writing, constituted a part thereof, and that the contract can have no greater force than if the notes had not been given. This we deny *in toto*. But let us assume, for argument's sake, that such is the legal construction of this contract, we would then have debts due, upon a contract in writing, for the sale of land; and we say *such debts are personal property*. *People v. Ogdensburgh*, 48 N. Y. 390.

But we think our legislature has expressly said that this \$6,000 is personal property, and *that*, when speaking upon this *very subject of taxation*. Article 1, §§ 1, 2, of the tax law, (Gen. St. 1019.) No one can contend that this \$6,000 is embraced in the definition of "real property," "real estate," and "land;" and the legislature, it would seem, contemplated, and did embrace, every other conceivable kind of property under the definition of "personal property," in the general sense of those words. And in the definition of personal property and credits (section 2 of tax law) this \$6,000 is clearly included. We have, then, the authority of our own statutes for saying that this \$6,000 is personal property. And being personal property, it is taxable in Butler county. Plaintiff resided there on March 1, 1872. The *property* of every person must be liable to bear an equal and just proportion of the public burdens, by way of taxation. This \$6,000 is the indebtedness of Lovatt to plaintiff, and is *the property of plaintiff*. This debt being the personal, intangible property of the plaintiff, is taxable where he resides. It does not have, and cannot have, *596 any other *situs* than the *domi*cile* of the owner. That the maxim of the common law, *mobilia sequuntur personam*, applies to property as well for the purposes of taxation as any other, is clearly

established by the authorities, and it is a maxim formed upon general utility, and is one which settles this case in our favor. Story, Cond. Laws, §§ 379-381; Com. v. Hays, 8 B. Mon. 2; Johnson v. Com., 7 Dana, 340; Evansville v. Hall, 14 Ind. 27; Powell v. Madison, 21 Ind. 335; State Tax on Foreign-held Bonds, 15 Wall. 320. The case of City of Davenport v. Mississippi & M. R. Co., 12 Iowa, 547, decides a question exactly analogous to this one, it being upon the question of taxing a mortgage; and the court in the syllabus say: "Mortgages before foreclosure are choses in action, and as such attach to the person of the holder, and are taxable at the place of his domicile. They are not taxable in this state when the owners are non-residents." And the same principle is expressly decided in People v. Eastman, 25 Cal. 603. Our legislature adopts this principle, and incorporates it into the statute law of the state, when it says, (section 8, c. 107, Gen. St.): "All personal property shall be listed and taxed each year in the township or city in which the person charged with the tax thereon resides on the first day of March." In Griffith v. Carter, 8 Kan. *565, this court say, on page 570: "The maxim of the common law was this: *mobilia sequuntur personam*. The domicile of the owner drew to it his personal estate wherever it might happen to be. In the absence of any statutory provision to the contrary, this common-law rule would control, and *personal property be taxable where the owner had his domicile*. The statute has in plain language affirmed the common-law rule." It will not do to say that the statutory provision above quoted, and the decision of this court, referred to property situate in this state, for that would be begging the question; for we contend that the property that is in this \$6,000 is the debt due to the plaintiff, and that that debt and property exists, and has its *situs* wherever plaintiff resides.

That the notes and written contract of sale do not constitute the property is evidenced by another reason. Suppose they should *597 be lost or destroyed by fire, or in any other *manner, if they constituted the property, then the rights of both plaintiff and Lovatt would cease, and the plaintiff's property would be gone, just the same as if he owned a threshing-machine, and it should burn up, or he had a sum in greenbacks, and they should be destroyed. In these events his property would be destroyed beyond recovery. That he would be placed in this position by the loss of the notes and contract of sale will not be contended. Hence we say that these notes and written contract of sale do not constitute the property, and it is immaterial where they are situate. They are merely the evidence by which plaintiff establishes, or can prove, his property, and, if they should be destroyed, he can prove his rights and his property, to-wit, his debt, by secondary evidence, and his property would exist just the same, and he could have just the same benefit from it, after the destruction of the notes and contract of sale as during their existence. This being intangible personal property of his, the plaintiff should

have listed it in Plum Grove township, and it being assessed against him by the county clerk as by law provided, the plaintiff having failed and neglected to list it, he cannot avoid paying tax thereon.

But the counsel for plaintiff cites numerous authorities to show that this rule of *mobilia sequuntur personam* is not of universal application, and does not apply when the question of taxation is being considered. We think that not one of the cases cited by him is applicable to this case, and will briefly review those that we have been able to examine. In *Duer v. Small*, 17 How. Pr. 201, the case was of a banker living in New Jersey, but doing business with others as a banker in New York. It was held that his *bank stock* and *stock in business* in New York was to be taxed there, under a statutory provision of New York. We also have a statute requiring stockholders in banks and banking associations to be assessed on the value of their shares of stock in the city or township where such bank or banking association is situate, but this does not and cannot decide

anything upon a question of the nature involved in this case.

*598 In *Hoyt v. Commissioners of Taxes*, 23 N. Y. 228, the relator lived in New York, and had capital employed in *business* in New Orleans,—was a merchant in the latter city. In *McCormick v. Fitch*, 14 Minn. 252, (Gil. 185,) the property in question was *machinery* shipped by plaintiffs from Chicago to Minnesota, to be sold, and was there sold. In *City of St. Louis v. Wiggins Ferry Co.*, 40 Mo. 580, the question was upon the taxation of a *ferry-boat*. In *Wilkey v. City of Pekin*, 19 Ill. 160, the subject-matter of taxation was a *steam-boat*. In *Powell v. City of Madison*, 21 Ind. 335, the subject-matter was *pork*; and in this last case the court say: "It may be true that for the purpose of taxation the *situs* of such property as *debts*, corporation stocks, and such intangibilities may be regarded as the *domicile of the owner*." In *Rieman v. Shepard*, 27 Ind. 288, the question of taxation arose in regard to *hogs* packed in Vigo county, which had money, labor, and skill there expended upon them, by which their value was enhanced, and their condition as a merchantable commodity changed. In *St. Louis v. Ferry Co.*, 11 Wall. 423, the question was of taxing a *ferry-boat* plying across the Mississippi river, and the court expressly avoid deciding "whether the personal property of a resident of one state situate in another could be taxed in the former."

In all these cases the subject-matter of taxation was tangible personal property, and should we concede, for argument's sake, that this class of property has a *situs* separate and apart from the domicile of the owner, it by no means follows that *debts* and other intangible personal property do, for they are separate and distinct classes and kinds of property, having no similarity, and no resemblance; and while, under some circumstances, the reason for the adoption of the rule of *mobilia sequuntur personam* might cease as to the former class, the same reasons, nor any others, do not exist as to the latter class.

The former are capable of having a *situs* of themselves,—a place where they are situated,—where they may be seen and handled, which may be a different place from the residence of the owner.

Not so of debts and intangible personal property. They can-
 *599 not be seen or handled. If reduced to writing, the *writing constitutes but the evidence of the property, and not the property itself. The property in the intangibles is attendant upon or attached to the person of the owner; it constitutes a part of his resources, and a portion of the wealth of the state of which the creditor is a resident, just as much where the debtor resides in a different state as where he resides in the same.

Plaintiff's counsel also cites Story on the Conflict of Laws, § 550. There the author was considering property in regard to the power the nation within whose border it is situate has over it, in especial reference to proceedings by attachment, etc., against the property; and, in reference to that subject, his language we admit to be good law; but his language written in reference to *one particular subject-matter* cannot be indiscriminately applied to all subject-matters, and has no reference to the subject of taxation. In *People v. Ogdensburg*, 48 N. Y. 390, cited by plaintiff, the court say that the maximum of *mobilia sequuntur personam* does not, to the full extent, apply for the purposes of taxation. This leaves us to draw the inference that *it does apply to some extent*; and if to any extent, certainly it will apply in such a case as ours. *Catlin v. Hull*, 21 Vt. 152, and *People v. Gardner*, 51 Barb. 352, are seemingly against us; but in each of these cases the money was loaned for profit, and not, when due, paid to the owner, but reinvested, and both principal and interest continually kept reinvested by the agents, while such is not the case before the court. Then, again, the statute in Vermont was different from ours.

Plaintiff contends, further, that these notes, if taxable at all, are taxable in the state of Illinois, and cites several sections of the Illinois statutes. In the first place, the notes were *not moneys*; and, in the second place, they were not loaned, invested, nor controlled by Gill & Co., who were simply the depository of them, and all they had to do was to receive the money, and transmit it to plaintiff, and hand over the deed to Lovatt; the money, when paid, could not by them be either *loaned, invested, or otherwise controlled*; and, even if
 *600 *it could have been, the notes could not, and it is *the notes*, and the property there is in them, and the contract of sale, that we have to deal with. In this case there is *no money* in the custody of Gill & Co., but simply some evidences of indebtedness. But it is immaterial what the laws of Illinois are, for property may sometimes be subject to taxation in two different states. *McCormick v. Fitch*, 14 Minn. 252, (Gil. 185;) *Clapp v. City of Burlington*, 1 Amer. Rep. 357; *Duer v. Small*, 17 How. Pr. 204; *Newcome v. Dunham*, 27 Ind. 286. But whether this \$6,000 is taxable in Illinois or

not, if it is taxable by the laws of our state the tax should be sustained, for it is a local question. Our right to tax is of necessity against the plaintiff as a person, and is not, and cannot be, against the property, as it would be in case of real estate; and the property being intangible, even if a tax should be levied against plaintiff for this property in Illinois, the courts there would have no power to enforce the collection of the tax. The property is not of that class that could be seized for the tax. But to avail him anything, the plaintiff would have to show, not only that the property was taxable in that state, but also that he, or his agent, was actually taxed there for this property, and that the tax had been paid; and as he makes no showing whatever upon either point, he must fail in this view of the case. Plaintiff is enjoying the benefit of our laws, and is protected by them; and these same laws by which he comes into this court, and asks relief, say he shall bear his proportion of the burdens which the existence of these laws imposes upon the whole people, by paying taxes upon his property. This he has not done, and it is this he is seeking to avoid. He might have some equity in his claim (but not any law) if he showed to this court that he paid taxes on this property in Illinois, or that he paid taxes on the land by him sold and contracted to be sold to Lovatt, but this he fails to show; and even this would not entitle him to the affirmative relief he seeks, but it would be a circumstance that might appeal to the equitable sense of the court.

*601 *VALENTINE, J. The only question involved in this case is whether the plaintiff, Wilcox, is liable to pay taxes on certain supposed personal property which he is supposed to own and possess in this state. The facts of the case are substantially as follows: "In the year 1868 the plaintiff agreed in writing to sell certain real estate he then possessed in the state of Illinois, to one Daniel Lovatt, for a price agreed upon between them, and Lovatt gave his notes for the amount; it being agreed that the notes were to be left at the bank of Charles F. Gill & Co., in the town of La Harpe, Hancock county, Illinois, and as fast as said Lovatt should make payment on said notes, from time to time, the plaintiff should convey to him a proportionate amount of said real estate. The plaintiff made no deed to Lovatt for said real estate at the time of the sale, nor did Lovatt give any mortgage to secure the payment of the notes, or execute any other instrument of writing than the notes and said agreement to sell, which he also signed. Before the plaintiff could be required to convey any part of the real estate to Lovatt, he (Lovatt) must have paid an amount equal to the value of eighty acres; and whenever an amount was paid equal in amount to the value of another eighty acres, then a conveyance was to be executed by plaintiff to Lovatt for such eighty acres; and so on, till all the land should be paid for. The payments were to be made one year apart; and should Lovatt fail in any pay-

ment he was to forfeit any payment made after the last preceding conveyance. Six thousand dollars remained unpaid on the first of March, 1872, and is the same \$6,000 placed on the tax-roll by the clerk of Butler county in said year as the personal property assessment of said Wilcox. The land was to remain the property of plaintiff till the payments were made as before stated. The notes never had been in the state of Kansas, and never out of the state of Illinois,

*602 nor in any other place than the bank before stated. The contract or *agreement to sell the lands between plaintiff and said

Lovatt was in writing, executed by both parties, and contained substantially the conditions above set forth." The tax complained of was levied for the year 1872 on said \$6,000. The plaintiff was, on the first day of March of that year, and has since been, a resident of said Butler county. "The land still unconveyed on March 1, 1872, was of the value of \$6,000."

Now, we suppose that it will be admitted that it is not the intention of the laws of Kansas to attempt to collect taxes for general revenue except upon property, and except upon property within the jurisdiction of the state of Kansas. Hence, if the contingent debt coming from Lovatt to the plaintiff is not property in and of itself, and aside from the real estate for which it was incurred, or if it is not property within the jurisdiction of the state of Kansas, then it cannot be taxed in Kansas. Then, what is there in Kansas to be taxed? Certainly no tangible property, and not even any intangible property that needs any protection from our laws. Everything is and has been in Illinois. The consideration for the notes, the notes themselves, the place of payment, the persons to whom the notes are to be paid, and presumptively the payors, and the funds which must be used in paying the notes, all are in Illinois, and have never been in Kansas. Nothing pertaining to the notes, or to the debt which they evidence, has ever been in Kansas, except that the owner of the notes resides in Kansas. Every act which brought the notes or the debt into existence was performed in Illinois, and every act that may be performed in the future for their collection, payment, or extinguishment must be performed there. The claim that said debt is taxable in this state is founded entirely upon the maxim *mobilia sequuntur personam*. Under this maxim it is claimed that movable property follows the *residence* or *domicile* of the owner, (not his *person*,) and therefore that personal property may be taxed at the residence of the owner, wherever he may be, and wherever the property may in fact be. This maxim would seem, from its terms, to apply to all

*603 movable property, *tangible as well as intangible, and it is generally so applied, wherever it is applied at all. But the defendant desires to make a distinction. While he seems to admit that by the weight of judicial determination the maxim does not fully apply for the purposes of taxation to tangible movable property, yet he nevertheless claims that it does apply, with all its force, to intangible

personal property. We think, however, he is mistaken. The weight of judicial authority seems to be that, for the purposes of taxation, the maxim does not fully apply, even where the property is intangible, *People v. Gardner*, 51 Barb. 352; *Catlin v. Hull*, 21 Vt. 152; *People v. Trustees, etc.*, 48 N. Y. 397; and other authorities cited in plaintiff's brief. This maxim is, at most, only a legal fiction; and Blackstone, speaking of legal fictions, says: "This maxim is invariably observed, that *no fiction shall extend to work an injury*, its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law." 3 Bl. Comm. 43.

Now, as the state of Illinois, and not Kansas, must furnish the plaintiff with all the remedies that he may have for the enforcement of all his rights connected with said notes, debt, etc., it would seem more just, if said debt is to be taxed at all, that the state of Illinois and not Kansas should tax it, and that we should not resort to legal fictions to give the state of Kansas the right to tax it. Where land is sold and conveyed, and notes given for the purchase money, we suppose the vendee may be taxed for the land, and the vendor for the notes received for the purchase money. But where the vendor still owns the land, and also owns it conditionally, as in this case, whether he can be taxed on both the land and the notes may be questionable. But that he should be taxed on both in Illinois and on the notes in this state, would be highly unjust. In the case of *People v. Trustees, etc.*, 48 N. Y. 397, the following language is used by EARL, C. J., and concurred in by the full bench: "I am unable to see why the money due upon the land contracts must not be assessed in the
 *604 same way. The debts due upon these con*tracts are personal estate, the same as if they were due upon notes or bonds; and such personal estate may be said to exist where the obligations for payment are held. Notes, bonds, and other contracts for the payment of money, have always been regarded and treated in the law as personal property. They represent the debts secured by them. They are the subject of larceny, and a transfer of them transfers the debt. If this kind of property does not exist at the place where the obligation is held, where does it exist? It certainly does not exist where the debtor may be, and follow his person. And while, for some purposes in the law, by legal fiction, it follows the person of the creditor, and exists where he may be, yet it has been settled that, for the purposes of taxation, this legal fiction does not, to the full extent, apply, and that such property belonging to a non-resident creditor may be taxed in the place where the obligations are held by his agent." This decision would make the notes given in this case taxable at the banking house of said Charles F. Gill & Co. This decision does not affect the taxability of notes where both the owners of the notes and the notes are in the same state, although in different counties; nor would it give the power to an owner of notes to fraudulently send them out of the state for the purpose of avoiding taxation on them

where they rightfully belong. This case has been very ably presented to this court by counsel on both sides, and, for a full discussion of the questions involved, we would refer to their briefs.

The judgment of the court below is reversed, and cause remanded, with the order that judgment be rendered for the plaintiff, on the agreed statement of facts, perpetually enjoining the said county treasurer from collecting said tax.

(All the justices concurring.)

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*WILLIAMS and another v. JACOB LOUIS.¹

January Term, 1875.

Intoxicating Liquors: License: Wholesale Liquor Dealer: Sales on Credit: Effect of License. Where a wholesale liquor dealer obtains a license signed by the mayor, clerk, and treasurer of a city of the second class, authorizing him to sell intoxicating liquors at wholesale in said city, and he afterwards, in pursuance thereof, sells intoxicating liquors at wholesale, *held*, in an action brought by the vendor of such liquors against the vendee for the price of the liquors, (1) that the license, if granted by the city council of said city specially to the wholesale dealer, is valid; (2) that, in the absence of anything to the contrary, it will be presumed that the license was regularly granted and issued; (3) that it is not necessary that the license should be issued to some person who is actually a grocer, a dram-shop keeper, or a tavern keeper, in order to be valid; (4) that the license need not, upon its face, and in direct terms, purport to be a grocery license, a dram-shop license, or a tavern license; but if it clearly appears upon its face that it is a license to sell intoxicating liquors, it is sufficient; (5) that being issued as a license to sell intoxicating liquors at wholesale, and not at retail, does not invalidate the license as a license to sell at wholesale.

Error from Anderson district court.

Action by Louis to recover the balance due on account of \$158 for brandy, wine, whisky, and gin sold to Williams & Pattee, on which defendants had paid \$55. Defendants made a general denial, and sought to recover back the \$55 paid by them. The liquors were sold at the city of Ottawa, in Franklin county, where Louis was doing business. The action was commenced before a justice of the peace in Anderson county, and removed to the district court by appeal, where the action was tried at the September term, 1873. Judgment for plaintiff for amount claimed.

J. J. & D. W. Hoffman, for plaintiffs in error.

¹ This case referred to, *Salina v. Seitz*, 16 Kan. 146; *State v. Pitzer*, 28 Kan. 269

H. B. Hugbanks, for defendant in error.

*606 *VALENTINE, J. This was an action brought by Jacob Louis against Williams & Pattee, on an account for liquors and other articles sold by him to them. The defense to the action is that Louis sold said liquors in violation of law, having no legal license therefor, and therefore that he cannot recover. Section 3 of the act concerning the sale of intoxicating liquors, commonly called the "Dram-shop Act," makes it unlawful for any person to sell any intoxicating liquor, "without taking out and having a license as grocer, dram-shop keeper, or tavern keeper." Gen. St. 400, § 3. Sections 1 and 2 of the same act provide that the license shall be granted by the city council of any incorporated town or city where the establishment for the sale of such liquors is located in such town or city, and by the county commissioners where such establishment is located elsewhere. Section 47 of the second-class city act of 1872 provides, among other things, that "the city council shall have exclusive authority to levy and collect a license tax on * * * grocers, * * * dram-shops, saloons, liquor sellers," etc. Laws 1872, p. 206, § 47. And it is not necessary that a person who desires to sell intoxicating liquors in an incorporated town or city should have a license therefor from the county board, but it is sufficient if he has a license from the council of such town or city. *State v. Pittman*, 10 Kan. *593; *City of Emporia v. Volmer*, 12 Kan. *633. The liquor in the present case was sold in the city of Ottawa, a city of the second class. An ordinance of said city authorized the city council thereof to grant licenses "to sell intoxicating liquors in quantities of not less than one gallon, or in packages, as bought and sold in wholesale markets," and Louis, at the time he sold said liquors, had a license, signed by the mayor, the clerk, and the treasurer of said city, authorizing him "to sell intoxicating liquors at wholesale in quantities of not less than one gallon, or in packages, as bought and sold in wholesale markets." The plaintiff

*607 below introduced all the evidence that was *introduced. The defendants below did not even attempt to introduce any evidence. It does not appear from the record that Mr. Louis ever sold any liquor in violation of his license, or outside thereof. It does not appear that he ever sold less than one gallon of liquor at a time, or that he ever broke an original package, as he purchased such package at wholesale in the market. The only question, then, is whether his license is valid or not. We think that *prima facie* it is valid. Its validity, however, depends, as we think, upon whether it was granted by the city council specially to him. But as the ordinance authorized the city council to grant licenses, and authorized no one else to do so, and as this license was signed by three of the principal officers of the city, it will be presumed, in the absence of anything to the contrary, that all the officers did their duty, and therefore that the license was

granted by the city council, and that it was granted by them in special and express terms to Louis. After it was shown that Louis had a license to sell liquor, signed by the principal officers of the city of Ottawa, if the defendants then claimed that there was any irregularity in the granting or the issue of said license, we think it then devolved upon the defendants to show it.

But it is claimed that Louis was not a grocer, dram-shop keeper, or tavern keeper, and that his license was not issued to him as such, and for that reason that the license is void. Now, it is not shown that Louis was not a grocer, dram-shop keeper, or tavern keeper. It is shown that he was a wholesale liquor dealer, but it is not shown that he was not also a grocer, dram-shop keeper, or tavern keeper. But even if it were shown that he was not a grocer, dram-shop keeper, or tavern keeper, still we do not think that it would make any difference. The law does not require that a person, in order to obtain a grocery license, dram-shop license, or tavern license, should actually be a grocer, dram-shop keeper, or tavern keeper. Any person may obtain such a license, and sell intoxicating liquor under it, whatever his occupation or business may be. We shall, therefore, decide this case upon the presumption that Louis followed no occupation or business except that of wholesale liquor dealer.

The next question is whether the license itself should, upon its face, purport to be a grocery license, a dram-shop license, or a tavern license. We do not think that it is necessary that it should, in direct terms. If it should be in substance and in fact just what a grocery license, a dram-shop license, or a tavern license must necessarily be under the statutes, then we think it would be entirely sufficient as a license. Now, a grocery license, a dram-shop license, or a tavern license, under the statutes, cannot be anything more or less than a license to sell intoxicating liquors. Therefore, a license which in express terms authorizes the sale of intoxicating liquors will be deemed sufficient. The license in this case merely authorized the plaintiff to sell intoxicating liquors at *wholesale*. It might, under the statutes, have authorized him to sell both at wholesale and retail. But the fact that it did not authorize plaintiff to sell intoxicating liquors at retail, will not, as we think, invalidate the license as a license to sell intoxicating liquors at wholesale. The city council in granting the license were not bound to exercise their whole power in the premises in order to exercise any portion of such power.

But even if this license were technically void, it does not necessarily follow that the plaintiff cannot recover. A party in such a case is debarred from recovering only where he willfully violates the law. Here was no willful violation of any law. The plaintiff innocently believed that he had a good license, and one that would protect him in the sale of liquors at wholesale. If he was mistaken, however, the mistake was probably such a mistake of fact as would excuse him. But the defendants are hardly in such a condition as

to demand the most rigid scrutiny into the technical defects of the plaintiff's license. They have no special claims that appeal strongly to men's sympathies. Their virtuous indignation at the wickedness of selling intoxicating liquors at wholesale, under a license technically defective, and their pit*eous wail for the vindication of violated law, may possibly not be prompted wholly by disinterested motives. If Louis had really violated the law by selling intoxicating liquors without a license, the courts would lend him no aid in recovering for the price of such liquors. But even then the defendants would have no high moral right to refuse to pay for what they had purchased, and used, and promised to pay for. There is no high moral principle, that we are aware of, requiring a retail liquor dealer to repudiate obligations assumed by him for liquors purchased by him from the wholesale dealer. The wholesale dealer does not, in any case, sell the liquors to be used as a beverage, except possibly indirectly, through the retail dealer himself. The case of *Dolson v. Hope*, 7 Kan. *161, is good law, but it does not apply to this case. The judgment of the court below must be affirmed.

(All the justices concurring.)

W. W. ROLLER and others v. C. M. OTT and another.

January Term, 1875.

1. **Contract: Consideration: Presumption.** Where a plaintiff founds his cause of action upon a contract embodied in a written instrument, and neither the petition nor the written instrument shows affirmatively that there was no consideration for the contract, it will be presumed *prima facie* that there was a sufficient consideration; but *held*, in this particular case, that the petition and written instrument, without the aid of presumptions, both sufficiently show a sufficient consideration for the contract.
2. ———: **In Restraint of Trade: Public Policy.** A contract entered into upon sufficient consideration between O. and R., that O. shall not sell furniture in Ottawa to any person except R., is valid.
3. ———. Such contracts, however, are, to some extent, against public policy, and hence their provisions should not be extended by construction or implication so as to favor persons desiring to enforce them beyond what their terms would most clearly require.¹

¹ Where both parties to a contract, void as against public policy, are equally at fault, the law will leave them where it finds them. If the contract be still executory, it will not enforce it, or award damages for its breach; if already executed, it will not restore the price paid, or the property delivered. *Setter v. Alvey*, 15 Kan. *157; *Tucker v. Allen*, 16 Kan. 324. Option contracts, see note to *Cobb v. Freil*, 5 McCrary, 80.

*610 *Error from Franklin district court.

Roller & Co., partners, commenced their action against C. M. Ott and A. Gottschalk, to recover damages for past breaches of a contract, and to enjoin defendants from further violations of said contract. Plaintiffs' petition was as follows:

"[Title.] The plaintiffs state that in March, 1872, the Ottawa Furniture & Wood-work Company was duly organized as a corporation under the statutes of the state of Kansas, for the purpose of manufacturing furniture and other wood-work, and of vending furniture at retail and wholesale, in the city of Ottawa; that said corporation, at said city, erected a large and costly factory, fitted with valuable and powerful steam machinery, adapted to the purpose of manufacturing furniture, and other wood-work, rapidly, and in large quantities, and at the same time said corporation put said factory into operation, and established and carried on in connection therewith a large wholesale and retail furniture store in said city, and said corporation continued to operate said factory, and carry on said wholesale and retail business, until about the thirty-first of January, 1873, when the defendants, Ott & Gottschalk, purchased all the stock and property of said corporation, and took possession thereof; and afterwards, on the fifth of February, 1873, the plaintiffs herein and said defendants entered into an agreement to carry on said factory and wholesale furniture store and trade as copartners, (of which agreement a copy is annexed, marked 'Exhibit A,') upon the terms therein set forth; that about April 1, 1873, said parties, finding it impossible to get on harmoniously in the conduct and management of said business and factory, agreed to and did dissolve said copartnership upon the terms and conditions contained in a written memorandum thereof, of which a copy is hereto attached, marked 'Exhibit B,' and among which was and is a covenant of the following tenor, viz.: 'In consideration of deduction of \$589.67 made by W. W. Roller & Co., as above, said C. M. Ott and A. Gottschalk, on their part, bind themselves not to sell any furniture in Ottawa to any other parties other than said W. W. Roller & Co., and at the lowest market prices.' At the time said agreement of dissolution was entered into, both the defendants well knew that these plaintiffs had long been and then were continuously engaged in the wholesale and retail furniture

*611 *business in the city of Ottawa aforesaid, and that they intended thereafter to continue in said business, as since hitherto they have actually done, and that said business could not be profitably carried on in Ottawa if subjected and exposed to the competition of the said factory; and as after said dissolution the defendants intended to operate, and actually since then hitherto have operated, said factory as partners, producing therein large quantities of furniture, the covenant hereinbefore set forth was entered into by and between these plaintiffs and the defendants to prevent said wholesale and retail business of the plaintiffs from being injured and destroyed

by the competition of the said factory, and of the sale of the furniture therein to be produced, either at wholesale or retail, by the defendants, in the city of Ottawa, to any parties other than these plaintiffs, and said covenant was one of the principal inducements which led these plaintiffs to enter into said agreement of dissolution; and these plaintiffs have done and duly performed all the conditions thereof on their part to be performed. Yet the defendants, in violation thereof, and in breach of the covenant therein and above set forth, have, within the six months last past, without plaintiffs' consent, repeatedly sold, both at wholesale and retail, many articles, and large quantities of furniture, in the city of Ottawa above named, to divers parties other than these plaintiffs, and at the lowest market prices, to the damage and loss of profits to these plaintiffs in the sum of \$500; and said defendants are still continuing to sell, in Ottawa aforesaid, and deliver to parties in said city other than these plaintiffs, many articles of furniture at retail, and large quantities thereof at wholesale, in violation of said covenant and agreement; and all this without the consent of plaintiffs. And said defendants have recently notified the plaintiffs that they (the defendants) do not intend to regard or in anywise perform any part of the said covenant above set forth any longer or further.

"Wherefore the plaintiffs pray that a temporary injunction may issue restraining the defendants, and each of them, from directly or indirectly selling any furniture in Ottawa, Franklin county, Kansas, to any parties other than these plaintiffs, during the pendency of this suit, and that upon the final hearing hereof said injunction may be made perpetual; and that this court may take and state an account of the damages and loss of profits sustained by these plaintiffs by reason of defendants' violation of the covenant hereinbefore set forth; and that the plaintiffs may have judgment for such damages *612 and loss of *profits when ascertained; and that plaintiffs have such other and further relief in the premises as may be just."

The defendants demurred. The district court, at the March term, 1874, sustained said demurrer, and dismissed plaintiffs' petition.

John W. Deford, for plaintiffs.

The petition states a good cause of action. *Guerand v. Dandeleit*, 32 Md. 561; *Guerand v. Dandeleit*, 3 Amer. Rep. 164; *Oregon S. N. Co. v. Winsor*, 10 Alb. Law J. 41; *Selby v. Platts*, 3 Chand. 183; *Beard v. Dennis*, 6 Ind. 200. The court below assigned as its reason for allowing the demurrer that the petition discloses no consideration for the covenant sued on. But it alleges at least two considerations, either of which is sufficient, viz.: (1) That "said covenant was one of the principal inducements which led the plaintiffs to enter into said agreement of dissolution," and "was entered into by and between the plaintiffs and defendants to prevent said wholesale and retail business of plaintiffs from being injured and destroyed by the competition of the said factor." And the covenant itself says, "*in considera-*

tion of deduction of \$589.62," made by Roller & Co. But the court below suggested, as to the "deduction of \$589.62," that he could "make nothing out of it," on referring to Exhibit B, annexed to the petition. • To this we answer: (1) Exhibit B is no part of the petition, and therefore, in passing on its sufficiency, is not to be regarded, (*Memphis Med. College v. Newton*, 2 Handy, 163;) and (2) the consideration fixed by the parties is sufficient, as in other contracts, in the absence of fraud, (*Duffy v. Shockey*, 11 Ind. 70.) The fact that the court could not understand the "figuring" of the parties, as it appears in Exhibit B, was no proof of a *nudum pactum*. Indeed, if the contract was silent as to the consideration, it would still, being in writing, import one. *Waynick v. Richmond*, 11 Kan. *488. *A fortiori*, then, where it *does recite* one, it ought to be taken as adequate until the contrary clearly appears, even though the court cannot see how the parties "figured it out." Besides, under the averments of this petition, a valuable and good consideration in *613 *addition to that expressed in the covenant might be proved by parol. 1 Greenl. Ev. §§ 285, 304.

C. B. Mason, for defendants.

It is not enough that there be simply a consideration for a contract which may be in restraint of trade, but, in addition to the pecuniary consideration, it must appear that there was some good reason for entering into the contract, and that it imposes no restraint upon one party which is not beneficial to the other. *Chappel v. Brockway*, 21 Wend. 157; *Mills v. Mills*, 40 N. Y. 545. The covenant in this case, being indefinite in time, imposes a restraint upon one party which is not beneficial to the other, but is against the principles of sound public policy, and void.

Admitting that limited restraint in trade in a certain locality, and for a certain period, are valid contracts, yet such a contract is not valid except when founded on a good and sufficient consideration. 2 Pars. Cont. 747-753, and notes *a, b, c*; *Holbrook v. Waters*, 9 How. Pr. 335. The covenant on the part of defendants is without any consideration, as appears upon the face of the petition. We hold that the exhibits attached to the petition, and especially Exhibit B, is to be held and taken as part of the pleading, by the very terms of the allegation of the covenant in this petition.

The consideration received by defendants (if any is, in this case) is a deduction claimed to have been made to defendants by plaintiffs. The partnership between plaintiffs and defendants was dissolved upon the terms and conditions of Exhibit B, which contains the covenant, "In consideration of deduction of \$589.62, made by W. W. Roller & Co., as above," etc. This necessarily involves an examination of that portion of the agreement "B" which precedes this covenant. An analysis of Exhibit B shows that plaintiffs sold to defendants stock and other assets to amount of \$4,120.79; that defendants sold plaintiffs merchandise to amount of \$3,134.97; leaving due plaintiffs, \$985.82.

By the next recital it appears this sum of \$985.82 was adjusted, being deducted from a claim of defendants against plaintiffs amounting to the sum of \$1,802.07, leaving still unsettled and due defendants, \$816.25. Now, by the terms of Exhibit B, there remained no indebtedness from defendants to plaintiffs, but there exists an unadjusted amount of \$816.25 claimed by the defendants to be due them from the plaintiffs. But however awkward or ambiguous the contract may appear, the demurrer was properly sustained; and if any action can be sustained, it should be to reform the agreement.

VALENTINE, J. The questions involved in this case were raised in the court below by petition and demurrer. The grounds of the demurrer were (1) a defect of parties defendant; (2) several causes of action improperly joined; (3) the petition did not state facts sufficient to constitute a cause of action. The court below sustained the demurrer, and the plaintiffs now bring the case to this court. The defendants do not now claim that the demurrer should have been sustained upon either the first or the second ground of the demurrer, but claim that it was and should have been sustained upon the third ground thereof. Hence the only question for us to consider is whether the petition stated facts sufficient to constitute a cause of action. The whole cause of action is founded upon the alleged breach by the defendants of a certain agreement in writing, alleged to have been made and entered into between the plaintiffs and defendants. The substance of this contract is set forth in the petition, and a copy thereof is attached to the petition, and referred to in the petition as Exhibit B, although it is not in terms made a part of the petition. It is claimed by the defendants that this contract is void—*First*, for want of consideration; and, *second*, because it is in restraint of trade, and therefore against public policy. These are the only questions in the case. Now, whatever may be the real facts in the case, we must take the facts as stated in the petition as true; and, taking such facts to be true, there would not only seem to be a sufficient consideration for the contract, but the contract would seem in all other respects to be valid. Whether we examine the petition with or without Exhibit B, it so obviously states a sufficient consideration for the contract that we do not think it is necessary to discuss the same. The closing up of the copartnership existing between the plaintiffs and defendants, the final settlement thereof, and dissolution of the same, was a sufficient consideration for the contract. The release by the plaintiffs of \$589.62 in their partnership settlement was a sufficient consideration. But the contract is shown to have been in writing, and therefore, unless the contract or the petition affirmatively shows that there was no consideration, the contract itself will import a consideration. *Fuller v. Scott*, 8 Kan. *25; *Waynick v. Richmond*, 11 Kan. *488; and statutes cited in these

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two cases. Mere silence on the part of the petition or contract will not show that there was no consideration; but, on the contrary, where the petition does not affirmatively show that there was no consideration, it will be presumed *prima facie* that there was a sufficient consideration.

We do not think that the contract is void because in the restraint of trade. It merely binds the individuals C. M. Ott and A. Gottschalk not to sell any furniture in Ottawa to any person except W. W. Roller & Co. The provision of the contract relating to this matter reads as follows: "In consideration of deduction of \$589.62 made by W. W. Roller & Co., as above, said C. M. Ott and A. Gottschalk, on their part, bind themselves not to sell any furniture in Ottawa to any other parties other than said W. W. Roller & Co., and at the lowest market prices." This contract does not prevent the Ottawa Furniture & Wood-work Company from selling to others than Roller & Co. in Ottawa; and it does not prevent Ott & Gottschalk from selling furniture to others than Roller & Co. just outside of the city limits of Ottawa. It was probably designed to prevent Ott & Gottschalk from establishing a furniture store in the city of Ottawa. To this extent, and to the extent of binding them not to sell furniture *616 in Ottawa to any *one except W. W. Roller & Co., we think the contract is valid.

The last clause of said contract, reading, "and at the lowest market prices," is probably void for uncertainty. The defendants are not bound to sell furniture to Roller & Co. anywhere, or at any price, and they are certainly not prohibited from selling furniture to any one, or at any price, outside of the city limits of Ottawa. Other portions of said contract not quoted in this opinion are about as defective as said clause. All contracts of this kind are to some extent against public policy, and hence their provisions should not be extended by construction or implication so as to favor parties desiring to enforce them beyond what their terms would most clearly require. They are not anywhere to be looked upon with favor; and where a party desires to enforce one of them, he must simply take what he has in the clearest terms got. That such contracts are valid, we would refer to the following authorities: *Dean v. Emerson*, 102 Mass. 480; *McClurg's Appeal*, 58 Pa. St. 51; *Dunlop v. Gregory*, 10 N. Y. 241; *Beard v. Dennis*, 6 Ind. 200; *Thomas v. Miles*, 3 Ohio St. 274.

The judgment of the court below is reversed, and cause remanded for further proceedings.

(All the justices concurring.)

BRIDGET O'BRIEN and others v. JOHN M. WETHERELL.¹

January Term, 1875.

1. **Ejectment: Grantor against Grantee: Breach of Condition: When Defendant may not Deny that His Grantor had Title.** Where the defendants hold their entire title and possession to a certain piece of land from and under the plaintiff, and hold the same upon the express condition that no intoxicating liquors shall ever be sold upon the premises, and are to forfeit the premises back to the plaintiff whenever such condition shall be broken, the defendants are estopped, when sued by the *617 plaintiff for the recovery of the *premises on the ground of a breach of such condition, from denying that the title conveyed to them or to their grantors by the plaintiff was, when so conveyed, a good title.
2. **Conveyances: Condition Subsequent: When it Runs with the Land: Forfeiture.** Where a deed conveys land in fee but upon the express condition that neither the grantee, nor his heirs or assigns, shall ever sell or permit to be sold any intoxicating liquors upon the premises conveyed, and that the land shall be forfeited back to the grantor whenever such condition shall be broken, *held*, that the estate conveyed is an estate upon condition subsequent; that the condition is valid, and, until broken, runs with the land, and is binding, not only upon the grantee himself, but also upon his assigns; and that the land may be recovered back by the grantor from the grantee, or from any assignee of his who may commit a breach of said condition.

Error from Osage district court.

Ejectment, brought by Wetherell, as plaintiff, against Bridget O'Brien, and Michael, her husband, and one O'Neil, as defendants, to recover the possession of "lot 24, and a four-foot strip off lot No. 23, making 29 feet front, in block 14, in Wetherell's addition to the town of Osage City." Wetherell had formerly owned said property, and had sold and conveyed the same by deed to one Reber, upon certain terms and conditions in said deed expressed and set forth. Reber sold and conveyed the land to a party who conveyed it to O'Neil, and O'Neil conveyed it to Bridget O'Brien. Plaintiff founded his action upon a breach of the condition expressed in his deed to Reber, claiming that such breach worked a forfeiture of the title and estate conditionally conveyed. The defendants, under a general denial, claimed—*First*, that Wetherell never had any title; and, *second*, that the condition did not run with the land, and that they held the absolute title in fee-simple. Second trial at the January term, 1874. Verdict and judgment for plaintiff.

S. M. Berry, for plaintiffs in error.

James Rogers, for defendant in error.

¹This case referred to, *Mooney v. Olsen*, 21 Kan. 697; *Atchison, T. & S. F. R. Co. v. Rockwood*, 25 Kan. 802.

*618 *VALENTINE, J. This was an action of ejectment, brought by Wetherell against Bridget O'Brien, Michael O'Brien, and Michael O'Neil, to eject the defendants from a certain lot or parcel of land in Wetherell's addition to the town of Osage City. The theory upon which the plaintiff expects to recover is, as we would infer from the record and briefs of counsel, as follows: The plaintiff at one time owned the property in dispute. He transferred the property by deed to one Theodore L. Reber, upon the expressed condition that no intoxicating liquors should ever be sold on the premises, and that if Reber, his heirs or assigns, should ever violate this condition, the property should be forfeited back to the plaintiff. The defendants hold their entire title and possession (there being two intermediate conveyances, however) solely under Reber. The defendants kept a liquor saloon on said premises, and sold intoxicating liquors thereon. The defendants expect to defeat the plaintiff's action upon the following grounds, to-wit: *First*, Wetherell never owned the property in dispute; *second*, the language used in the deed from Wetherell to Reber, which the plaintiff supposes created an estate merely upon condition, did in fact create an estate absolute, with merely a personal covenant on the part of Reber, not running with the land, that no intoxicating liquors should be sold on the premises; and therefore, as it is not claimed that Reber himself ever violated said covenant, no action of any kind has ever accrued against either Reber, or these defendants; or any one else; *fourth*, these defendants do not derive their title or possession from Reber.

The findings of the jury were general, and both the findings of the jury and the judgment of the district court were in favor of the plaintiff, and against the defendants; and hence we must assume that upon the evidence introduced all the material facts in the case were rightfully found against the defendants, and in favor of the plaintiff, unless there was substantially an entire *lack of evidence on some material fact necessary to be proved by the plaintiff in order to enable him to recover. This proposition follows as a necessary result from the numerous decisions upon similar questions promulgated by this court.

The record in this case apparently shows that the title to the property in controversy originally passed from the United States to John McManus; from John McManus to Seyfert, McManus & Co.; from Seyfert, McManus & Co. to John M. Wetherell; from Wetherell to Theodore L. Reber; from Reber to John Brinkley; from Brinkley to Michael O'Neil; and from O'Neil to Bridget O'Brien; and that Bridget O'Brien and Michael O'Brien are husband and wife, now in possession of the property, claiming it as their own, and selling intoxicating liquors thereon. The defendants expect to defeat the action of the plaintiff on the ground that the deed from Seyfert, McManus & Co. to Wetherell shows upon its face that Seyfert, McManus & Co. had no power to buy, sell, or hold real estate in Kansas. That portion of

the deed which the defendants rely on as showing said fact reads as follows: "This deed, made the fifteenth day of January, 1869, between the corporation of Seyfert, McManus & Co., of the city of Reading, county of Berks, and state of Pennsylvania, of the first part, and John M. Wetherell, of the city of Philadelphia and state of Pennsylvania, of the second part, witnesseth: Whereas, by an act of the general assembly of the commonwealth of Pennsylvania, approved the seventh of April, 1862, the parties doing business at the Reading Iron-works, in the county of Berks aforesaid, were created a body corporate under the name, style, and title of Seyfert, McManus & Co.; and whereas, by a supplement to said act, approved the twenty-eighth of February, 1865, it is provided that, in addition to the powers now possessed by Seyfert, McManus & Co., the said corporation shall be capable of purchasing, holding, leasing, and improving lands in any of the states or territories of the United States other than Pennsylvania, and to obtain therefrom any and all minerals, and other valuable substances, whether by working or mining, leasing or disposing of privileges to work or mine such lands, or any part thereof, and to erect houses or other buildings, machinery, or works thereon,
 *620 *and to use, lease, or work the same, and to dispose of all such lands, mines, works, and the products thereof, by lease, mortgage, or sale, in such manner as they may deem proper; and whereas, the said corporation of Seyfert, McManus & Co. are the owners in fee-simple of certain lands in the state of Kansas, under letters patent granted by the United States of America, to-wit," etc.

This deed was executed on the part of Seyfert, McManus & Co. by John McManus, president of the company, and John Schroeder, secretary. Now, if this John McManus is the same John McManus who purchased the property from the government, we suppose the title to the property passed from John McManus to John M. Wetherell, whether it passed immediately through Seyfert, McManus & Co., or directly from John McManus by virtue of the deed he executed for Seyfert, McManus & Co. to Wetherell. But said deed really shows that Seyfert, McManus & Co. were a corporation actually "doing business at the Reading Iron-works, in the county of Berks," in the state of Pennsylvania, and tends more strongly to show that such corporation had power to buy, hold, and, if necessary, sell real estate in Kansas, than otherwise. That a corporation may be created in one state with power to buy, hold, and sell real estate in another state, we suppose will not be questioned. *Hunt v. Kansas & M. B. Co.*, 11 Kan. *484, *485; *State v. Boston, etc., Co.*, 25 Vt. 433, 443; *Whitman Min. Co. v. Baker*, 3 Nev. 386; *Lumbard v. Aldrich*, 8 N. H. 31; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Ang. & A. Corp.* §§ 161, 162. But it may be claimed that this particular corporation had no such power. Such power was certainly attempted to be given to said corporation in express terms. Then why did it not possess such power? Simply, as is claimed, because it could not exercise such

power in Pennsylvania, the state where it was created. But it is not shown definitely what powers it could exercise in Pennsylvania. It is true, the amendment to its charter did not give it authority to exercise any such power in Pennsylvania, but its original charter may have done so. But even if its original charter did not give

*621 *it authority to exercise any such power in Pennsylvania, still that would not necessarily prevent it from exercising such power in another state, it being expressly authorized so to do. A corporation is not always and necessarily confined to the exercise of only such powers in other states which it could properly exercise in its own state. *Land-grant Ry. Co. v. County of Coffey*, 6 Kan. 254, and authorities above cited. The *Land-grant Railway & Trust Company*, mentioned in 6 Kan. *245 *et seq.*, was no corporation. It had no home, no domicile, no place of doing business, no office, no legal existence anywhere; and hence, whatever may be anywhere said of that supposed corporation may not have any application whatever to the corporation of *Seyfert, McManus & Co.*

But suppose said corporation transcended its powers when it purchased, held, and sold real estate in Kansas, has any person or authority, except the state, any right to complain, or even to question the validity of the transaction? *Goundie v. Northampton Water Co.*, 7 Pa. St. 233. But, above all others, have the defendants any right to complain or to question the validity of said transaction? They hold their entire title to the property, and the possession thereof, from and under the plaintiff. They have not the least shadow of title, except such as they have derived from the plaintiff. This is evidently true from the evidence in the case, whether Reber ever conveyed his title to the property by deed to Brinkley or not. The deeds from Brinkley to O'Neil, and from O'Neil to Mrs. O'Brien, show it, (see 3 Washb. *Real Prop. c. 2, § 6, pars. 24, 26, and cases there cited*;) and other evidence tends to show it; and there is not a particle of evidence that tends to show the contrary. And therefore, assuming that the deed from the plaintiff to Reber is in terms just such a deed as the plaintiff claims that it is, we think that the defendants are estopped from denying the plaintiff's title. That is, where the defendants hold their entire title and possession to certain land from and under the

*622 plaintiff, and hold the same under the express con*dition that no intoxicating liquors shall ever be sold upon the premises, and are to forfeit the premises back to the plaintiff whenever such condition shall be broken, the defendants are estopped, when sued by the plaintiff for the recovery of the premises on the ground of such forfeiture, from denying that the title conveyed to them or to their grantors by the plaintiff was, when so conveyed, a good title. Upon this principle alone the question now under consideration may be decided against the defendants. While a grantee, or one claiming under him, may in many cases dispute the title attempted to be conveyed by the grantor, yet the principle contained in the proposition

just enunciated, we think, has never been questioned; and many authorities go much further in asserting that the grantee, or one in privity with him, cannot dispute the grantor's title. *Bigelow, Estop.* 414; *Williams v. Cash*, 27 Ga. 507, 512; *Woolfolk v. Ashby*, 2 Mete. (Ky.) 288; *Fitch v. Baldwin*, 17 Johns. 161; *Jackson v. Hotchkiss*, 6 Cow. 401; *Root v. Crook*, 7 Pa. St. 378; *Wedge v. Moore*, 6 Cush. 8; *Hodges v. Eddy*, 38 Vt. 328, 348, 349; *Ward v. McIntosh*, 12 Ohio St. 281. We might here say that the deeds from Brinkley to O'Neil, and from O'Neil to Mrs. O'Brien, conveyed the premises "with all the restrictions and reservations in regard to the sale of intoxicating liquors contained in the original deed from John M. Wetherell and wife to Theodore L. Reber and wife." This quotation is copied from the last-mentioned deed, and the deed from Brinkley to O'Neil contains a clause of the same purport, and couched in nearly the exact language. We might also say, before passing to the next question, that in this state the party in ejectment having the better title may always recover, whatever that title may be, legal or equitable. It is true, a plaintiff must recover upon the strength of his own title; but if his title is better than that of his adversary, he may recover, however weak his title may be. A mere prior possession, with claim of ownership, would probably be sufficient to enable the plaintiff to recover as against a party who had no right to the premises.

*628 Now, *apply this doctrine to the present case. Wetherell, the plaintiff, once had possession, with a claim of ownership. The defendants either hold under him, or else have no right to the premises at all. They have violated the conditions upon which Wetherell parted with the possession of the premises. Now, should they be allowed to question his original ownership of the property?

The next question is whether the deed from the plaintiff to Reber created merely an estate upon condition, or created an absolute estate, with merely a personal covenant on the part of Reber, not running with the land, that no intoxicating liquors should ever be sold on the premises. The deed reads as follows:

"This indenture, made this seventh day of August, A. D. 1870, by and between John M. Wetherell and Mary S., his wife, of the city of Philadelphia, in the state of Pennsylvania, parties of the first part, and Theodore L. Reber, of the county of Osage, in the state of Kansas, party of the second part, witnesseth that the said parties of the first part, for and in consideration of the sum of twenty dollars to said first parties in hand paid by said second party, the receipt whereof is hereby acknowledged, and for the further consideration that the said second party, and his heirs and assigns, forever, shall and will well and faithfully observe, keep, and perform the following conditions and covenant, to-wit, and it is expressly agreed and covenanted that the said party of the second part, his heirs and assigns, forever, shall never bargain, sell, barter, trade, or exchange any

whisky, brandy, wines, or other intoxicating liquors, (beer excepted,) at or upon the premises hereinafter described and hereby conveyed, or any part thereof, or in any house or building that may be erected thereon; nor shall said second party, or his heirs and assigns, ever at any time suffer, allow, or permit any other person or persons so to do, —doth by these presents grant, bargain, sell, remise, release, alien, convey, and confirm unto the said party of the second part, and to his heirs and assigns, forever, all the following described tracts, pieces, and parcels of land lying and being situate in Wetherell's addition to the town of Osage City, in the county of Osage, in the state of Kansas, to-wit, lots numbered 23 and 24, in block numbered 14, and *624 *lot number 31, in block numbered 13, together with all and singular the hereditaments and appurtenances thereto belonging, or in anywise appertaining, to have and to hold the same, and every part thereof, unto the said party of the second part, and his heirs and assigns, forever; subject, however, and upon the express condition, that the said party of the second part, and his heirs and assigns forever, shall and will well and faithfully perform the covenants and conditions hereinbefore named. And the said John M. Wetherell and Mary S., his wife, for themselves and their heirs, executors, administrators, and assigns, do hereby covenant, and agree to and with the said party of the second part, and his heirs and assigns, that the said parties of the first part, and their successors, will warrant and forever defend the said lands and appurtenances, and every part thereof, unto the said second party, and to his heirs and assigns forever, against the said parties of the first part, and their successors, and against all and every person or persons whomsoever, lawfully claiming or to claim the same, subject, however, and upon the express condition, that said party of the second part, and his heirs and assigns, shall and will well and faithfully keep and perform the conditions, covenants, and agreements hereinbefore named. And it is one of the conditions, and a part of the consideration, for the sale and conveyance of the lands hereinbefore described, forever, that if said second party, or his heirs or assigns, or any person or persons, by or with the knowledge, consent, or permission of said second party, or his heirs or assigns, shall at any time fail, neglect, or refuse to faithfully and fully keep, perform, and observe the conditions and covenants aforesaid, or any of them, such failure, neglect, or refusal shall be taken and held to be a breach of the covenant and condition of this conveyance; and any such breach of any of the conditions, covenants, and agreements aforesaid shall work a forfeiture of the lands hereinbefore described to the whole and every part thereof, together with all the appurtenances thereto belonging, or in anywise appertaining, and the same, the whole, and every part thereof, shall immediately revert to and become the property of the said parties of the first part, and their successors and assigns, forever, as fully and completely as if this conveyance had never been made.

"In testimony whereof the said John M. Wetherell and Mary S., his wife, by John F. Dodds, their attorney in fact, have caused
 *626 this conveyance to be made, and set their hands *and seals to the same, in the said county of Osage, on the seventh day of August, 1870.

JOHN M. WETHERELL. [Seal.]

"MARY S. WETHERELL. [Seal.]

"By JOHN F. DODDS, their Attorney in Fact." [Seal.]

The foregoing deed seems plain to us beyond all question. There can be no doubt as to what was intended by the parties thereto; and while the language thereof clearly shows that it was intended by the parties that Reber should be bound by a personal covenant never to sell, or permit to be sold, any intoxicating liquors on the premises, yet it still more clearly shows that it was further intended by the parties that the estate in the premises should be conveyed merely upon the condition that neither Reber, nor any one holding under him, should ever do any act prohibited by said covenant. The deed expressly says that the conveyance is upon condition. The condition is expressly made to reach not only Reber, but his heirs and assigns. The deed expressly says that if this condition shall ever be broken by the grantee, or his heirs or assigns, the premises shall be forfeited back to the grantor, his heirs or assigns. And of this condition the defendants had ample notice, as the recitals in their own deeds most clearly show. The estate conveyed was clearly an estate upon condition subsequent, and the condition, until broken, runs with the land, beyond all doubt. We do not in this case intend to decide whether a covenant, personal or otherwise, could be created on the part of Reber, the grantee, by a deed which he never signed, (3 Washb. Real Prop. c. 4, § 2, pars. 48, 49;) nor do we intend to decide whether the assigns of Wetherell, the grantor, could take any advantage of the breach of any condition contained in such a deed, (1 Washb. Real Prop. c. 14, par. 14,) for these questions are not in this case. What we do decide is that, by the language contained in the said deed from Wetherell to Reber, a valid condition subsequent was created, upon the continued observance of which by the grantee, and
 *626 his heirs and assigns, the estate conveyed to *them depended; and that whenever either of them committed a breach of said condition the grantor was at liberty to claim a forfeiture of the estate from them to himself. And as ample authority for this decision, we would refer to the case of Plumb v. Tubbs, 41 N. Y. 442. The case of Harsha v. Reid, 45 N. Y. 417, relied on by the plaintiffs in error, has no application whatever to the case now under consideration. That was a case where a person already the owner of a certain piece of land covenanted with another person for a money consideration that he would not erect a grist-mill on the land; and the covenant in that case had no connection with the sale or conveyance of that land, or of any other land, upon condition or otherwise. In the lan-

guage of the court deciding the case, "the covenantees did not derive title from the coventors, but the covenant was an independent and personal contract, made upon and for a money consideration *in no way connected with the title.*"

These are the only questions necessary to be considered in detail. Bridget O'Brien was the principal defendant in the case, and the question asked her by the plaintiff on the trial was undoubtedly for the purpose of showing that her husband sold the liquors which he did sell with her knowledge and consent, and the question was therefore competent under the language of the deed. The admission of the testimony of the witness Curtis was not sufficiently erroneous and material, if erroneous at all, so as to require a reversal of the judgment of the court below. The sale of the liquors in this case, as in most cases, had to be proved principally by circumstantial evidence; and therefore the plaintiff proved the following circumstances by Curtis, to-wit, that the word "Saloon" was over the awning of the building where it is claimed the liquors were sold, and that the witness frequently saw persons go into the building apparently sober and come out drunk, and that this led him to believe that intoxicating liquors were sold there. If this evidence were wholly thrown out, there would still be ample evidence to sustain the verdict of the jury.

The judgment of the court below is affirmed.

(All the justices concurring.)

*627 *COMMISSIONERS OF BROWN Co. v. WILLIAM B. BARNETT.

January Term, 1875.

County Commissioners: Power to Rent Buildings for County Purposes. The commissioners of a county are empowered, in case the county does not own buildings reasonably suited or adequate therefor, to rent any requisite number of rooms for county offices, and to bind the county by a contract therefor; and under all ordinary circumstances the judgment of the commissioners is conclusive as to the unfitness or insufficiency of the buildings owned by the county.

Error from Brown district court.

Action by Barnett to recover \$50 for rent of room for county treasurer's office. In December, 1872, a written lease or contract was entered into by Barnett and the then board of county commissioners, whereby the county board rented from Barnett a room for one year, to be used by the county treasurer. It was so used, and the rent paid up to December 31, 1873. The county board did not surrender possession, but permitted the treasurer to occupy said room for his office. April 1, 1874, Barnett presented his bill for the three months' rent due that day, and, payment being refused by the commissioners

then in office, this suit was brought. Trial in the district court, on appeal, at the October term, 1874. Verdict and judgment for plaintiff.

Nathan Price and E. Bierer, for plaintiffs in error.

C. W. Johnson, for defendant in error.

BREWER, J. As the record stands in this case, there is scarcely any question which has not already been decided by this court. The action was on an account for rent, brought first before a justice of the peace, and taken on appeal to the district court. No question is made as to the sufficiency of the bill of particulars. There is nothing in the record to show that all the testimony has been preserved. *628 Indeed, it is evident from instructions asked that it has not been. Of course, then, we must presume that it was sufficient to sustain the verdict. Some instructions were asked by defendant, (plaintiff in error,) which were refused, but the record fails to show that all the instructions which were given have been preserved, and, as often said, the instructions refused may have been so refused because already once substantially given.

A single matter may, however, properly be noticed. The rent claimed was for rooms rented for county offices. It is admitted that there was, at the time, belonging to the county, a court-house; and, such being the case, it is contended that the commissioners had no power to rent other offices, or bind the county by a contract therefor. By the third clause of section 16 of the act concerning counties and county officers the commissioners are empowered "to purchase sites for, and to build and keep in repair, county buildings, and cause the same to be insured in the name of the county treasurer for the benefit of the county, and, in case there are no county buildings, to provide suitable rooms for county purposes." Now, the contention of counsel is, upon the maxim, *expressio unius, exclusio alterius*, and upon the rule that the grant of a specific power upon certain conditions is, by implication, a denial of that power except upon those conditions, that, as the power is in terms granted to provide rooms for offices in case there are no county buildings, it is not granted and does not exist in case there are such buildings. It does not appear what kind of a court-house the county had,—whether adequate to the needs of the various county offices or not; and to sustain the claim of counsel would deny to the commissioners the power to provide rooms for county offices, and facilities for the transaction of county business, whenever the county chanced to possess a court-house, however unsuitable for occupation, or inadequate to the wants of the public. So strict a construction would simply illustrate the saying that the letter killeth, while the spirit maketh alive. We do not think the language *629 quoted sustains the claim of counsel. It justifies and should receive a more liberal construction. The commissioners are the general guardians and agents of the county, and have the gen-

eral management of its affairs; and the quoted clause empowers them, if the county has no buildings reasonably suited or adequate therefor, to rent any requisite number of rooms for county offices; and, under all ordinary circumstances, the judgment of the commissioners is conclusive as to the unfitness or insufficiency of the buildings owned by the county.

The judgment of the district court will be affirmed.

It is understood that the case of same plaintiff against Barnett, Morrill & Co. is similar to this, and must be decided in the same way. (All the justices concurring.)

STATE OF KANSAS v. WALTER SMITHERS and another.

January Term, 1875.

County Records: Not to be Removed to Another County to be Used as Evidence. The district court has no power to require that the books and records of the county treasurer and county clerk of one county shall be removed fifty miles from the place where they are usually kept, into another county, so that they may be used as evidence in a criminal action pending in such other county. Copies may be used where the original cannot be procured.¹

Appeal from Lyon district court.

Motion for an attachment for an alleged contempt. In a criminal action against one A. F. Nicholas, Walter Smithers, as county treasurer, and S. N. Fancher, as county clerk, of Greenwood county, were duly subpoenaed to attend the Lyon district court, "with all the books and records of their respective offices that in any manner relate to the county treasurer of said county for the years 1868 to 1874,"

*630 *to testify as witnesses on the part of the state in said case of "The State v. Nicholas." The papers on appeal to this court were filed March 16, 1875, during the January term.

W. C. Huffman, Co. Atty., and Ruggles & Sterry, for the State, in support of the motion.

Gillett & Forde, for Smithers and Fancher, *contra*.

VALENTINE, J. A criminal action brought and pending in Greenwood county was removed, by change of venue, to Lyon county. A *subpœna duces tecum* was then issued, and served upon the defendants in this case, Walter Smithers, treasurer of Greenwood county, and S. N. Fancher, county clerk of said Greenwood county, commanding them to appear and produce the books and records of their

¹See Dassel; Comp. Laws 1885, § 4198.

respective offices at the March term, 1875, of the district court of said Lyon county, for the purpose that said books and papers might be used as evidence in said criminal action. Smithers and Fancher failed to respond to said subpoena. A rule was then issued by the district court of Lyon county, requiring them to appear and show cause why an attachment should not be issued against them as for a contempt of the court. They appeared and showed that they were respectively county treasurer and county clerk of Greenwood county, as aforesaid; that they held their offices at Eureka, the county-seat of said Greenwood county; and that Eureka is about fifty miles from Emporia, the county-seat of Lyon county, where the district court was held. The court, on this showing, discharged the rule, and refused to issue any attachment against these defendants, and the state now appeals to this court.

The only question that we are asked to decide is whether the district court had the power to require said officers to remove their books and papers from Eureka, Greenwood county, to Emporia, *631 Lyon county. Perhaps, more properly speaking, the *question is whether the district court committed such an error by refusing to grant said attachment as will call for the judicial interposition of this court to reverse the rulings of the district court. And involved in this question are the questions whether the district court has any discretion in dispensing with this kind of evidence, and in waiving the issue of attachments in this kind of cases, or whether the court must, in all cases where such evidence appears to be relevant and material, require the production of the same, if asked to do so by a party, and grant an attachment against any officer who may fail to respond readily to the process of the court.

But, passing over all other questions, had the court the power to require the production of said evidence? We hardly think it had. In the first place, ample provision has been made in this state for the use of copies of all public records and documents where the originals themselves might be used, and hence there is no great or overwhelming necessity for obtaining the originals. But, independent of this, we think the statutes show affirmatively that it was not intended that the public records and documents should ever be removed to any great distance from the place where they are required to be usually kept. Section 172 of the act concerning counties and county officers provides that all county officers must hold their offices at the county-seat; that they must keep their offices open every day, except Sunday; that "all books and papers required to be in their offices shall be open for the examination of any person; and, if any of said officers shall neglect to comply with the provisions of this section, he shall forfeit for each day he so neglects the sum of five dollars." Gen. St. 292, § 172. And section 12 of an act amending the Code of Civil Procedure provides that "no public officer herein named, [and county treasurers and county clerks are named,] or other custodians of pub-

lic records, shall be compelled to attend any court, officer, or tribunal sitting more than one mile from his office, with any record or records belonging to his office, or in his custody as such officer." Laws

*632 1870, p. 174, § 12. *And, upon general principles, it would hardly seem consistent with public policy to allow the public records to be hauled about from place to place, all over the state, at the mere whim or fancy of some capricious individual who might suppose he needed them, to use as evidence in some criminal trial, or even on some preliminary examination, unimportant in itself, but swelled by his imagination, to prodigious proportions.

The judgment of the court below is affirmed.

(All the justices concurring.)

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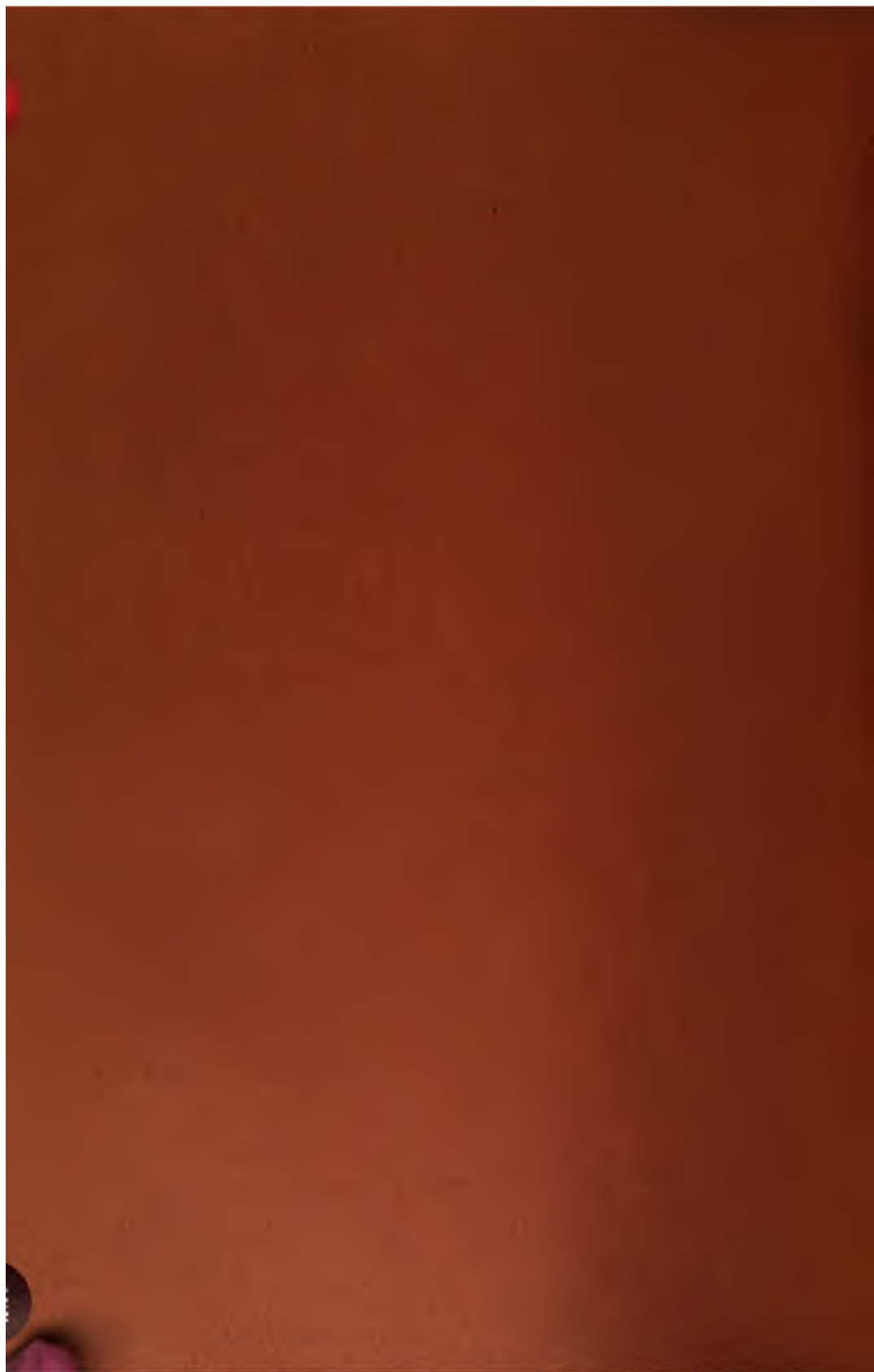
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14 KAN. 37, KANSAS PAC. RY. CO. v. POINTER

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Cited in note in 90 Am. Dec. 66, on duty and liability of railroad company towards persons other than lawfully on premises without contract relations.

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Same—Comparative negligence doctrine.—Cited in *Kansas Pac. R. Co. v. Richardson*, 25 Kan. 391; *Atchison, T. & S. F. R. Co. v. Morgan*, 31 Kan. 77, 1 Pac. 298; *Missouri Pac. R. Co. v. Walters*, 78 Kan. 39, 96 Pac. 346—holding that the doctrine of comparative negligence was never applied in Kansas; *Chicago, R. I. & Pac. R. Co. v. Lacy*, 78 Kan. 622, 97 Pac. 1025; *Butner v. Western Union Telegraph Co.*, 2 Okl. 234, 37 Pac. 1067—holding that negligence means ordinary negligence; *Edgerton v. O'Neil*, 4 Kan. App. 73, 46 Pac. 206, holding that slight contributory negligence does not bar recovery for injury caused by gross negligence.

Same—Affirmative defense.—Cited in *Gibson v. City of Wyandotte*, 20 Kan. 156; *Central Branch U. Pac. R. Co. v. Hotham*, 22 Kan. 41; *Central Branch U. Pac. R. Co. v. Walters*, 24 Kan. 504; *Kansas City, L. & S. R. Co. v. Phillibert*, 25 Kan. 582; *Union Pac. R. Co. v. Dyche*, 28 Kan. 200; *Moulton v. Aldrich*, 28 Kan. 300; *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176; *City of Eskridge v. Lewis*, 51 Kan. 376, 32 Pac. 1104; *Fletcher v. City of Ellsworth*, 53 Kan. 751, 37 Pac. 115; *Chicago, R. I. & Pac. R. Co. v. Hinds*, 56 Kan. 758, 44 Pac. 993; *Atchison, T. & S. F. R. Co. v. Peck*, 79 Kan. 418, 100 Pac. 54; *Northern Pac. R. Co. v. Hess*, 2 Wash. 383, 26 Pac. 866—holding that contributory negligence was a matter of affirmative defense.

Cited in notes in 33 L. R. A. (N. S.) 1096, 1161; 39 Am. Rep. 511—on burden of proof as to contributory negligence.

Special findings—Failure to answer interrogatories.—Cited in *Briggs & Watson v. Eggan*, 17 Kan. 589, holding that failure to make a special finding or finding in too general terms is not reversible error, unless the defect was pointed out to the trial court; *Cain Bros. Co. v. Wallace*, 46 Kan. 138, 26 Pac. 445, holding that, where a special question was not answered by a jury, objection was waived through not being made when the jury returned into court; *Stanard v. Sampson*, 23 Okl. 13, 99 Pac. 796, holding that either party may require a special finding to be made more specific and certain before the jury is discharged.

Cited in note in 24 L. R. A. (N. S.) 71, 72, on what special verdict must contain.

14 KAN. 67, MAGILL v. MARTIN

Cited in *Johnson v. J. J. Douglass Co.*, 8 Okl. 594, 58 Pac. 743.

Taxation—Form of deeds.—Cited in *McCauslin v. McGuire*, 14 Kan. 234; *Morrill v. Douglass*, 14 Kan. 293; *Spicer v. Howe*, 38 Kan. 465, 16 Pac. 825—holding a tax deed invalid, except as to certain described land.

Same—Purchases by county.—Cited in *Babbitt v. Johnson*, 15 Kan. 252; *Larkin v. Wilson*, 28 Kan. 513; *Rush v. Lewis & Clark County*, 30 Mont. 566, 93 Pac. 943—holding void a tax deed showing on its face a sale to the county as a competitive bidder; *Mack v. Price*, 35 Kan. 134, 10 Pac. 521, holding that, when a county treasurer bids off property for taxes, the county takes the whole property; *Dyke v. Whyte*, 17 Colo. 296, 29 Pac. 128; *Charlton v. Kelly*, 7 Colo. App. 301, 43 Pac. 455—holding that a tax deed is void which shows that statutory provisions concerning purchase by county have not been followed; *Weeks v. Merkle*, 6 Okl. 714, 52 Pac. 929, holding invalid a tax deed covering several non-contiguous parcels and based on a certificate issued to the county.

Distinguished in *O'Keefe v. Dillenbeck*, 15 Okl. 437, 83 Pac. 540, on validity of a tax deed showing on its face a purchase by the county for a lump sum in cash.

Same—Who may purchase at tax sale.—Cited in note in 75 Am. St. Rep. 235, on who may purchase and enforce a tax title.

14 KAN. 82, LEAVENWORTH, L. & G. R. CO. v. CLEMMANS

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14 KAN. 92, YOUNG v. LEDRICK

Probate judge—Powers.—Cited in *State v. Brown*, 35 Kan. 167, 10 Pac. 594, holding that a probate judge does not forfeit his office through failure to discharge duties distinct from his judicial duties; *In re Morris*, 39 Kan. 28, 18 Pac. 171, 7 Am. St. Rep. 512, holding that a probate judge can exercise jurisdiction on proceedings in aid of execution; *Board of Com'rs of Miami County v. Collins*, 47 Kan. 417, 28 Pac. 175; *In re Gassaway*, 70 Kan. 606, 79 Pac. 113—holding that a probate judge may be given judicial powers other than those conferred by the Constitution; *Central Loan & Trust Co. v. Campbell Commission Co.*, 5 Okl. 396, 49 Pac. 48, on validity of acts conferring judicial functions concerning matters of which the district court has jurisdiction; *Bowersock v. Adams*, 55 Kan. 681, 41 Pac. 971, holding that records of certain proceedings before a probate judge did not become probate court records; *State v. Durein*, 70 Kan. 13, 80 Pac. 987, holding that duties concerning licensing of sale of intoxicating liquors are properly imposed on the probate judge; *Honce v. Schram*, 73 Kan. 368, 85 Pac. 535, holding that, on a proceeding in aid of execution, the district court's jurisdiction to review the probate judge's action is original rather than appellate.

Right to impose new official duties.—Cited in *State v. Majors*, 16 Kan. 440, holding that new duties, judicial, quasi judicial, or ministerial, may be imposed on existing officers.

14 KAN. 101, BUDD v. KRAMER

Cited in *City of Wyandotte v. Zeitz*, 21 Kan. 649; *Hamrick v. Board of Education of City of Wellington*, 28 Kan. 385.

Pleadings—Exhibits and setting out instruments.—Cited in *Winkfield v. Brinkman*, 21 Kan. 682; *State v. School District No. 3*, 34 Kan. 237, 8 Pac. 208—holding that an exhibit attached to a petition should be construed in connection therewith; *Dunham v. Holloway*, 8 Okl. 244, 41 Pac. 140; *Grimes v.*

Cullison, 3 Okl. 268, 41 Pac. 355; *Whiteacre v. Nichols*, 17 Okl. 387, 87 Pac. 865—holding that an exhibit is part of the complaint to which it is attached; *Stephens v. American Fire Ins. Co.*, 14 Utah, 265, 47 Pac. 83, on setting out instruments in pleadings.

Harmless error.—Cited in *State v. O'Laughlin*, 29 Kan. 20, holding that error is not ground for reversal, if it does not affect any substantial right.

14 KAN. 105, *STATE v. FOLWELL*

Evidence of other offenses.—Cited in *State v. Adams*, 20 Kan. 311; *State v. Burns*, 35 Kan. 387, 11 Pac. 161; *State v. Reed*, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322; *State v. Stevens*, 56 Kan. 720, 44 Pac. 992; *State v. Franklin*, 69 Kan. 798, 77 Pac. 588; *State v. Hansford*, 81 Kan. 300, 106 Pac. 738; *State v. Lowe*, 6 Kan. App. 110, 50 Pac. 912; *Vickers v. United States*, 1 Okl. Cr. 452, 98 Pac. 467—holding that relevant testimony is not rendered inadmissible against accused because it tends to show commission of an independent offense.

Cited in notes in 62 L. R. A. 198, 294; 105 Am. St. Rep. 984—on admissibility of evidence of other crimes.

Opinions of witnesses.—Cited in *Townsdin v. Nutt*, 19 Kan. 282, holding that it was not prejudicial error to permit plaintiff to testify that an assault injured her; *State v. Stackhouse*, 24 Kan. 445, holding admissible an opinion whether certain persons were on good terms, etc.; *Kansas Pac. R. Co. v. Whipple*, 39 Kan. 531, 18 Pac. 730, holding that a witness was properly permitted to testify whether a person had ample time to leave a railroad track after warning; *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829; *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318; *State v. Vanella*, 40 Mont. 326, 106 Pac. 364, 20 Ann. Cas. 398; *First Nat. Bank v. Fire Ass'n of Philadelphia*, 33 Or. 172, 50 Pac. 568, 53 Pac. 8—on scope of matters on which witnesses may give opinions; *First Nat. Bank v. Fire Ass'n of Philadelphia*, 33 Or. 172, 50 Pac. 568, 53 Pac. 8, holding that expert witnesses could testify whether a fire could spread to an upper floor in a given time; *Union Pac. Ry. Co. v. Gilland*, 4 Wyo. 395, 34 Pac. 953, holding that witnesses were properly permitted to state opinions in an action against a railway company for setting out a fire.

14 KAN. 111, *STATE v. GURNEE*

Participants in misdemeanors as principals.—Cited in *State v. Stark*, 63 Kan. 529, 66 Pac. 243, 54 L. R. A. 910, 88 Am. St. Rep. 251, holding that all participants in a misdemeanor are principals.

Declarations by persons in possession of land.—Cited in *Hubbard v. Cheney*, 76 Kan. 222, 91 Pac. 793, 123 Am. St. Rep. 129, holding that declarations of persons in possession of land are admissible to show the character and extent of their claims.

Secondary proof of instruments in accused's possession.—Cited in *State v. Dreany*, 65 Kan. 292, 69 Pac. 182, holding that parol evidence of the contents of an instrument in accused's possession is proper; *McKnight v. United States*, 115 Fed. 972, 54 C. C. A. 358, holding that the state need not give notice to produce incriminating documents before offering secondary evidence.

Complaint for malicious trespass.—Distinguished in *State v. Haney*, 32 Kan. 428, 4 Pac. 831, on requisites of complaint for malicious trespass on land.

14 KAN. 125, *HOUSTON v. DELAHAY*

- **Joinder of causes in petition.**—Cited in *Commissioners of Barton County v. Plumb*, 20 Kan. 147, holding that a petition stated but one cause of action on a penal bond.

14 KAN. 131, HOLMES v. RILEY

Burden of proof in action on note.—Cited in *Brown v. Tourtelotte*, 24 Colo. 204, 50 Pac. 195, on burden of proof in an action on a note.

14 KAN. 133, STATE v. JENNERSON

Specification of error.—Cited in *State v. Coulter*, 40 Kan. 673, 20 Pac. 525; *Eldridge v. Deets*, 4 Kan. App. 241, 45 Pac. 948—holding that appellant's brief must specify the error in a ruling complained of.

14 KAN. 135, STATE v. KELLERMAN

Instructions on credibility of witnesses.—Cited in *Trimble v. Territory*, 8 Ariz. 273, 71 Pac. 932, holding that it is proper to instruct that, if any witness has willfully testified falsely, etc., his entire testimony may be disregarded; *O'Grady v. People*, 42 Colo. 312, 95 Pac. 346, holding that it was proper to refuse to instruct that testimony of detectives should be received with great caution and distrust.

Same—Testimony of accomplice.—Cited in *State v. Patterson*, 52 Kan. 335, 34 Pac. 784; *State v. McDonald*, 57 Kan. 537, 46 Pac. 966, on duty to instruct on weight of accomplice's testimony.

Cited in notes in 71 Am. Dec. 672, 675; 98 Am. St. Rep. 166—on conviction on uncorroborated evidence of accomplice.

Newly discovered evidence as ground for new trial.—Cited in *Huster v. Wynn*, 8 Okl. 569, 58 Pac. 736, holding that, on motion for new trial on the ground of newly discovered evidence, affidavits of the newly discovered witnesses should be produced or their absence accounted for.

14 KAN. 140, HAUG v. GILLETT

Intoxicating liquors—Legislative control over traffic.—Cited in *State v. Durein*, 70 Kan. 13, 80 Pac. 987, on legislative control over liquor traffic; *State v. Weiss*, 84 Kan. 165, 113 Pac. 388, 36 L. R. A. (N. S.) 73, holding that a Legislature can prohibit manufacture and sale of intoxicants without express constitutional authority.

Cited in note in 15 L. R. A. (N. S.) 918, on constitutional right to prohibit sale of intoxicants.

Same—Necessity for license.—Cited in *McCarty v. Gordon*, 16 Kan. 35, holding that a wholesale liquor dealer in another state need not have a license to ship liquors under orders taken by his representative.

Same—When sale is complete.—Cited in *State v. Copp*, 34 Kan. 522, 9 Pac. 233, as to when contract to sell becomes absolute without payment or delivery.

Cited in note in 22 L. R. A. 415, on passing of title to property by delivery to carrier for transportation to consignee or vendee; in 26 L. R. A. (N. S.) 17, 55, on sufficiency of selection or designation of goods sold out of larger lot.

Same—Validity of notes for price of liquors.—Cited in *Snider v. Koehler*, 17 Kan. 432, holding that verdict for plaintiff was properly directed in an action on notes, defended on the ground they were given for liquor sold without a license.

Distinguished in *Glass v. Alt*, 17 Kan. 444, holding invalid a note given for liquors sold without license.

14 KAN. 143, AKIN v. DAVIS

Temporary injunction.—Cited in *Railroad Commission of Alabama v. Central of Georgia Ry. Co.*, 170 Fed. 225, 95 C. C. A. 117, on right to temporarily enjoin enforcement of statute regulating freight rates; *Santa Cruz Fair Bldg. Ass'n v. Grant*, 104 Cal. 306, 37 Pac. 1034, on right to temporarily enjoin local

improvement assessment; *Conley v. Fleming*, 14 Kan. 381, holding that in doubtful cases a preliminary injunction should be refused, where plaintiff is not apt to be prejudiced; *Olmstead v. Koester*, 14 Kan. 463, holding that it was not error to refuse preliminary injunction against collection of taxes; *Johnson v. Board of Com'rs of Wilson County*, 34 Kan. 670, 9 Pac. 384; *Van Natta-Lynds Drug Co. v. Gerson*, 43 Kan. 660, 23 Pac. 1071; *Kemper v. Campbell*, 45 Kan. 529, 26 Pac. 53—holding that granting of a preliminary injunction is largely discretionary; *Emmons v. Gille*, 51 Kan. 178, 32 Pac. 916, holding that probable effect is proper consideration in determining whether temporary order should issue.

Right to appeal from temporary order.—Cited in *Re Brown*, 2 Okl. 590, 39 Pac. 469, holding that an appeal lies from an order suspending an attorney pending disbarment proceedings.

Milldams.—Cited in note in 59 L. R. A. 885, on liability for damming back stream.

14 KAN. 148, *YOUNG v. CLIPPINGER*

Quitclaim deed as estoppel.—Cited in *Johnson v. Williams*, 37 Kan. 179, 14 Pac. 537, 1 Am. St. Rep. 243; *Price v. King*, 44 Kan. 639, 25 Pac. 43—holding that a quitclaim grantor can subsequently acquire an adverse interest.

Cited in note in 32 L. R. A. (N. S.) 589, on effect of covenants of title or seisin, where granting clause merely purports to convey grantor's interest; in 35 L. R. A. (N. S.) 1183, 1187, on effect of quitclaim upon after-acquired title.

14 KAN. 151, *LOWNSBERRY v. RAKESTRAW*

Time for filing case-made or bill of exceptions.—Cited in *State v. Bohan*, 19 Kan. 28; *State v. Schoenewald*, 26 Kan. 288; *Scott v. McKinstry*, 27 Kan. 162; *State v. Burrows*, 33 Kan. 10, 5 Pac. 449; *State v. Smith*, 38 Kan. 194, 16 Pac. 254—holding that a bill of exceptions filed out of term is no part of the record; *Pierce v. Myers*, 28 Kan. 364, holding that motion to dismiss writ of error was properly overruled, where pending the motion the case-made was amended by being authenticated.

Title to Indian lands.—Cited in *Rathbone v. Sterling*, 25 Kan. 444, on title to lots in town site entered by probate judge.

14 KAN. 159, *OTTAWA UNIVERSITY v. PARKINSON*

Value of attorney's services.—Cited in *Bachman v. O'Reilly*, 14 Colo. 433, 24 Pac. 546; *Ottawa University v. Welsh*, 14 Kan. 164—on determination of value of attorney's fees; *Tullock v. Mulvane*, 61 Kan. 650, 60 Pac. 749, holding that special importance of litigation to client may be considered in determining value of attorney's services.

Objection to deposition.—Cited in *State v. Simmons*, 74 Kan. 799, 88 Pac. 57, holding that, if part of a deposition is admissible, objection to it as a whole is insufficient.

14 KAN. 164, *OTTAWA UNIVERSITY v. WELSH*

14 KAN. 164, *KERMAYER v. NEWBY*

Payment by check or note.—Cited in *Shepard & Playford v. John G. Allen & Son*, 16 Kan. 182, holding that notes may be made to serve as additional evidence of debt, permitting the original debt to subsist; *Medberry, Yetter & Co. v. Soper, Brainard & Co.*, 17 Kan. 369, holding that mere acceptance of a note of one joint debtor does not discharge the other debtors; *Mordis v. Kennedy*, 23 Kan. 408, 33 Am. Rep. 169; *Mullins v. Brown*, 32 Kan. 312, 4 Pac. 305; *Noble v. Doughten*, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A. (N. S.) 1167—holding that the mere taking of a bank check does not show discharge of a debt for which it is given; *Hurd v. G. C. Hixon & Co.*, 27 Kan. 722; *Bradley, Wheeler & Co.*

v. Harwi, 43 Kan. 314, 23 Pac. 506; Topeka Capital Co. v. Merriam, 60 Kan. 397, 56 Pac. 757; Webb v. National Bank of the Republic, 67 Kan. 62, 72 Pac. 520—holding that extinguishment of a debt is not shown by mere acceptance of a note.

Cited in note in 35 L. R. A. (N. S.) 29, 39, on payment by commercial paper.

14 KAN. 168, McLAUGHLIN v. DAVIS

Attachment—Affidavit not pleading.—Cited in Rapp v. Kyle, 26 Kan. 89, holding that an attachment affidavit is not a pleading.

Same—Wrongful levy of writ.—Cited in Hoge v. Norton, 22 Kan. 374, on liability on an attachment bond; Kerr v. Reece, 27 Kan. 469; Western News Co. v. Wilmarth, 34 Kan. 254, 8 Pac. 104—holding that determination of suit in which attachment is had is not essential to suit for wrongful attachment; Duff & Repp Furniture Co. v. Read, 74 Kan. 730, 88 Pac. 263, holding that levy under irregular, unauthorized, or void process constitutes a trespass.

Cited in note in 81 Am. Dec. 477, on actions for wrongful attachments and defenses thereto; in 68 Am. St. Rep. 268, on damages for wrongful or malicious attachment.

14 KAN. 170, STATE v. SULLIVAN

14 KAN. 173, STATE v. HOWARD

Instructions.—Cited in State v. Bohan, 19 Kan. 28, holding that an instruction on self-defense was not erroneous; State v. Pierce, 23 Kan. 153, on sufficiency of the instructions in a murder trial; State v. Keefe, 54 Kan. 197, 38 Pac. 302, holding that an instruction was erroneous; People v. Hancock, 7 Utah, 170, 25 Pac. 1093, holding that a jury will be presumed to have followed an erroneous instruction, though a proper, but conflicting, instruction was given.

Self-defense.—Cited in State v. Scott, 24 Kan. 68, holding that evidence of threats by decedent was improperly excluded; State v. Douglas, 53 Kan. 669, 37 Pac. 172; State v. Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322; State v. Burton, 63 Kan. 602, 66 Pac. 633; State v. Petteys, 65 Kan. 625, 70 Pac. 588—on right to act in self-defense.

Burden of proof.—Cited in note in 81 Am. Dec. 503 (par. 5), on burden of proof in criminal case.

14 KAN. 175, AYRES v. PROBASCO

Imputation of agent's knowledge.—Cited in Hardten v. State, 32 Kan. 637, 5 Pac. 212, holding that a wife was bound by her husband's knowledge that premises were devoted to illegal use; Despain v. Pac. Mut. Life Ins. Co., 81 Kan. 722, 106 Pac. 1027, holding that knowledge of a corporation's agents is imputed to it; Westerman v. Evans, 1 Kan. App. 1, 41 Pac. 675; Richardson v. Penny, 6 Okl. 328, 50 Pac. 231—holding that knowledge of an agent is imputed to his principal.

Invalid instruments and rights of bona fide holders.—Distinguished in Tucker v. Allen, 16 Kan. 312, holding that void deed may become valid by ratification; Chicago Lumber Co. v. Ashworth, 26 Kan. 212, holding valid a mortgage to a partnership in the firm name; Northrup v. Hottenstein, 38 Kan. 263, 16 Pac. 445, holding that plaintiff was not an innocent mortgagee.

Cited in McNeill v. Jordan, 28 Kan. 7, holding that a bona fide purchaser's title was not defeated by fraud in a prior conveyance; Chapman v. Veach, 32 Kan. 167, 4 Pac. 100, holding that a deed conveyed growing crops; Madaris v. Edwards, 32 Kan. 284, 4 Pac. 313, holding that a mortgagor is presumed to have owned the property.

Cited in note in 9 L. R. A. (N. S.) 948, on validation of undelivered deed by ratification or estoppel.

Same—Filling blanks.—Cited in *State v. Matthews*, 44 Kan. 596, 25 Pac. 36, 10 L. R. A. 308, holding that a deed is void if blanks therein are filled contrary to the grantor's directions.

Distinguished in *Exchange Nat. Bank of El Dorado v. Fleming*, 63 Kan. 139, 65 Pac. 213, holding valid a deed in which the grantee's name was inserted after it was executed; *Frayer v. Holtom*, 8 Kan. App. 718, 54 Pac. 918, holding that deed blank as to grantee was valid.

Same—Right to subrogation.—Cited in *Johnson v. Moore*, 83 Kan. 90, 5 Pac. 406; *Everston v. Central Bank of Kansas*, 33 Kan. 352, 6 Pac. 605; *Crippen v. Chappel*, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187—holding that, where a mortgage was invalidated, the mortgagee was entitled to subrogation under a mortgage paid off with the proceeds of his loan.

Cited in note in 99 Am. St. Rep. 489, on right of subrogation.

Statute of frauds—Written authority to agent.—Cited in *Rose v. Hayden*, 35 Kan. 106, 10 Pac. 554, 57 Am. Rep. 145, holding that a contract authorizing a broker to sell land need not be in writing.

Homestead—Necessity for wife's joinder in conveyance.—Cited in *Thimes v. Stumpff*, 33 Kan. 53, 5 Pac. 431; *Schermerhorn v. Mahaffie*, 34 Kan. 108, 8 Pac. 199—holding void a contract to convey a homestead in which the wife did not join; *Foster Lumber Co. v. Harlan County Bank*, 71 Kan. 158, 80 Pac. 49, 114 Am. St. Rep. 470, 6 Ann. Cas. 44, holding that an equitable mortgage on a homestead was valid without the wife's joinder.

Cited in note in 95 Am. St. Rep. 914, on effect of conveyance or incumbrance of homestead by one spouse only; in 65 Am. Dec. 485, on conveyance of homestead.

Usury—Sufficiency of pleading.—Cited in *Hover v. Cockins*, 17 Kan. 514, holding that a pleading was insufficient to state a cause of action for usury.

Operation of statutes.—Cited in *School District No. 13 v. State*, 15 Kan. 43, on law governing apportionment of property on division of school district; *Douglass v. Loftus*, 85 Kan. 720, 119 Pac. 74, holding that a certain statute preserves rights accrued, though no action had been commenced for their enforcement when the act took effect.

14 KAN. 202, NEWELL v. NEWELL

Constructive trusts.—Cited in *Brison v. Brison*, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; *Kahm v. Klaus*, 64 Kan. 24, 67 Pac. 542—holding that a constructive trust arises under stated facts; *Lyons v. Berlan*, 67 Kan. 426, 73 Pac. 52, on proof required to establish a constructive trust; *Parrish v. Parrish*, 33 Or. 486, 54 Pac. 352, as to when trust ex maleficio arises.

Prejudicial error in vacating finding.—Cited in *Fountain v. Kenney*, 66 Kan. 797, 72 Pac. 392, holding that setting aside a finding as to fraud was prejudicial error.

Amendment changing cause of action.—Cited in note in 61 Am. St. Rep. 424, on amendments which are not admissible because changing cause of action.

Consideration for conveyance.—Cited in note in 68 L. R. A. 929, on recital of money consideration in deed as contractual.

14 KAN. 207, ANDERSON v. KENT

Divestiture of homestead right.—Cited in *Bathey v. Barker*, 62 Kan. 517, 64 Pac. 79, 56 L. R. A. 33, on question whether loss of wife and children divests homestead right.

Cited in note in 60 Am. Dec. 608, on abandonment of homestead.

Waiver of second trial in ejectment.—Cited in *West v. Cameron*, 39 Kan. 736, 18 Pac. 884, holding that in ejectment it was not error to fail to grant a second trial where neither party asked it.

14 KAN. 212, ATCHISON, T. & S. F. R. CO. v. CUTHBERT

Superfluous conditions in bond.—Cited in *Kall v. Bell*, 79 Kan. 358, 99 Pac. 598, holding that a bond is not invalid for containing superfluous conditions.

Railroad company's liability for contractor's debts.—Cited in *Missouri Pac. Ry. Co. v. Hartman*, 5 Kan. App. 581, 49 Pac. 109, holding that one seeking to enforce statutory liability of a railway company for a contractor's debts must show all the facts required by the statute.

14 KAN. 217, STATE EX REL. McDONALD v. CONN

14 KAN. 221, MORRIS v. GERMAN

14 KAN. 224, DORMAN v. OROZIER

Verification of mechanic's lien statement by agent.—Cited in *Delahay v. Goldie*, 17 Kan. 268, holding that a mechanic's lien statement may be verified by agent.

Cited in note in 42 Am. Dec. 63 (par. 3), on positive statement of facts in affidavit by agent.

14 KAN. 228, SANFORD v. SHEPARD

Cited in *Thomas v. Reynolds*, 29 Kan. 304.

Expert testimony as to value of land.—Cited in *Ruckman v. Imbler Lumber Co.*, 42 Or. 281, 70 Pac. 811, holding that a witness could not give an estimate of the value of land without special knowledge.

Justice court—Pleading.—Cited in *Stanley v. Farmers' Bank*, 17 Kan. 592, holding that on appeal from justice court any defense may be established without answer; *Robbins v. Sackett*, 23 Kan. 301; *Wagstaff v. Challiss*, 29 Kan. 505—holding that want of an answer on appeal from justice court did not prevent proof of a counterclaim; *Robbins v. Sackett*, 23 Kan. 301, holding that limitation need seldom be pleaded in justice court cases.

Same—Appellate jurisdiction.—Cited in *Wagstaff v. Challiss*, 31 Kan. 212, 1 Pac. 631, holding that, on appeal from justice court, the district court is limited to the justice's jurisdiction.

14 KAN. 234, McCAUSLIN v. McGUIRE

Sufficiency of tax deed.—Cited in *Gardenhire v. Mitchell*, 21 Kan. 88, holding that a tax deed is prima facie evidence of proceedings from valuation of the land to execution of the deed, including assignment of the sale certificate; *Board of Regents of the Kansas State Agricultural College v. Linscott*, 30 Kan. 240, 1 Pac. 81, holding that a tax deed sufficiently showed that the assignee of the tax sale certificate paid the county treasurer the required amount for the certificate; *Mack v. Price*, 35 Kan. 184, 10 Pac. 521, holding that a tax deed recital that a certificate was "duly" assigned is sufficient; *Havel v. Decatur County Abstract Co.*, 76 Kan. 336, 91 Pac. 790, holding that a tax deed need not show the residence of the purchaser; *Baughman v. Harvey*, 76 Kan. 767, 93 Pac. 146, holding that a tax deed was not vitiated by irregularity of certain recitals.

Acknowledgment.—Cited in note in 108 Am. St. Rep. 551, as to when defects in certificate of acknowledgment are fatal.

Tax sale—Payment of price.—Cited in note in 33 L. R. A. 483, on necessity of immediate payment on tax sale.

14 KAN. 250, COLLIER v. BLAKE

Trusts—Who may execute.—Cited in *Harris v. Calvert*, 2 Kan. App. 749, 44 Pac. 25, holding that the trust of guardianship does not pass to the guardian's executor on his death.

Cited in note in 180 Am. St. Rep. 519, 523, on who may execute a trust after death of one or all of trustees.

14 KAN. 259, CENTRAL BRANCH U. P. R. CO. v. WILCOX

Consideration for trust.—Cited in *Tenney v. Simpson*, 37 Kan. 353, 15 Pac. 187, holding that exclusive right to purchase land was sufficient consideration to support a partnership trust.

Taxation of contracts to convey.—Cited in *Brown v. Thomas*, 37 Kan. 282, 15 Pac. 211, on right to tax contract to convey.

14 KAN. 273, SWENSON v. AULTMAN

Right to continuance.—Cited in *Payne v. First Nat. Bank*, 16 Kan. 147; *Board of Regents of Kansas State Agricultural College v. Linscott*, 30 Kan. 240, 1 Pac. 81; *Harlow v. Warren*, 38 Kan. 480, 17 Pac. 159; *Clouston v. Gray*, 48 Kan. 31, 28 Pac. 983—holding that granting a continuance is largely discretionary; *Wilkins v. Moore*, 20 Kan. 538; *Tucker v. Garner*, 25 Kan. 454—holding that continuance asked on account of absent testimony was properly refused for want of diligence; *St. Louis, W. & W. R. Co. v. Ransom*, 29 Kan. 298, holding that, to warrant a continuance, absent testimony must be both competent and material.

Cited in note in 74 Am. Dec. 141, 146, 147, on continuance of civil causes.

Admissibility of agent's declaration.—Cited in *Tennis v. Inter-State Consol. Rapid Transit R. Co.*, 45 Kan. 503, 25 Pac. 876; *Acme Harvester Co. v. Madden*, 4 Kan. App. 598, 46 Pac. 319; *Chickasha Cotton Oil Co. v. Lamb & Tyner*, 28 Okl. 275, 114 Pac. 333—holding that an agent's declarations concerning a past transaction are not admissible against the principal.

Cited in note in 53 Am. Dec. 776, on admissions of agent as evidence against principal.

Res gestæ testimony.—Cited in *Jenkins v. Levis*, 25 Kan. 479, holding that declarations were not admissible as part of the res gestæ on an issue of execution of a note and mortgage.

14 KAN. 277, BELL v. TAYLOR

Judicial sale—Sale in parcels.—Cited in *Dexter v. Cochran*, 17 Kan. 447; *Geuda Springs Town & Water Co. v. Lombard*, 57 Kan. 625, 47 Pac. 532; *Miller v. Trudgeon*, 16 Okl. 337, 86 Pac. 523, 8 Ann. Cas. 739—holding that a judicial sale in gross of contiguous tracts owned by same judgment debtors is not void; *Bernhard v. Hovey*, 9 Kan. App. 25, 57 Pac. 245, holding that a single sale of separate lots was irregular; *Hutchison v. Yahn*, 9 Kan. App. 837, 61 Pac. 458, holding that a notice of foreclosure sale was voidable, where it did not describe separate parcels.

Same—Excessive amount of land.—Cited in note in 13 Am. Dec. 213, on sale by sheriff of excessive amount of land.

14 KAN. 280, BOYD v. SANFORD

Newly discovered evidence as ground for new trial.—Cited in *Wilkes v. Wolback*, 30 Kan. 875, 2 Pac. 508; *Carson, Pirie, Scott & Co. v. C. M. Henderson & Co.*, 34 Kan. 404, 8 Pac. 727—holding that one asking a new trial on the ground of newly discovered evidence must show that failure to earlier discover same was not due to lack of diligence.

14 KAN. 282, SHED v. AUGUSTINE

Cited in *Dodge v. Coffin*, 15 Kan. 277.

Consistency of defenses.—Cited in *Gross v. St. Paul Fire & M. Ins. Co.*, 22 Fed. 74, holding that defenses to suit on fire policies were not inconsistent; *Disney v. St. Louis Jewelry Co.*, 78 Kan. 145, 90 Pac. 782, holding that in an action on a contract of sale defenses of fraud and breach of warranty are not so inconsistent as to require an election.

Cited in note in 48 L. R. A. 195, 208, on right to plead inconsistent defenses.

Judicial notice of foreign statutes and decisions.—Cited in *Loyal Mystic Legion of America v. Brewer*, 75 Kan. 729, 90 Pac. 247; *Gunderson v. Gunderson*, 25 Wash. 459, 65 Pac. 791—holding that judicial notice is not taken of the statutes or decisions of another state.

Cited in note in 11 Am. Dec. 782, on presumption and judicial notice of laws; in 49 Am. Rep. 206, on what will be judicially noticed; in 67 L. R. A. 47, on how case determined when proper foreign law not proved.

Prejudicial nature of erroneous instructions.—Cited in *Hodgin v. Barton*, 23 Kan. 740; *Solomon R. Co. v. Jones*, 30 Kan. 601, 2 Pac. 657—holding that misleading instructions require reversal, though there are other matters on which the jury might have returned the same verdict.

14 KAN. 288, WILLIAMS v. FEINIMAN

Sale of liquors.—Cited in *McCarty v. Gordon*, 16 Kan. 85, holding that a sale of liquors was made in a distant city and not in L., thus not requiring the seller to have a license to sell at L.; *Snider v. Koehler*, 17 Kan. 432, holding that verdict for plaintiff was properly directed on failure to prove defense that notes sued on were given for liquor unlawfully sold; *Glass v. Alt*, 17 Kan. 444, holding that note given under illegal sale of liquors is not collectible.

Cited in note in 22 L. R. A. 425, on passing of title to property by delivery to carrier for transportation to consignee or vendee; in 61 L. R. A. 419, 425, on conflict of laws as to sales of liquor; in 26 L. R. A. (N. S.) 17, 55, on sufficiency of selection or designation of goods sold out of larger lot.

14 KAN. 290, BUSH v. PEAKE

Right to special verdict.—Cited in *Briggs & Watson v. Eggan*, 17 Kan. 589, on right to special verdict.

14 KAN. 291, McVEY v. BURNS

Plaintiff's right to dismiss action.—Cited in *Amos v. Humboldt Loan Ass'n*, 21 Kan. 474, holding that action to foreclose a mortgage might be dismissed without prejudice notwithstanding a counterclaim; *Allen v. Douglass*, 29 Kan. 412, on right of plaintiff in ejectment to dismiss; *Ætna Life Ins. Co. v. Lakin Tp.*, 59 Fed. 989, 8 C. C. A. 437, holding that plaintiff could dismiss without prejudice at any time before submission to the jury.

Defendant's rights on dismissal.—Cited in *Manning v. Manning*, 26 Kan. 98; *McKey v. Lauffin*, 48 Kan. 581, 30 Pac. 16—on rights of defendant in replevin on dismissal by plaintiff; *Citizens' State Bank v. Morse*, 60 Kan. 526, 57 Pac. 115, holding that in replevin it was proper to render judgment for return of the property or payment of its admitted value.

14 KAN. 293, MORRILL v. DOUGLASS

Cited in *Bliss v. Couch*, 46 Kan. 400, 26 Pac. 706.

Tax deed—Validity.—Cited in *Board of Regents of Kansas State Agricultural College v. Linscott*, 30 Kan. 240, 1 Pac. 81, on sufficiency of tax deed as to recital of payment for assignment of certificate; *Douglass v. Dickson*, 81 Kan. 310, 1 Pac. 541, holding that a tax deed was *prima facie* valid; *Mack v. Price*, 35 Kan.

184, 10 Pac. 521, holding that a tax deed was not void for omitting certain words from the attestation or conclusion clause; *Thompson v. Colburn*, 68 Kan. 819, 75 Pac. 508, holding that a tax deed was not fatally defective on account of recitals therein; *Raughman v. Harvey*, 76 Kan. 767, 93 Pac. 146, holding that tax deed was not void for irregularity in recitals concerning sale.

Same—Sufficiency of consideration.—Cited in *Douglass v. Nuzum*, 16 Kan. 515, holding that payment of one year's taxes is sufficient to sustain a tax deed.

Validity of county's contract.—Cited in *Waters, Chase & Tillotson v. Trovillo*, 47 Kan. 197, 27 Pac. 822, holding void a contract by a county for services required of the county attorney.

Presumption of regularity of deed.—Cited in *Graden v. Mais*, 77 Kan. 702, 95 Pac. 412, 127 Am. St. Rep. 456, on presumption arising on loss of record of deed.

Control of lands purchased by county for taxes.—Cited in *Noble v. Cain*, 22 Kan. 493, on control of lands purchased by county for taxes.

14 KAN. 308, *JEFFS v. FLICKENGER*

14 KAN. 310, *TILTON v. KNAPP*

14 KAN. 312, *CEMETERY ASS'N v. MEENINGER*

Cited in *Douglass v. City of Leavenworth*, 6 Kan. App. 96, 49 Pac. 676.

Cul-de-sac as highway.—Cited in *Dyche v. Weichselbaum*, 9 Kan. App. 360, 58 Pac. 126, on proposition that a cul-de-sac can be a public highway.

Dedication—Proof.—Cited in Board of Com'rs of Wyandotte County v. First Presbyterian Church, 30 Kan. 620, 1 Pac. 109, on proof of intention to dedicate.

Same—Acceptance.—Cited in *Hitchcock v. City of Oberlin*, 46 Kan. 90, 26 Pac. 466 (concurring opinion); *State ex rel. v. McClure*, 58 Kan. 295, 36 Pac. 353—holding that generally there must be an acceptance of a parcel dedication; *Raymond v. City of Wichita*, 70 Kan. 523, 79 Pac. 323, on acceptance of dedication of land for street.

Cited in note in 22 L. R. A. (N. S.) 1114, on limited use of way by public as acceptance.

Same—Common law.—Cited in Board of Com'rs of Wyandotte County v. First Presbyterian Church, 30 Kan. 620, 1 Pac. 109, holding that a dedication may be validly made independently of statute.

Cited in note in 57 Am. St. Rep. 746, 759, 760, on highways by user.

14 KAN. 318, *RHEINHART v. STATE*

Requisites of petition on redelivery bond.—Cited in *O'Loughlin v. Carr*, 9 Kan. App. 818, 60 Pac. 478, holding that the petition in an action on a replevin redelivery bond need not allege that affidavit was filed in the replevin action before the order of delivery was issued.

Sufficiency of objection to evidence.—Cited in *Humphrey v. Collins*, 23 Kan. 549; *Long v. Kasebeer*, 28 Kan. 226; *State v. Taylor*, 36 Kan. 329, 13 Pac. 550—holding that ordinarily a general objection to evidence is not available.

Order of proof.—Cited in *Blake v. Powell*, 26 Kan. 320, holding that the order of proof is largely discretionary with a trial court.

Officers—De facto officers.—Cited in Commissioners of Saline County v. Anderson, 20 Kan. 298, 27 Am. Rep. 171, holding that a county clerk de jure has no right of action against county clerk de facto for salary paid the latter.

Same—Holding over.—Cited in *Salamanca Tp. v. Wilson*, 109 U. S. 627, 3 Sup. Ct. 344, 27 L. Ed. 1055, holding that service on a township treasurer was not invalidated by his previous removal from the township.

14 KAN. 324, CANNON v. KREIPE

Harmless error in striking defense.—Cited in *Clark v. Weir*, 37 Kan. 98, 14 Pac. 533, holding that exclusion of one of two defenses was harmless error, where defendant introduced all his evidence under a remaining defense.

14 KAN. 328, WATSON v. VOORHEES

Mortgages by homestead entrymen.—Cited in *Stark v. Morgan*, 73 Kan. 453, 85 Pac. 567, 6 L. R. A. (N. S.) 934, 9 Am. Cas. 930; *Fariss v. Deming Investment Co.*, 5 Okl. 496, 49 Pac. 926; *Stark v. Duvall*, 7 Okl. 213, 54 Pac. 453—holding that the federal statute (Act May 20, 1862, c. 75, § 4, 12 Stat. 398 [U. S. Comp. St. 1901, p. 1398]) which provides public lands entered as a homestead shall not be liable for debts contracted before issuance of patent did not prevent a mortgage lien from attaching.

Cited in note in 6 L. R. A. (N. S.) 935, on mortgage upon public lands executed by homesteader prior to patent or final proof.

Omission to plead defense.—Cited in *Peterson v. Crosier*, 29 Utah, 235, 81 Pac. 860, holding that defendant was not entitled to vacation of a default judgment for neglect of his counsel to interpose a defense of limitations; *Haseltine v. Gilliland*, 2 Kan. App. 456, holding that an unvacated judgment is conclusive as to the parties' rights.

14 KAN. 331, HIGBY v. AYRES

Authority of judge pro tem.—Cited in *Re Watson*, 30 Kan. 753, 1 Pac. 775, holding that parties were precluded from questioning a judge's decision on the ground that he was not the regular judge and had not been selected and sworn as a judge pro tem.; *Hegwer v. Kiff*, 31 Kan. 636, 3 Pac. 303, holding that application for a change of place of trial was not too late, when made when the case was called for trial by a pro tem. judge; *City of Wellington v. Wellington Tp.*, 46 Kan. 213, 26 Pac. 415; *Missouri Pac. R. Co. v. Preston*, 63 Kan. 819, 66 Pac. 1050 (concurring opinion)—holding that the authority of a judge pro tem. could not be questioned on appeal, where the parties consented to trial before him.

De facto officer.—Cited in *Commissioners of Saline County v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171, holding that county commissioners were not liable to a county clerk de jure for salary paid a county clerk de facto.

Necessity for reply.—Cited in *Baker v. L. C. Van Ness & Co.*, 25 Okl. 34, 105 Pac. 660, holding that in an action by a partnership a reply was necessary, where defendant pleaded that the firm had not complied with the statutes governing use of fictitious names.

14 KAN. 342, BRANDON v. BRANDON

Divorce—Effect of decree.—Cited in *Re Johnston*, 54 Kan. 726, 39 Pac. 725, holding that divorce and adjustment of property interests are cotemporaneous.

Cited in note in 65 Am. Dec. 356, on effect of valid decree of divorce.

Same—Alimony as lien on land.—Cited in *Blankenship v. Blankenship*, 19 Kan. 159; *Johnson v. Johnson*, 66 Kan. 546, 72 Pac. 267—holding that alimony may be decreed a lien against the husband's land.

Cited in note in 102 Am. St. Rep. 708, on power of courts to create and enforce liens to secure payment of alimony.

Same—Disposition of homestead.—Cited in *Leach v. Leach*, 46 Kan. 724, 27 Pac. 131; *Goldsborough v. Hewitt*, 23 Okl. 66, 99 Pac. 907, 138 Am. St. Rep. 795—on right to assign homestead to either party in a divorce action.

Cited in note in 23 L. R. A. 240, on effect of divorce on homestead rights.

Same—Custody of children.—Cited in note in 34 Am. Rep. 700, on custody of children.

Same—Drunkenness.—Cited in note in 34 L. R. A. 454, on drunkenness as affecting divorce.

14 KAN. 347, **WEAVER v. GARDNER**

Sufficiency of indorsement on summons.—Cited in *Knowles v. Armstrong*, 15 Kan. 371; *Beverly v. Fairchild*, 47 Kan. 289, 27 Pac. 985; *Sparks v. Beyer*, 5 Kan. App. 721, 46 Pac. 980; *Horton v. Haines*, 23 Okl. 878, 102 Pac. 121—holding that indorsement on summons authorized mortgage foreclosure; *Abbey v. W. B. Grimes Dry Goods Co.*, 44 Kan. 415, 24 Pac. 426, holding that indorsement of summons need not be signed by the clerk and attested with the seal of the court.

Stare decisis.—Cited in note in 73 Am. St. Rep. 101, on limitations on doctrine of stare decisis.

14 KAN. 349, **MISSOURI, K. & T. RY. CO. v. DAVIDSON**

Railroads—Setting out fires.—Cited in *Kansas Pac. R. Co. v. Brady*, 17 Kan. 380; *Leavenworth, L. & G. R. Co. v. Cook*, 18 Kan. 261; *Hunt v. Haines*, 25 Kan. 210; *Johnston v. Marriage*, 74 Kan. 208, 86 Pac. 461, 87 Pac. 74—on liability of railway company for purely accidental fires; *Atchison, T. & S. F. R. Co. v. Dennis*, 38 Kan. 424, 17 Pac. 153; *Interstate Galloway Cattle Co. v. Kline*, 51 Kan. 23, 32 Pac. 628—on negligence in permitting dry grass, etc., to accumulate on a railway right of way.

Cited in note in 15 L. R. A. 41, on presumption of negligence from occurrence of accidents.

14 KAN. 352, **SMITH v. BURKHALTER**

Review on appeal from justice court.—Cited in *Stuttle v. Bowers*, 31 Kan. 432, 2 Pac. 806, in support of counsel's contention that the district court did not err in accepting a transcript on appeal as being conclusive as to what was done in justice court.

14 KAN. 355, **BAWDEN v. STEWART**

Vacancies in district judgeships.—Cited in *Wendorff v. Dill*, 83 Kan. 782, 112 Pac. 588, holding that an election of district judges constitutes a "regular" election under the constitutional provision for filling vacancies.

14 KAN. 366, **RUSSELL v. SMITH**

Pleading—Defects—Waiver.—Cited in *Wright v. Bacheller*, 16 Kan. 259; *Netcott v. Porter*, 19 Kan. 131—holding that replies may sometimes be waived; *Kansas Pac. R. Co. v. Taylor*, 17 Kan. 566, on waiver of pleading of essential fact; *Street v. Morgan*, 64 Kan. 85, 67 Pac. 448, holding that argumentative denial did not enlarge the issues made by a general denial; *Colean Mfg. Co. v. Johnson*, 82 Kan. 655, 109 Pac. 408, 20 Ann. Cas. 296, on necessity for reply.

Replevin—Preservation of property.—Cited in note in 69 L. R. A. 288, on duty to preserve and return property replevined.

14 KAN. 375, STATE v. WALTER

Cited in *City of Olathe v. Adams*, 15 Kan. 391.

Venue sufficiently stated in indictment.—Cited in *State v. Bybee*, 17 Kan. 462; *Flohr v. Territory*, 14 Okl. 477, 78 Pac. 565, holding that an indictment sufficiently charged the venue of the offense.

14 KAN. 377, BROWN v. JOHNSON

Continuance.—Cited in *Conley v. Fleming*, 14 Kan. 381; *State v. Bartley*, 48 Kan. 421, 29 Pac. 701—holding that application for continuance on ground of absent testimony was properly refused.

Cited in note in 74 Am. Dec. 148, on continuance of civil causes.

Error, writ of—Review dependent on record.—Cited in *Merket v. Smith*, 33 Kan. 66, 5 Pac. 394, on right to review merits where all the evidence is not in the record; *Hill v. First Nat. Bank*, 42 Kan. 364, 22 Pac. 324; *State ex rel. Bradford v. Board of Com'rs of Harper County*, 43 Kan. 195, 23 Pac. 101; *Newby v. Myers*, 44 Kan. 477, 24 Pac. 971; *Frazier v. Weaver*, 67 Kan. 829, 72 Pac. 792; *Southwest Missouri Electric Ry. Co. v. Fry*, 71 Kan. 736, 81 Pac. 462; *Streeter v. Westenhaver*, 1 Kan. App. 730, 41 Pac. 992; *Lilly v. Russell & Co.*, 4 Okl. 94, 44 Pac. 212; *Board of Com'rs of Washita County v. Hubble*, 8 Okl. 169, 56 Pac. 1058; *Board of Com'rs of D. County v. Wright*, 8 Okl. 190, 57 Pac. 203—as to when record should show that it contains all the evidence.

Effect of signature to case-made.—Cited in *Eddy v. Weaver*, 37 Kan. 540, 15 Pac. 492; *Wilson v. Willey*, 1 Kan. App. 427, 42 Pac. 1092; *Mutual Benefit Life Ins. Co. v. Sackett*, 5 Kan. App. 660, 48 Pac. 994; *Board of Com'rs of Day County v. Hubble*, 8 Okl. 209, 57 Pac. 163; *Wade v. Gould*, 8 Okl. 690, 59 Pac. 11; *Martin v. Gassert*, 17 Okl. 177, 87 Pac. 586—on effect of signature to case-made.

14 KAN. 381, CONLEY v. FLEMING

Preliminary injunction as discretionary remedy.—Cited in *Railroad Commission of Alabama v. Central of Georgia Ry. Co.*, 170 Fed. 225, 95 C. C. A. 117; *Olmstead v. Koester*, 14 Kan. 463; *Davis v. Stark*, 30 Kan. 565, 2 Pac. 637; *Johnson v. Board of Com'rs of Wilson County*, 34 Kan. 670, 9 Pac. 384; *Mead v. Anderson*, 40 Kan. 203, 19 Pac. 708; *Van Natta-Lynds Drug Co. v. Gerson*, 43 Kan. 660, 23 Pac. 1071—holding that granting of a preliminary injunction is largely discretionary.

Same—Evidence on application.—Cited in *Emmons v. Gille*, 51 Kan. 178, 32 Pac. 916, holding that probable results of final hearing and effects of temporary injunction may be considered on application therefor.

Location of county seats.—Cited in *State ex rel. Kellogg v. Board of Com'rs of Atchison County*, 44 Kan. 186, 24 Pac. 87.

Distinguished in *Allen v. Reed*, 10 Okl. 105, 60 Pac. 782, 63 Pac. 867—holding that a county seat need not be located inside the limits of a city or other municipal corporation.

Elections—Irregularities.—Cited in note in 90 Am. St. Rep. 66, on irregularities avoiding elections.

14 KAN. 387, SWENSON v. MOLINE PLOW CO.

Misjoinder of parties and causes of action.—Cited in *Palmer v. Waddell*, 22 Kan. 352, holding that plaintiffs could not recover in a single action damages to their separate rights; *Bowman v. Gerny*, 23 Kan. 306, holding that there was no misjoinder of parties in a suit to cancel a note and mortgage; *Jeffers v. Forbes*, 28 Kan. 174, holding that separate vendors cannot unite in a single bill against a common purchaser; *Ambrose v. Parrott*, 28 Kan. 693, holding that a petition on notes stated several causes of action; *McGrath v. City of Newton*,

29 Kan. 304, holding that only such parties as are united in interest should be joined as plaintiffs; Durein v. Pontious, 34 Kan. 353, 8 Pac. 428, holding that there was a misjoinder of plaintiffs in an action for damages caused by selling plaintiffs' father intoxicating liquors; Leavenworth N. & S. R. Co. v. Wilkins, 45 Kan. 674, 26 Pac. 18, holding that there was misjoinder in an action against a railway company for injury to land; Hurd v. Simpson, 47 Kan. 372, 27 Pac. 961, holding that several persons cannot maintain a joint action on separate causes of action; Henley v. Wheatley, 68 Kan. 271, 74 Pac. 1125, holding that a separate action cannot be maintained on a promise to pay contained in a mortgage; State Ins. Co. of Des Moines, Iowa, v. Belford, 2 Kan. App. 280, 42 Pac. 409, holding that united causes of action must affect all the parties; Stewart v. Templeton, 55 Or. 364, 104 Pac. 978, 106 Pac. 640, holding that there was no misjoinder of plaintiffs in an action on notes.

Cited in note in 37 L. R. A. 742, on proceedings to enforce mortgage for part of mortgage debt.

Mortgage as incident of note.—Burhans v. Hutcheson, 25 Kan. 625, 37 Am. Rep. 274, holding that the owner of notes is the owner of a mortgage securing them.

Effect of assignment or foreclosure of mortgage.—Perkins v. Matteson, 40 Kan. 165, 19 Pac. 633, holding that a mortgagee was liable for the statutory penalty for failing to release the mortgage after unrecorded assignment; Dumont v. Taylor, 67 Kan. 727, 74 Pac. 234, holding that after mortgage foreclosure suit cannot be maintained on debt secured.

14 KAN. 390, JOHNSTON v. WINFIELD TOWN CO.

Right to vary consideration recited in deed.—Cited in Ruggles v. Clare, 45 Kan. 662, 26 Pac. 25, holding that in the absence of fraud the consideration expressed in a deed cannot be contradicted or varied, to invalidate the deed.

Cited in note in 20 L. R. A. 109, on parol evidence as to consideration of deed.

Delivery of deed.—Cited in Rohr v. Alexander, 57 Kan. 381, 46 Pac. 699, holding that, while delivery is essential to a conveyance, possession by the grantee, affords prima facie evidence thereof.

14 KAN. 398, CLARK v. SPENCER, 19 AM. REP. 96

Pleading.—Cited in Wagstaff v. Challiss, 29 Kan. 505, holding that defendant in a case originating in justice court is entitled to prove a set-off or counterclaim without pleading.

Same—Proof admissible under general denial.—Cited in Barber Asphalt Pav. Co. v. Botsford, 56 Kan. 532, 44 Pac. 3, holding that new defensive matter is not admissible under a general denial; Curtis v. Schmehr, 69 Kan. 124, 76 Pac. 434; Columbia Nat. Bank v. Western Iron & Steel Co., 14 Wash. 162, 44 Pac. 145—on right to prove payment under general denial.

Same—Amended or supplemental pleadings.—Cited in City of Burlingame v. Kansas Valley Nat. Bank, 17 Kan. 407; Simpson v. Vose, 31 Kan. 227, 1 Pac. 601; Central Branch Union Pac. R. Co. v. Andrews, 41 Kan. 370, 21 Pac. 276; Dreilling v. First Nat. Bank, 43 Kan. 197, 23 Pac. 94, 19 Am. St. Rep. 126; Austin v. Jones, 47 Kan. 565, 28 Pac. 621; Kuchler v. Weaver, 23 Okl. 420, 100 Pac. 915, 18 Ann. Cas. 462—on power of court respecting filing of amended or supplemental pleadings.

Contracts—Failure of consideration.—Cited in note in 117 Am. St. Rep. 524, on contracts, consideration for which has partly failed, or is partly illegal.

14 KAN. 408, BABCOCK v. DEFORD

Parol evidence affecting writings.—Cited in Weeks v. Medler, 20 Kan. 57; Schoen v. Sunderland, 39 Kan. 758, 18 Pac. 913; St. Louis Wire-Mill Co. v. Con-

solidated Barb-Wire Co., 46 Kan. 773, 27 Pac. 118; Getto v. Binkert, 55 Kan. 617, 40 Pac. 925; Heskett v. Border Queen Mill & Elevator Co., 81 Kan. 350, 105 Pac. 432—holding that a cotemporary, independent, parol contract could be shown; Dodge v. Oatis, 27 Kan. 762, holding that the maker of a note could show certain extraneous matters as a defense thereto; German Fire Ins. Co. v. Thompson, 43 Kan. 567, 23 Pac. 608; Evans v. McElfresh, 85 Kan. 389, 116 Pac. 612; Dempster Mill Mfg. Co. v. Fitzwater, 6 Kan. App. 24, 40 Pac. 624—holding that incomplete written contract may be supplemented by parol evidence.

Distinguished in *Thisler v. Mackey*, 65 Kan. 464, 70 Pac. 334, holding that oral evidence of a contemporaneous agreement to surrender a note without payment on rescission of the contract under which it was given was inadmissible.

Agents—Acts and representations.—Cited in *McNamara v. Culver*, 22 Kan. 661; *Victor Sewing Mach. Co. v. Rhelnschild*, 25 Kan. 534—holding that there could be no recovery on an order for goods which were returned as not complying with the salesman's representations; *Banks v. Everest*, 35 Kan. 687, 12 Pac. 141, holding that an agent's acts in contracting to sell law books bound his principal; *Raynor v. Bryant*, 43 Kan. 492, 23 Pac. 601; *Kansas Farmers' Fire Ins. Co. v. Saindon*, 52 Kan. 486, 35 Pac. 15, 39 Am. St. Rep. 356—holding that an insurance company was estopped to deny agency of a solicitor.

Same—Authority of salesman.—Cited in *Ludlow-Saylor Wire Co. v. Fribley Hardware & Implement Co.*, 67 Kan. 710, 74 Pac. 287; *Aultman Threshing & Engine Co. v. Knoll*, 71 Kan. 109, 79 Pac. 1074; *Wells v. Hickox*, 1 Kan. App. 485, 40 Pac. 821; *Smith v. Droubay*, 20 Utah, 443, 58 Pac. 1112—on authority of traveling salesman.

14 KAN 412, LONG v. CULP

Taxation—Exemptions.—Cited in *Clearwater Timber Co. v. Nez Perce County*, 155 Fed. 633, holding that Idaho property exempt from taxation on the second Monday in January is exempt for the current year; *Doty v. Bassett*, 44 Kan. 754, 26 Pac. 51, holding that public lands not entered on or before March 1st were not taxable for the current year.

Cited in note in 132 Am. St. Rep. 337, on exemption from taxation or assessment of lands owned by governmental bodies, or in which they have an interest.

Statutes—Construction.—Cited in *Watson v. Keystone Iron-Works Co.*, 70 Kan. 43, 74 Kan. 269 (dissenting opinion), on construction of statutes.

Same—Conflict between general and special acts.—Cited in *Magone v. King*, 51 Fed. 525, 2 C. C. A. 363; *United States v. Jackson*, 143 Fed. 783, 75 C. C. A. 41; *Jackson v. Chicago, R. I. & P. Ry. Co.*, 178 Fed. 432, 102 C. C. A. 159; *State v. Wilson*, 73 Kan. 334, 80 Pac. 639, 84 Pac. 737, 117 Am. St. Rep. 479; *Lowndes v. Huntington*, 153 U. S. 1, 14 Sup. Ct. 758, 38 L. Ed. 615—holding that a specific statute controls a general one on the same subject.

14 KAN. 416, CUNNINGHAM, IN RE

Judicial control over Governor.—Cited in *Martin v. Ingham*, 38 Kan. 641, 17 Pac. 162, on control of courts over Governor's acts.

Cited in note in 6 L. R. A. (N. S.) 755, on mandamus to Governor.

14 KAN. 418, STATE EX REL. GRIFFITH v. OSAWKEE TP., 19 AM. REP. 99

Right of state to aid individuals.—Cited in *Re Madera Irr. Dist.*, 92 Cal. 298, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; *Dodge v. Mission Tp., Shawnee County, Kan.*, 107 Fed. 827, 46 C. C. A. 661, 54 L. R. A. 242; *First State Bank of Holstein, Neb., v. Shallenberger*, 172 Fed. 999; *Larabee v. Dolley*, 175 Fed. 365; *Central Branch U. P. R. Co. v. Smith*, 23 Kan. 745—on validity of bonds in aid of private enterprises; *In re Relief Bills*, 21 Colo.

62, 39 Pac. 1089, holding that state cannot extend charitable or industrial aid to persons not under the state's control; *Blain v. Riley County Agricultural Society*, 21 Kan. 558, holding that mandamus did not lie to compel a county treasurer to make a payment to a county agricultural society.

Distinguished in *Lake Koen Navigation, Reservoir & Irrigation Co. v. Klein*, 63 Kan. 484, 65 Pac. 684, on the right of private corporations to exercise the power of eminent domain.

Cited in note in 7 L. R. A. (N. S.) 1197, on validity of statute providing for assistance of individual members of certain classes of unfortunate or afflicted persons; in 14 L. R. A. 475, on public purposes for which money may be appropriated or raised by taxation; in 27 L. R. A. (N. S.) 1079, on right to use public funds to relieve persons not entirely without means.

14 KAN. 430, *McCOY v. HAZLETT*

Payment by note or check.—Cited in *Shepard & Playford v. John G. Allen & Son*, 16 Kan. 182; *Medberry, Yetter & Co. v. Soper, Brainard & Co.*, 17 Kan. 369—holding that a note may be given in extinguishment of a pre-existing debt; *Topeka Capital Co. v. Merriam*, 60 Kan. 397, 56 Pac. 757; *Webb v. National Bank of the Republic*, 67 Kan. 62, 72 Pac. 520—holding that whether notes were intended to extinguish or supplement existing indebtedness was to be determined from the evidence; *Mullins v. Brown*, 32 Kan. 312, 4 Pac. 305, holding that a check to the drawer's agent could not be evidence of payment to another; *Bradley, Wheeler & Co. v. Harwi*, 43 Kan. 314, 23 Pac. 566, holding that a note does not prima facie discharge the debt for which it is given.

Cited in note in 35 L. R. A. (N. S.) 7, on payment by commercial paper.

14 KAN. 432, *SHELLABARGER v. BISHOP*

Right to mechanic's lien.—Cited in *Delahay v. Goldie*, 17 Kan. 263, holding that a lumber dealer is entitled to a lien for materials furnished a contractor; *Couroy v. Perry*, 26 Kan. 472, on time for filing mechanic's lien.

Cited in note in 20 L. R. A. 565, on payment to contractors or subcontractors as affecting liens of subordinate claimants.

14 KAN. 435, *CLARK v. LIBBEY*

Indian lands—Alienation.—Cited in *Libbey v. Clark*, 118 U. S. 260, 6 Sup. Ct. 1045, 30 L. Ed. 133, holding that lands were inalienable for five years after ratification of a treaty; *Laughton v. Nadeau*, 75 Fed. 789, holding that an Indian boy, whose patent was obtained by false representations, could not alienate his land; *Clark v. Akers*, 16 Kan. 166; *Clark v. Libbey*, 17 Kan. 634—holding that a deed violating an Indian treaty was void; *Campbell v. Paramore*, 17 Kan. 639, on removal of restrictions upon Indian allottee; *Commissioners of Franklin County v. Pennock*, 18 Kan. 579, holding that certain Indian lands were taxable and alienable on issuance of patents; *Baldwin v. Squires*, 20 Kan. 280, holding that a conveyance made by an allottee was valid.

14 KAN. 439, *HORVILLE v. NORTHRUP*

14 KAN. 443, *SHEPARD v. HAAS*

Extrinsic evidence to explain contract.—Cited in *St. Louis, L. & W. R. Co. v. Maddox*, 18 Kan. 546; *Evans v. McElfresh*, 85 Kan. 389, 116 Pac. 612—holding that extrinsic evidence was admissible to explain incomplete and subordinate agreement.

Sufficiency of assignment of error.—Cited in *Richardson v. Mackay*, 4 Okl. 328, 46 Pac. 546, holding that an assignment that the trial court erred in overruling motion for new trial was sufficient to authorize review of certain objections.

14 KAN. 446, NEITZEL v. CITY OF CONCORDIA

Cited in *City of Salina v. Seitz*, 18 Kan. 143; *City of Topeka v. Boutwell*, 53 Kan. 20, 35 Pac. 819, 27 L. R. A. 593.

Nature of prosecution.—Cited in *City of Olathe v. Adams*, 15 Kan. 391; *Mariner v. Mackey*, 25 Kan. 669; *In re Rolfs*, 30 Kan. 758, 1 Pac. 523—holding that a prosecution for maintaining a public nuisance is a criminal prosecution; *In re Jahn*, 55 Kan. 694, 41 Pac. 956, holding that a prosecution for violation of an ordinance was in the nature of a criminal action.

Cited in note in 33 L. R. A. 39, on proceedings for violations of ordinances as prosecutions for crime.

Remedy for review of conviction.—Cited in *City of Burlington v. James*, 17 Kan. 221; *West v. City of Columbus*, 20 Kan. 683; *Peterson v. City of Ottawa*, 41 Kan. 298, 21 Pac. 263—holding that appeal, and not error, is the proper remedy to review a conviction for violating an ordinance; *State v. Ashmore*, 19 Kan. 544, holding that there is no jurisdiction of an appeal without notice of appeal.

14 KAN. 449, CURTIS v. BUCKLEY

Cited in *Goodrich v. Board of Com'rs of Atchison County*, 47 Kan. 355, 27 Pac. 1006, 18 L. R. A. 113.

Equitable liens for purchase money.—Cited in *Oswalt v. Hallowell*, 15 Kan. 154, on purchase-money liens; *Kuhn v. Freeman*, 15 Kan. 423, holding that an action could be brought on purchase-money notes, to subject the land to payment thereof; *Seaman v. Huffaker*, 21 Kan. 254, holding that an equitable owner of land can mortgage it; *Foster Lumber Co. v. Harlan County Bank*, 71 Kan. 158, 80 Pac. 49, 114 Am. St. Rep. 470, 6 Ann. Cas. 44, holding that an equitable lien for purchase money was not within the statute of frauds.

Cited in note in 4 Am. St. Rep. 703, on what constitutes an equitable mortgage.

Proof of protest of note.—Cited in *C. C. Thompson & Walkup Co. v. Appleby*, 5 Kan. App. 680, 48 Pac. 933, holding that proof as to protest of a note is immaterial, in the absence of proof that notice of dishonor was properly served.

Pleading—Different counts.—Cited in note in 72 Am. Dec. 589 (par. 2), on stating same cause of action in different counts.

14 KAN. 458, SANDERSON v. STREETER

Validity of conveyance to wife.—Cited in *Horder v. Horder*, 23 Kan. 391, 33 Am. Rep. 167, holding that a voluntary deed to a wife would be held valid as against a nondependent heir of the husband.

Cited in note in 90 Am. St. Rep. 507, on attacks by creditors on conveyances made by husbands to wives.

14 KAN. 463, OLMSTEAD v. KOESTER

Verified petition as affidavit.—Cited in *Howard v. Eddy*, 56 Kan. 498, 43 Pac. 1183, holding that a verified petition may be used as an affidavit on an application for a temporary injunction; *State v. Missouri & K. Telephone Co.*, 77 Kan. 774, 95 Pac. 391, on construction of a verified petition used as affidavit.

Discretion in granting temporary injunction.—Cited in *Santa Cruz Fair Bldg. Ass'n v. Grant*, 104 Cal. 306, 37 Pac. 1034; *Johnson v. Board of Com'rs of Wilson County*, 34 Kan. 670, 9 Pac. 384; *Van Natta-Lynds Drug Co. v. Gerson*, 43 Kan. 600, 23 Pac. 1071; *Kemper v. Campbell*, 45 Kan. 529, 26 Pac. 53; *Emmons v. Gille*, 51 Kan. 178, 32 Pac. 916—holding that a temporary injunction is a discretionary remedy.

14 KAN. 469, PACIFIC R. CO. v. BROWN

Error, writ of—Sufficiency of record.—Cited in *Pfeiffer v. Union Evangelical Church*, 20 Kan. 100; *Bard v. Elston*, 31 Kan. 274, 1 Pac. 565; *Winston v.*

Burnell, 44 Kan. 367, 24 Pac. 477, 21 Am. St. Rep. 289; *City of Abilene v. Wright*, 4 Kan. App. 708, 46 Pac. 715—holding that insufficiency of record prevented review of rulings.

Refusal of instructions.—Cited in *State v. O'Laughlin*, 29 Kan. 20, holding that refusal to repeat instruction is not error.

Railroad company's duty toward trespassing animals.—Cited in *Atchison, T. & S. F. R. Co. v. Davis*, 31 Kan. 645, 3 Pac. 301; *Atchison, T. & S. F. R. Co. v. Davis*, 26 Okl. 359, 109 Pac. 551—on care required of railroad companies toward animals on track.

14 KAN. 474, CHALLISS v. HEKELNKAEMPER

Rights under invalid tax deed.—Cited in *Coe v. Farwell*, 24 Kan. 566; *McKeen v. Haxtun*, 25 Kan. 698; *Wagner v. Underhill*, 71 Kan. 637, 81 Pac. 177; *Lewis Academy v. Wilkinson*, 79 Kan. 557, 100 Pac. 510—holding that a holder of an invalid tax deed could not be dispossessed until reimbursed; *Smith v. Smith*, 15 Kan. 290, on equitable rule in granting relief against taxes.

Description of lands in tax proceedings.—Cited in *Bruce v. McBee*, 23 Kan. 379, holding that in tax proceedings, lands should be described as platted.

14 KAN. 478, CASEY v. KILGORE

14 KAN. 484, ROBINSON v. MELVIN

Conclusiveness of findings.—Cited in *Keith v. Stetter*, 25 Kan. 100; *Macfarland v. Buck*, 27 Kan. 783; *First Nat. Bank v. McIntosh & Peters Live Stock & Commission Co.*, 72 Kan. 603, 84 Pac. 535; *Belknap Hardware Mfg. Co. v. Sleeth*, 77 Kan. 164, 93 Pac. 580; *Newell v. Whitwell*, 16 Mont. 243, 40 Pac. 866—holding that a trial judge's findings on depositions, etc., is persuasive, but not conclusive.

Harmless error in refusing change of venue.—Cited in *Jones v. Williamsburg City Fire Ins. Co.*, 83 Kan. 682, 112 Pac. 826, holding that error in refusing a change of venue was harmless.

Attachment—Dissolution.—Cited in note in 123 Am. St. Rep. 1059, on proceedings to dissolve attachments.

14 KAN. 489, LIGHT v. STATE EX REL. DONELSON

County seat elections.—Cited in *Re County Seat of Linn County*, 15 Kan. 500, holding that in a county seat election contest the Supreme Court could not inquire into the sufficiency of the signatures on a petition; *Brown v. State ex rel. Ward*, 44 Kan. 291, 24 Pac. 345, on right to call second election.

Distinguished in *State v. Board of Com'rs of Kearny County*, 42 Kan. 739, 22 Pac. 735, on conclusiveness of canvass.

Cited in note in 90 Am. St. Rep. 69, on irregularities avoiding elections.

14 KAN. 494, ANTHONY v. HERMAN

Contracts for benefit of third person.—Cited in *Malone v. Crescent City Mill & Transportation Co.*, 77 Cal. 38, 18 Pac. 858; *Grant v. Pendery*, 15 Kan. 236; *Harrison v. Simpson*, 17 Kan. 508; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Center v. McQuesten*, 18 Kan. 476; *Kansas Pac. R. Co. v. Hopkins*, 18 Kan. 494; *Floyd v. Ort*, 20 Kan. 162; *Alliance Mut. Life Assur. Society of United States v. Welch*, 26 Kan. 632; *Brenner v. Luth*, 28 Kan. 581; *Strong v. Marcy*, 33 Kan. 109, 5 Pac. 366; *Burton v. Larkin*, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541; *Rickman v. Miller*, 39 Kan. 362, 18 Pac. 304; *Plano Mfg. Co. v. Burrows*, 40 Kan. 361, 19 Pac. 809; *Searing v. Benton*, 41 Kan. 758, 21 Pac. 800; *Rouse v. Bartholomew*, 51 Kan. 425, 32 Pac. 1088; *Hardesty v. Cox*, 53 Kan. 618, 36 Pac. 985; *Russell v. Western Union Telegraph Co.*, 57 Kan. 230, 45

Pac. 598; *Stewart v. Rogers*, 71 Kan. 53, 80 Pac. 58; *Ryan v. Phillips*, 8 Kan. App. 704, 44 Pac. 909; *Chanute Nat. Bank v. Crowell*, 6 Kan. App. 533, 51 Pac. 575; *Bank of Garnett v. Cramer*, 7 Kan. App. 461, 53 Pac. 534; *American Surety Co. of New York v. Thorn-Hallwell Cement Co.*, 9 Kan. App. 8, 57 Pac. 237—on one's right to sue on a contract made by a third person for his benefit.

Cited in note in 78 Am. Dec. 76, on personal liability of grantee to pay off prior mortgage; in 25 L. R. A. 267; 71 Am. St. Rep. 184—on right of third person to sue on contract made for his benefit; in 48 Am. Dec. 739, on promise to answer for debt of another.

14 KAN. 498, *RICE v. NAGLE*

Injuries by trespassing animals.—Cited in note in 49 Am. Dec. 255, on liability for injuries by trespassing animals.

Same—Fences.—Cited in note in 22 L. R. A. 105, on sufficiency of fences.

14 KAN. 499, *TURNER v. CRAWFORD*

Cited in *Gerson v. Hanson*, 34 Kan. 590, 9 Pac. 230.

Right to set off claims.—Cited in *Gardner v. Risher*, 35 Kan. 93, 10 Pac. 584, holding that set-off cannot be defeated by assignment; *St. Louis, Ft. S. & W. R. Co. v. Chenault*, 36 Kan. 51, 12 Pac. 303, holding that a corporate treasurer, sued by the corporation, could set off claims against it; *Kansas City, Ft. S. & M. R. Co. v. Murray*, 57 Kan. 697, 47 Pac. 835, on right to offset one obligation against another; *Hillis v. First Nat. Bank*, 54 Kan. 421, 38 Pac. 565, holding that suit lies to set one judgment off against another; *Schuler v. Collins*, 63 Kan. 372, 65 Pac. 662, holding that right depends upon equitable consideration.

Right to sue on judgment.—Cited in *Dempsey v. Oswego Tp.*, 51 Fed. 97, 2 C. C. A. 110, holding that suit on judgments was barred; *Lockard v. Board of Com'rs of Decatur County*, 10 Kan. App. 316, 62 Pac. 547, on right to sue on domestic judgment.

14 KAN. 504, *ST. JOSEPH & D. C. R. CO. v. CASEY*

Attachment discharged by appeal.—Cited in *Roll, Thayer, Williams & Co. v. Murray*, 35 Kan. 171, 10 Pac. 472; *Becker v. Steele*, 41 Kan. 173, 21 Pac. 169—holding that an attachment in justice court was discharged by defendant's appeal.

14 KAN. 509, *NELSON v. BECKER*

Validity of premature proceedings.—Cited in *Gross v. Funk*, 20 Kan. 655, holding that a party cannot ignore notice to settle a case-made, though the time fixed be premature; *Gross v. Knox*, 32 Kan. 725, 5 Pac. 32, holding that proceedings under a premature order of sale were voidable, and not void; *Christie v. Carter*, 56 Kan. 166, 42 Pac. 708, holding that a proceeding in error should be dismissed for want of notice of the settlement of the case-made.

Defects in process.—Cited in note in 61 Am. St. Rep. 488, on effect of defects in service of process on jurisdiction; in 85 Am. Dec. 530, on validity of judgment on defective or imperfect service.

14 KAN. 512, *KANSAS PAC. RY. CO. v. SALMON*

Amendment of pleadings.—Distinguished in *Atchison, T. & S. F. R. Co. v. Schroeder*, 56 Kan. 731, 44 Pac. 1093, holding that a barred cause of action cannot be engrafted upon a cause not barred.

Cited in *School District No. 73, Marion County, v. Dudley*, 28 Kan. 160, holding that it was not reversible error to permit amendment of the bill of particulars in an action on a school district warrant; *Taylor v. Atchison, T. & S. F.*

R. Co., 81 Kan. 282, 68 Pac. 601; *Mulhall v. Mulhall*, 3 Okl. 204, 41 Pac. 109—holding that amendment of a petition was properly allowed as against a plea of limitations.

Liability of employer for injury to employé.—Cited in *Kansas Pac. R. Co. v. Little*, 19 Kan. 267; *Union Pac. R. Co. v. Young*, 19 Kan. 488; *Hannibal & St. J. R. Co. v. Fox*, 31 Kan. 586, 3 Pac. 320; *Missouri Pac. R. Co. v. Perego*, 36 Kan. 424, 14 Pac. 7; *Union Pac. R. Co. v. Fray*, 43 Kan. 750, 23 Pac. 1039; *Atchison & E. Bridge Co. v. Miller*, 71 Kan. 13, 80 Pac. 18, 1 L. R. A. (N. S.) 682—on liability of railroad company for injury to employé.

Same—Fellow servants.—Cited in note in 75 Am. St. Rep. 631, on who is a vice principal; in 25 L. R. A. 711; 48 L. R. A. 375—on liability of master for injuries to servant by incompetency of fellow servant; in 61 L. R. A. 610, on vice principalship considered with reference to superior rank of negligent servant; in 54 L. R. A. 38, on vice principalship as determined with reference to character of act causing injury.

Conclusiveness of verdict.—Cited in *Kansas Pac. R. Co. v. Kunkel*, 17 Kan. 145; *Tripp & Moor Boot & Shoe Co. v. Martin*, 45 Kan. 765, 26 Pac. 424—holding that verdict sustained by evidence will not be disturbed on appeal.

Evidence—Proof as to character.—Cited in note in 14 L. R. A. (N. S.) 758, 759, on evidence of specific instances to prove character.

14 KAN. 529, *SIMCOCK v. FIRST NAT. BANK OF EMPORIA*

Judgment—Defective service of process.—Cited in *Lieberman v. Douglass*, 62 Kan. 784, 64 Pac. 590, holding that attack on constructive service was direct and not collateral; *Havens v. Drake*, 43 Kan. 484, 23 Pac. 621, holding that judgment in partition was not void because of defective notice.

Same—Vacation on motion.—Cited in note in 60 Am. St. Rep. 645, on vacation of judgments on motion when not specially authorized by statute.

What constitutes special appearance.—Cited in *Green v. Green*, 42 Kan. 654, 22 Pac. 730, 16 Am. St. Rep. 510; *Downing v. W. J. Gow & Bros. Mtg. Inv. Co.*, 53 Kan. 246, 36 Pac. 327—on what constitutes special appearance.

14 KAN. 532, *COMMISSIONERS OF CHASE COUNTY v. SHIPMAN*

Taxation of real estate.—Cited in note in 15 L. R. A. 297, on what constitutes real estate for purposes of taxation.

14 KAN. 538, *STATE v. WHITE*

Information—Sufficiency—Language of statute.—Cited in *State v. Miller*, 25 Kan. 699, holding that an information for assault with intent to kill was not fatally defective; *State v. Fooks*, 29 Kan. 425; *State v. Foster*, 30 Kan. 365, 2 Pac. 628; *State v. Beverlin*, 30 Kan. 611, 2 Pac. 630; *State v. Morrison*, 46 Kan. 679, 27 Pac. 133; *State v. Tucker*, 72 Kan. 481, 84 Pac. 126; *City of Wellsville v. Seyler*, 80 Kan. 798, 102 Pac. 52—holding that an information that states the elements of an offense substantially in the statutory language is sufficient; *State v. Hart*, 33 Kan. 218, 6 Pac. 288; *State v. McGaffin*, 36 Kan. 315, 13 Pac. 560—holding that words equivalent to statutory language are sufficient.

Same—"Felonious intent."—Cited in *State v. Douglas*, 53 Kan. 669, 37 Pac. 172, defining "felonious intent."

Same—Necessity for charging malice.—Cited in *State v. Dixon*, 30 Kan. 650, 103 Pac. 130, holding that an information for misconduct of a city marshal in office was not insufficient for omitting the word "malicious."

Intoxication as defense.—Cited in *Zibold v. Reneer*, 73 Kan. 312, 85 Pac. 290, holding that, for one to be too drunk to intend to kill, he must be too drunk

to intend to shoot; *State v. Rumble*, 81 Kan. 16, 105 Pac. 1, 25 L. R. A. (N. S.) 376, holding that intoxication is not conclusive as to absence of intent to kill.

Cited in note in 38 L. R. A. 463, on what intoxication will excuse crime.

14 KAN. 542, *RUMSEY v. SCHMITZ*

Ratification of agent's acts.—Cited in *Adams v. Smith*, 19 Nev. 259, 9 Pac. 337, 10 Pac. 353, holding that whether undisputed facts show ratification of an agent's acts is a question of law.

Review of evidence.—Cited in *Durham v. Carbon Coal & Mining Co.*, 22 Kan. 232, holding that the Supreme Court can accept the testimony as true, where it is not conflicting.

14 KAN. 548, *COOK v. OTTAWA UNIVERSITY*

Right to reopen case.—Cited in *Mason v. Ryms*, 26 Kan. 464; *Oberlander v. Confrey*, 38 Kan. 462, 17 Pac. 88; *State v. Sowders*, 42 Kan. 312, 22 Pac. 425; *German Fire Ins. Co. v. Thompson*, 43 Kan. 567, 23 Pac. 608; *Farmers' & Merchants' Bank of Cawker City v. Bank of Glen Elder*, 46 Kan. 376, 26 Pac. 690—holding that it is discretionary with a trial court to reopen a case for further testimony or argument.

Rights and liabilities of mortgagee.—Cited in *Gillett v. Romig*, 17 Okl. 324, 87 Pac. 325, holding on rights and liabilities of mortgagee or his grantee in possession.

14 KAN. 553, *PLANT SEED CO. v. HALL*

Acceptance of offers.—Cited in *Seymour v. Armstrong*, 10 Kan. App. 10, 61 Pac. 675, holding that unconditional acceptance is essential to contract.

14 KAN. 557, *MISSOURI, K. & T. RY. CO. v. BROWN*

Filing in justice court.—Cited in *Kansas Pac. R. Co. v. Taylor*, 17 Kan. 566; *Underwood v. Scott*, 43 Kan. 714, 23 Pac. 942; *Pate v. Fitzhugh*, 46 Kan. 129, 26 Pac. 452; *Sallor v. Caldwell*, 65 Kan. 86, 66 Pac. 1085; *St. Louis & S. F. Ry. Co. v. Bryan Fruit Co.*, 1 Kan. App. 551, 42 Pac. 267—holding that pleadings in justice court will be liberally construed.

Rights of laborers, etc., under railroad construction contracts.—Cited in *J. Parkinson & Co. v. Alexander*, 37 Kan. 110, 14 Pac. 466; *Missouri Pac. Ry. Co. v. Hartman*, 5 Kan. App. 581, 49 Pac. 109—on rights of laborers, subcontractors, etc., on railroad construction work.

14 KAN. 563, *MISSOURI, K. & T. RY. CO. v. BAKER*

Rights of employes on railroad construction.—Cited in *Mann v. Corrigan*, 28 Kan. 194; *Mann v. Burt*, 35 Kan. 10, 10 Pac. 95; *Boyle v. Mountain Key Mining Co.*, 9 N. M. 237, 50 Pac. 347; *Durkheimer v. Copperopolis Copper Co.*, 55 Or. 37, 104 Pac. 895—holding that foreman, clerks, timekeepers, etc., are not protected by statute; *Gilmore v. Westerman*, 13 Wash. 390, 43 Pac. 845, on rights of laborers under railroad construction contracts.

Construction of statutes.—Cited in *D. L. Wells & Co. v. Mehl*, 25 Kan. 205, holding that a statute imposing liability should be strictly construed.

What constitutes "labor."—Cited in *City of Topeka v. Crawford*, 78 Kan. 583, 96 Pac. 862, 17 L. R. A. (N. S.) 1156, 16 Ann. Cas. 403—holding that managing a theater constitutes "labor," within an ordinance prohibiting Sunday labor.

Cited in notes in 18 L. R. A. 305; 58 Am. St. Rep. 307—as to who are laborers, employes, or servants within statutes giving them preferences.

14 KAN. 588, *PIPER v. UNION PAC. RY. CO.*

Conditions in deeds.—Cited in *Piper v. Union Pac. R. Co.*, 14 Kan. 574, on validity of judgment; *McElroy v. Morley*, 40 Kan. 76, 19 Pac. 341, holding

that a party was not entitled to take advantage of breach of a condition in a deed to which he was not a party.

Mitigation of damages in condemnation.—Cited in note in 26 L. R. A. 756, on mitigation of damages in condemnation by preserving to owner an estate, rights, or easements.

14 KAN. 574, PIPER v. UNION PAC. RY. CO.

Transfer of right to declare forfeiture.—Cited in Garfield Tp. v. Herman, 68 Kan. 256, 71 Pac. 517, holding that a right of forfeiture is not transferable by an ordinary deed.

Cited in note in 60 L. R. A. 759, on transferability of right of entry for condition broken.

14 KAN. 583, ROLLER v. SNODGRASS

14 KAN. 588, WILCOX v. ELLIS, 19 AM. REP. 107

Taxation—Situs of property.—Cited in New Orleans v. Stempel, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. Ed. 174, on situs of bank bills and municipal bonds for taxation purposes; Bristol v. Washington County, 177 U. S. 133, 20 Sup. Ct. 585, 44 L. Ed. 701, holding that bonds and mortgages were taxable where held; Fisher v. Commissioners of Rush County, 19 Kan. 414, holding that the maxim, "Mobilier sequuntur personam," does not always apply to intangible personalty, for taxation purposes; Blain v. Irby, 25 Kan. 490, holding that for taxation purposes notes have a situs of their own; Brown v. Thomas, 37 Kan. 282, 15 Pac. 211, holding that a contract vendor of land cannot be taxed on the contract.

Distinguished in Board of Com'rs of Johnson County v. Hewitt, 76 Kan. 816, 93 Pac. 181, 14 L. R. A. (N. S.) 493, holding that notes kept by a resident outside the state were taxable; Dykes v. Lockwood Mortgage Co., 2 Kan. App. 217, 43 Pac. 268, holding that the situs of a judgment is the creditor's residence; Gibbins v. Adamson, 5 Kan. App. 90, 48 Pac. 871, holding that the situs of a mortgage for taxation purposes is generally the holder's residence.

Cited in note in 56 Am. Dec. 530, on place for taxation of property; in 16 L. R. A. 61, on power to tax mortgages; in 16 L. R. A. 731, on situs for purpose of taxation of debts evidenced by notes and mortgages; in 36 L. R. A. (N. S.) 299, on personal property having taxation situs elsewhere, as subject of taxation in state of owner's domicile.

Enforcement of illegal contracts.—Cited in Sheldon v. Pruessner, 52 Kan. 579, 35 Pac. 201, 22 L. R. A. 709, holding that an illegal contract will not be enforced.

14 KAN. 605, WILLIAMS v. LOUIS

Validity of liquor traffic regulations.—Cited in City of Salina v. Seitz, 16 Kan. 143, holding valid an ordinance regulating sales of intoxicating liquors; State v. Pitzer, 23 Kan. 250, holding valid a license generally to sell liquor in a city of the second class.

Presumption of regularity in official action.—Cited in Kindley v. Rogers, 85 Kan. 645, 118 Pac. 1037, holding that municipal authorities are presumed to have acted legally until the contrary appears.

14 KAN. 609, ROLLER v. OTT

Presumption as to consideration.—Cited in Pratt v. Cook, 10 Kan. App. 144, 62 Pac. 438; McGuffin v. Coyle & Guss, 16 Okl. 648, 86 Pac. 962, 6 L. R. A. (N. S.) 524—holding that a written contract imports a consideration.

Validity of contracts in restraint of trade.—Cited in *Richardson v. Emmert*, 44 Kan. 262, 24 Pac. 478; *Hulen v. Earel*, 13 Okl. 246, 73 Pac. 927—holding that contracts in restraint of trade will not be extended by implication.

Cited in note in 9 L. R. A. (N. S.) 501, on validity of contract giving exclusive local right to handle goods; in 63 Am. Dec. 385; 92 Am. Dec. 753, 762—on contracts in restraint of trade.

14 KAN. 616, O'BRIEN v. WETHERELL

Ejectment—What interest will support.—Cited in *Mooney v. Olsen*, 21 Kan. 691; *Atchison, T. & S. F. R. Co. v. Rockwood*, 25 Kan. 292; *Redden v. Tefft*, 48 Kan. 302, 29 Pac. 157—on point as to what interest authorizes suit in ejectment.

Same—Plaintiff's title.—Cited in *Jones v. Hollister*, 51 Kan. 310, 32 Pac. 1115, holding that plaintiff in ejectment is entitled to recover, if his title is better than defendant's, though weak; *Baldrige v. Centgraf*, 82 Kan. 240, 108 Pac. 83, holding that, where defendant in ejectment claims under a contract with defendant, evidence of plaintiff's title becomes immaterial.

Conditions subsequent in deeds.—Cited in *McElroy v. Morley*, 40 Kan. 76, 19 Pac. 341, on right to claim reverter or forfeiture for breach of condition subsequent; *Ritchie v. Kansas, N. & D. R. Co.*, 55 Kan. 36, 39 Pac. 718, holding that title to land reverted to a grantor for breach of condition subsequent; *Cowell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. Ed. 547, holding that a condition in a deed providing for forfeiture on use of the property for liquor traffic was valid.

Cited in notes in 9 Am. Dec. 202 (par. 3); 95 Am. St. Rep. 223—on conditions in conveyance; in 79 Am. St. Rep. 762, 763, on what words create condition subsequent.

Extraterritorial powers of corporation.—Cited in *Atchison, T. & S. F. R. Co. v. Fletcher*, 35 Kan. 236, 10 Pac. 596; *Kansas City Bridge & Iron Co. v. Board of Com'rs of Wyandotte County*, 35 Kan. 557, 11 Pac. 360; *State v. Topeka Water Co.*, 61 Kan. 547, 60 Pac. 337—holding that corporations can contract beyond the states where they were organized.

Perpetuities.—Cited in note in 90 Am. Dec. 104, on perpetuities.

14 KAN. 627, COMMISSIONERS OF BROWN COUNTY v. BARNETT

County's power to rent buildings.—Cited in *Williams v. Board of Com'rs of Kearny County*, 61 Kan. 708, 60 Pac. 1046, holding that county commissioners can rent buildings for county purposes.

14 KAN. 629, STATE v. SMITHERS

Subpoena duces tecum.—Cited in note in 128 Am. St. Rep. 763, on subpoena duces tecum.

Contempt.—Cited in note in 16 L. R. A. (N. S.) 1067, 1068, on disobedience of void order as contempt.









EXTRA ANNOTATED EDITION
REPORTS
OF
CASES ARGUED AND DETERMINED,
IN THE
SUPREME COURT
OF THE
STATE OF KANSAS.

By C. F. W. DASSLER.

VOL. 15.

CONTAINING A REVISED REPORT OF ALL CASES REPORTED
IN VOLUME 15 OF THE KANSAS REPORTS, WITH
NOTES AND REFERENCES, ETC.

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PREFACE.

THIS volume contains all cases reported in volume 15 of the KANSAS REPORTS. The annotations embrace references to the current case law, as found in "The Reporters" issued by the publishers of this new edition of the KANSAS REPORTS. The paging of the old edition is indicated by * pages.

Leavenworth, Kan., September, 1886.

C. F. W. D.

(iii)

JUDGES

OF THE

SUPREME AND DISTRICT COURTS

OF THE

STATE OF KANSAS

DURING THE PERIOD COVERED BY THIS VOLUME.

State Supreme Court.

HON. SAMUEL A. KINGMAN, Chief Justice.
 HON. D. M. VALENTINE, } Associate Justices.
 HON. D. J. BREWER, }

Judges of District Courts.

FIRST	DISTRICT—	HON. H. W. IDE.			
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THIRD	"	"	JOHN T. MORTON.		
FOURTH	"	"	OWEN A. BASSETT.		
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SIXTH	"	"	W. C. STEWART.		
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²Resigned March 1, 1875. Succeeded by Hon. SAMUEL R. PETERS.

JUDGES AND OFFICERS OF THE FEDERAL COURTS FOR THE DISTRICT OF KANSAS

During the Period Covered by this Volume.

United States Circuit Court.

(Held at Leavenworth on the 1st Monday in June, and at Topeka on the 4th Monday in November.)

HON. SAMUEL F. MILLER,
Associate Justice Supreme Court of the United States, assigned to
the Circuit.

HON. JOHN F. DILLON,
Circuit Judge.

CLERK—HON. A. S. THOMAS.

United States District Court.

(Held at Leavenworth on the 2d Monday in October, and at Topeka on the 2d Monday in April.)

JUDGE—HON. C. G. FOSTER.

DISTRICT ATTORNEY—HON. GEORGE R. PECK.

U. S. MARSHAL—HON. WM. S. TOUGH.¹

REGISTERS IN BANKRUPTCY	}	HON. HIRAM GRISWOLD.
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Attorneys General of Kansas

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CHAS. CHADWICK	-	-	-	July 30, 1861, to Dec. 20, 1861.
SAMUEL A. STINSON	-	-	-	Dec. 20, 1861, to Jan. 12, 1863.
W. W. GUTHRIE	-	-	-	Jan. 12, 1863, to Jan. 9, 1865.
J. D. BRUMBAUGH	-	-	-	Jan. 9, 1865, to Jan. 14, 1867.
GEORGE H. HOYT	-	-	-	Jan. 14, 1867, to Jan. 11, 1869.
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A. I. WILLIAMS	-	-	-	Jan. 9, 1871, to Jan. 11, 1875.
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¹ Resigned. Succeeded in April, 1878, by Hon. CHARLES H. MILLER.

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SUPREME COURT.

STATE OF KANSAS.

JULY TERM, 1875.

PRESENT:

HON. SAMUEL A. KINGMAN, Chief Justice.

HON. D. M. VALENTINE, } Associate Justices.
HON. D. J. BREWER, }

OWEN DUFFEY and others v. HATTIE M. RAFFERTY.

July Term, 1875.

Ejectment: What Right or Title Sufficient. In an action in the nature of an action of ejectment, in Kansas, the plaintiff may recover, if he has any right to the property, and if that right is paramount to any right to the same possessed by the defendant, although the legal title to the property may be outstanding in some third person, and although some third person may have a better right to the property than the plaintiff.¹

Error from Leavenworth district court.

The case is stated in the opinion.

Clough & Wheat, for plaintiffs in error.

The facts found by the court were not sustained by the evidence. The deed from Russell and wife to William R. Oliver was void because of said Oliver's previous death. *Hunter v. Watson*, 12 Cal. 368, 376; *Galloway v. Finley*, 12 Pet. 264; *Stilwell v. Hubbard*, 20

¹The question of who shall recover, in such an action, depends entirely upon the question which party has the paramount right to the property in controversy. *Simpson v. Boring*, 16 Kan. 248; *Mooney v. Olsen*, 21 Kan. 697. It is not essential that the plaintiff should have a title perfect beyond all question, and paramount to the title of every other person. It is enough if he have a right to the property, and that that right is paramount to the right of the defendant. *Hollenback v. Es*, 31 Kan. 88; S. C. 1 Pac. Rep. 275.

Wend. 44; Price v. Johnston, 1 Ohio St. 390; Bank v. Webster, 44 N. H. 268; Day v. Griffith, 15 Iowa, 103; Woodbury v. Fisher, *10 20 Ind. 389; Parmelee v. Simpson, 5 *Wall. 86; Landes v. Brant, 10 How. 373; Wiggins v. Lusk, 12 Ill. 136. We claim, from said cases, that there did not any equitable right pass by said deed; that it takes the consent of a living person for equitable rights to pass, and that it is absurd to say that any rights pass by a void instrument; that the proceedings of the town company were void, and that Stevens never obtained any title to said lot 27, (2 U. S. St. at Large, 445, § 1; article 16, Treaty 1854 with Delaware Indians,) and that the pretended sale made by Stevens to Oliver and Montgomery was utterly void, (McCracken v. Todd, 1 Kan. *165, *166, and Stone v. Young, 4 Kan. *17;) that partitions between tenants in common are not made by such transactions as those disclosed in this case.

E. H. Eggleston, for defendant in error.

VALENTINE, J. This was an action in the nature of an action of ejectment, for the recovery of certain real property, to-wit, lot 27, block 45, in Leavenworth city. The case was submitted to the court below, without a jury, and the court made separate findings of fact and conclusions of law; and while some of the findings of fact are sustained by but very little evidence, yet we think they are all sustained by sufficient evidence; or, at least, we cannot say that any material finding of fact is so far unsustained by evidence that we should reverse the judgment of the court below on that account.

The judgment of the district court was in favor of the plaintiff below, Mrs. Rafferty, and against the defendants below, Duffey and the Millers. Is this judgment correct upon the facts, as found by the court below? It seems that the legal title to the property in controversy is still outstanding in the original patentee, William H. Russell; and therefore the only questions now to be determined, as between these parties, are, has the plaintiff, Mrs. Rafferty, any kind of right *11 to said property? and, if so, who has the better right *thereto, herself or the defendants? If she has any right to the property, and if that right is paramount to any right possessed by the defendants, she may recover, notwithstanding some other person not a party to the action may have a better right to the property than she has. Mrs. Rafferty's title to the property in controversy is substantially as follows: In 1854 the Leavenworth Town Company took possession of and surveyed and platted the original town-site of Leavenworth city. The title, however, to said town-site was still in the government of the United States, in trust for the Delaware Indians. In this connection see Fackler v. Ford, 24 How. 322; S. C. McCahon, *21, [and 1 Kan. (Dassler's Ed.) 463;] Maduska v. Thomas, 6 Kan. *153. Said company sold some of the lots, and apportioned others to the members of the town company. In this way, lots 27 and 28, in block 45, in said city, were apportioned to Daniel H. Stevens, a member of

the town company. In 1855, Stevens sold said lots to William R. Oliver and William Montgomery. On the nineteenth of September, 1856, Oliver died, leaving a widow and two minor daughters, Hattie M. and Maggie, the first of whom is now the plaintiff in this action, Mrs. Rafferty. December 11, 1856, Mrs. Oliver was duly appointed guardian for said minor children. February 11, 1857, said Russell, as the agent and trustee of said town company, and of the persons entitled to lots under said sales and apportionments made by said town company, purchased said lots from the government of the United States, paying therefor from funds raised by said town company for that purpose, and received from the sales of lots, and from assessments made on lots, a portion of which assessments was paid by Stevens. In April, 1857, Russell and wife executed a deed for lot 28 to Montgomery; and, not knowing that Oliver was dead, they also, at the same time, executed a deed for lot 27 to Oliver. Montgomery accepted his deed, and put the same on record. Mrs. Oliver also accepted the deed made to Oliver, and put the same on record, and from that time

till April, 1858, she had the entire possession of said lot 27, *12 when she gave possession *thereof to Simon Cort, defendant Duffey's grantor. October 15, 1859, Mrs. Oliver died, and two weeks thereafter Maggie Oliver, Mrs. Rafferty's sister, died, aged only five years. Cort and the defendants have had possession of said lot ever since. Cort received the possession thereof from Mrs. Oliver; and at no time since Russell executed said deeds to Oliver and Montgomery has either Russell or Montgomery made any claim to said lot 27. The defendant's title to said lot 27 is as follows: In 1858, Mrs. Oliver, in her own right, and as guardian for her said minor children, by one William Lynn, attempted to sell said lot 27 to Simon Cort, and gave Cort possession of the lot. On the day of the death of Mrs. Oliver, and subsequently thereto, there were some proceedings had in the probate court with reference to said sale and said lot 27; but, as these proceedings were so manifestly void that even the defendants themselves do not claim anything under them, we shall not make any further mention of them. August 29, 1860, Cort sold and conveyed said lot 27 to the defendant Duffey, and gave him possession thereof; and the other defendants hold under Duffey. Duffey has been in possession of said lot 27 ever since he purchased it from Cort, and no one but the plaintiff has ever attempted to disturb his possession, or right of possession thereto.

Now, taking all these facts together, we think they show that the plaintiff has some right to said lot, not only as against the defendants, but also as against every other person; and that, while the defendants might have some right to the property as against a mere wrongdoer, or against any person who had no rights thereto, yet that they have no right or title as against the plaintiff. The facts, as we think, show that when Oliver died he had an equitable interest in the fund with which said lot was purchased; that he had an equitable right

to demand that said fund should be used for the purpose of purchasing said lot; and that it was such a right as would descend to his heirs. The fund was devoted to the express purpose of purchasing said property; and, when Russell used the fund in purchasing the same from the United States, a trust-estate immediately resulted therein in favor of the heirs of Oliver, co-extensive with their interest in said fund. At the time of the death of Oliver, his two minor children, Hattie M. and Maggie, were his heirs. Laws 1855, p. 306, § 1. His widow, if entitled to anything, was entitled to only a dower interest of one-third during her natural life. Laws 1855, *supra*; and also page 314, § 1. Therefore, when Mrs. Oliver died, her interest in the property, if she ever had any, lapsed, and the whole interest derived from Oliver passed to the two minor children; and, when Maggie died, her interest in the property passed to her sister, Hattie M., now Mrs. Rafferty. Laws 1859, p. 383, § 19. From the acts of all the parties, there must have been an equitable partition of the property between Oliver and Montgomery. At least, it so appears from the acts of Montgomery and Russell, the parties most interested in the matter, and the only parties who have any right to controvert the matter. An equitable partition—a mere parol partition—of real estate, followed by acts, where the parties have only an equitable interest in the property, is sufficient.

From the foregoing it would seem that the plaintiff ought to recover in this case. Even if Cort obtained from Mrs. Oliver her dower interest in the property in controversy, still that dower interest had terminated before Duffey purchased the property from Cort, and long before this action was commenced. Duffey never obtained any interest in said property, legal or equitable. He never had anything more than a bare naked possession, derived from the plaintiff's guardian, through Cort and Lynn. Now, under these circumstances, even if the plaintiff had no title, legal or equitable, to said lot, yet still it would seem that she ought to recover. Her possession through her guardian was prior in time to that of the defendants, and the defendants hold under her possession. Now, it is a general rule that, as between parties claiming title, mere priority of possession gives precedence where no better title can be shown as belonging to either.

And this rule will certainly apply to this case, provided the plaintiff has failed to show any better title than a mere priority of possession with a claim of ownership.

There are other grounds suggested by plaintiff in error for the reversal of the judgment below, but we do not think that they are tenable.

The judgment of the court below is affirmed.

(All the justices concurring.)

CLINTON M. WOOD v. JOHN W. MILLSPAUGH, Receiver, etc.

July Term, 1875.

Injunction: Temporary: Discretion of Court. The district courts, and the judges thereof, have considerable discretion in allowing and disallowing, and in sustaining or vacating, temporary injunctions; and therefore, when the reasons urged for and against a temporary injunction are very nearly equally balanced, the supreme court will not reverse an order of the district court, or a judge thereof, vacating a temporary injunction.¹

Error from Cowley district court.

The case is stated in the opinion.

Fairbank, Torrance & Green, for plaintiff.

Leland J. Webb, for defendant.

VALENTINE, J. At the commencement of this action a temporary injunction was allowed to restrain the defendant, Millspaugh, from erecting a mill-dam on Walnut river, in Cowley county, so as
*15 to cause the water thereof to flow back *and into Dutch creek, a tributary of Walnut river, and thereby to overflow the plaintiff's land. Afterwards the judge of the court below, at chambers, vacated the order of injunction; and the plaintiff, excepting thereto, brings the case to this court for review. The reasons urged for and against the temporary injunction are very nearly equally balanced, and therefore, as district courts, and the judges thereof, have considerable discretion in allowing or disallowing, and in sustaining or vacating, temporary injunctions, we must sustain the order of the judge below vacating the temporary injunction allowed in this case. Even if the reasons in favor of sustaining a temporary injunction should slightly preponderate over those against it, still that would not be sufficient to authorize this court to reverse an order of the district court, or a judge thereof, vacating a temporary injunction, unless the preponderance should be so great that this court could say that the district court or judge had abused its or his discretion.

The order of the judge of the court below is affirmed.

(All the justices concurring.)

¹ See *Stoddart v. Vanlanningham*, 14 Kan. *18; *Johns v. Schmidt*, 33 Kan. 388; S. C. 4 Pac. Rep. 872. Principle of *res adjudicata* does not apply to the decision sustaining a temporary injunction, upon motion to dissolve, so as to prevent the court from hearing and trying the whole case upon the issues, when called for trial in regular form. *Id.* See, also, *Challiss v. County of Atchison*, *post*, *49.

KANSAS PAC. RY. CO. v. MISSOURI, K. & T. RY. CO.¹

July Term, 1875.

Public Lands: Land Grants Construed. On the twenty-sixth of July, 1866, the lands adjacent to the then selected line of plaintiff's road up the Smoky Hill river, and including the lands in controversy, were, in pursuance of positive and direct legislation, reserved from sale by the United States, and on the twenty-second of January, 1867, the road along these lands was completed, accepted by the president, and patents by him ordered to be issued for said lands. The land grants to the defendant provided that in case it should appear, when the line or route of its road was definitely fixed, that the United States had sold any section, or that it

*16 had been reserved by the United States for any purpose *whatever, then the secretary of the interior should cause other lands in equal amount to be selected for the grant. The line of defendant's road adjacent to the lands in dispute was definitely fixed between the fifth and twentieth of September, 1866. *Held*, that the grant to the defendant never attached to the said lands, but that the full title thereto passed to the plaintiff by the construction and acceptance of its road.

Error from Davis district court.

The case is sufficiently stated in the opinion.

J. P. Usher, for plaintiff.

T. C. Sears, for defendant.

BREWER, J. This is a controversy between these two corporations as to the title to certain lands situated near the junction of their roads, and claimed by each respectively under a congressional land grant. The suit was brought by the plaintiff in error in the district court of Davis county, and embraced nearly one hundred thousand acres of land in the counties of Davis and Dickinson. As to the major portion of these lands the district court decided in favor of the defendant, and the plaintiff now brings the case here on error. Each company claims under a land grant. In neither is it pretended that there was any specific designation of the lands granted. In each the location of the road determined the specific tracts. It becomes necessary, therefore, as to each road, to examine the terms of the

*17 grant, as well as to ascertain when the line of the road was definitely fixed. The plaintiff, originally known as the "Leavenworth, Pawnee & Western Railroad Company," subsequently as the "Union Pacific Railway Company, Eastern Division," and finally by its present name, claims under the acts of congress in aid of the construction of a road from the Missouri river to the Pacific ocean. The

¹ This case was taken to the supreme court of the United States, and the judgment of the state supreme court affirmed. The case is reported in 97 U. S. 491

first of these acts was approved July 1, 1862, and while it contemplated but a single main line, it also provided for the construction of two or three branches on the eastern end. One of these branches was to be constructed by the plaintiff. Section 3 defines the land grant to the main company. It reads: "That there be, and is hereby, granted to the said company * * * every alternate section of public land designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed." Section 4 provides that commissioners should be appointed upon the completion of every forty miles of road to examine and report whether such completed portion was built as required by the act, and upon a favorable report patents were to issue for the adjacent lands. In section 6 the grants were declared to be upon condition that the bonds issued by the United States in aid of the construction should be paid at maturity; that the road should be kept in repair; and the mails, troops, etc., transported thereon. In section 7 the assent of the company to the act was required within one year, and the completion of the road by July 1, 1874; and then followed these provisos: "Provided, that within two years after the passage of this act said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the department of the interior; whereupon the secretary of the interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry, and sale; and when any portion of said route *shall

*18 be finally located the secretary of the interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purpose herein named: provided, that, in fixing the point of connection of the main trunk with the eastern connections, it shall be fixed at the most practicable point for the construction of the Missouri and Iowa branches, as hereinafter provided." By section 8 the president was authorized to designate the initial point of the main line, which was to be on the one-hundredth meridian west from Greenwich, and at which all the eastern branches were to unite. Sections 9 and 10 refer to the plaintiff's road, and are as follows:

"Sec. 9. And be it further enacted that the Leavenworth, Pawnee & Western Railroad Company of Kansas are hereby authorized to construct a railroad and telegraph line from the Missouri river, at the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific Railroad of Missouri, to the aforesaid point on the one-hundredth meridian of longitude west from Greenwich, as herein provided, upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned, and to meet and connect with the same

at the meridian of longitude aforesaid; and in case the general route or line of road from the Missouri river to the Rocky mountains should be so located as to require a departure northwardly from the proposed line of said Kansas railroad before it reaches the meridian of longitude aforesaid, the location of said Kansas road shall be made so as to conform thereto; and said railroad through Kansas shall be so located between the mouth of the Kansas river as aforesaid, and the aforesaid point on the one-hundredth meridian of longitude, that the several railroads from Missouri and Iowa, herein authorized to connect with the same, can make connection within the limits prescribed in this act, provided the same can be done without deviating from the general direction of the whole line to the Pacific coast; the route in Kansas, west of the meridian of Fort Riley, to the aforesaid point on the one-hundredth meridian of longitude, to be subject to the approval of the president of the United States, and to be determined by him on actual survey. And said Kansas company may proceed to build said railroad to the aforesaid point on the one-hundredth meridian of longitude west from Greenwich in the territory of Nebraska. * * *

*19 *"Sec. 10. And be it further enacted that the said company chartered by the state of Kansas shall complete one hundred miles of their said road, commencing at the mouth of the Kansas river as aforesaid, within two years after filing their assent to the conditions of this act, as herein provided, and one hundred miles per year thereafter, until the whole is completed. * * *

Under this act the plaintiff, as appears by the proceedings, filed a map of its general route, and the fifteen-mile strip on either side thereof was duly reserved from sale. This route extended up the Kansas river to the left bank of the Republican, and thence along the bank of said last-named river to the one-hundredth meridian. Subsequently, and on the second of July, 1864, congress passed an amending act, which increased the land grant, the area of reserved lands, and authorized the plaintiff to connect its road with the main line at other than the one-hundredth meridian, providing, however, that the grant of bonds or land should not thereby be increased. Again, on the third of July, 1866, congress passed an act authorizing the location of a new route, the filing of a map thereof, and the reservation of the adjacent lands, section 1 of which is as follows:

"An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean,' etc., etc., 'approved July 2, 1864.'

"Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that the Union Pacific Railway Company, Eastern Division, is hereby authorized to designate the general route of their said road, and to file a map thereof, as now required by law, at any time before the first day of December, 1866; and upon the filing of the said map, showing the

general route of said road, the lands along the entire line thereof, so far as the same may be designated, shall be reserved from sale by order of the secretary of the interior: provided, that said company shall be entitled to only the same amount of the bonds of the United States to aid in the construction of their line of railroad and telegraph as they would have been entitled to if they had connected their said line with the Union Pacific Railroad on the one-hundredth degree of longitude *as now required by law: and provided, further, that said company shall connect their line of railroad and telegraph with the Union Pacific Railroad, but not at a point more than fifty miles westwardly from the meridian of Denver, in Colorado."

In pursuance of this act, and on the eleventh of July, 1866, the plaintiff filed a map of its newly-selected route up the Smoky Hill, instead of the Republican, river, and on the twenty-sixth of July, 1866, the lands along the line thereof were all duly reserved from sale by order of the secretary of the interior. This reservation included all the lands in controversy. Prior thereto the road had been completed to Fort Riley, and soon thereafter work commenced on the extension up the Smoky Hill. On the fourteenth of December, 1866, the president of the company made his affidavit of the completion of twenty miles, and on the twentieth of same month the commissioners appointed by the president were directed to make their examination. Before making their examination the company had completed five additional miles, and on the tenth of January, 1867, the commissioners were directed to examine and report upon the twenty-five miles of completed road. The commissioners, on the seventeenth of January, 1867, reported favorably, and on the twenty-second of said month the president of the United States approved the same, and directed the issue of patents for lands due the company on account of this completed section of twenty-five miles. All the lands in controversy were covered by this executive order. These are the facts material to the plaintiff's title. From them it seems that two propositions are clearly deducible: *First*, the lands in controversy were, among others, on the twenty-sixth of July, 1866, duly and legally reserved from sale; and, *second*, that, as between the United States and the plaintiff, full title to these lands passed, at least upon the approval of the president of the report of the commissioners, and the order to issue patents. It is probable that title passed upon the permanent location of plaintiff's road adjacent to these lands, but as the time of such location is not definitely

*21 shown by the findings, and as *a vesting of title prior to the approval of the president would not, in the conclusions to which we have come, have any effect upon the decision, we forbear further inquiry in that direction. So far as the action of the president was required, the subsequent approval was equivalent to a prior selection of the route.

Turning, now, to the claim of defendant, let us see upon what it rests. The first act in its chain of title was approved March 3, 1863. So much as is material is as follows:

"An act for a grant of lands to the state of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said state.

"Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that there be, and is hereby, granted to the state of Kansas, for the purpose of aiding in the construction: * * * *Second*, of a railroad from the city of Atchison, via Topeka, the capital of said state, to the western line of the state, in the direction of Fort Union and Santa Fe, New Mexico, with a branch, from where this last-named road crosses the Neosho, down said Neosho valley, to the point where the said first-named road enters the said Neosho valley, every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, and each of its branches. But in case it shall appear that the United States have, when the line or routes of said road and branches are definitely fixed, sold any section, or any part thereof, granted as aforesaid; or that the right of pre-emption or homestead settlement has attached to the same; or that the same has been reserved by the United States for any purpose whatever,—then it shall be the duty of the secretary of the interior to cause to be selected, for the purpose aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached as aforesaid; which lands, thus indicated by odd numbers, and selected by the direction of the secretary of the interior as aforesaid, shall be held by the state of Kansas

for the use and purpose aforesaid: provided, that the land
*22 to be so selected shall in no case be loca^ated further than

twenty miles from the lines of said road and branches: provided, further, that the lands hereby granted for and on account of said roads and branches severally shall be exclusively applied in the construction of the same, and for no other purpose whatever, and shall be disposed of only as the work progresses through the same, as in this act hereinafter provided: provided, also, that no part of the land granted by this act shall be applied to aid in the construction of any railroad, or part thereof, for the construction of which any previous grant of land or bonds may have been made by congress: and provided, further, that any and all lands heretofore reserved to the United States, by any act of congress, or in any other manner, by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the

operations of this act, except so far as it may be found necessary to locate the routes of said road and branches through such reserved lands; in which case the right of way only shall be granted, subject to the approval of the president of the United States."

In this act was no grant affecting in any way the lands in controversy; but the legislature of the state of Kansas (Laws 1864, p. 151) in accepting, on the ninth of February, 1864, this grant, and transferring certain of the lands to the Atchison, Topeka & Santa Fe Railroad Company, added this proviso: "And provided, further, that if the congress of the United States shall, on or before the fourth of March, 1866, consent that the Neosho Valley Branch of the above-named road may be extended so as to intersect the Union Pacific Railroad, Eastern Division, at or near Fort Riley, and shall make a grant of land for such extension of like amount with that granted per mile for the construction of the hereinabove named principal road, then said Atchison, Topeka & Santa Fe Railroad Company shall proceed to construct such branch to such intersection, on the terms and conditions hereinabove prescribed, applicable to the construction of such main road."

In pursuance of this implied request, congress on the first of July, 1864, passed an act making a land grant to the state of Kansas to aid in the construction of the road indicated in the above proviso,

*23 which grant was made expressly "subject to all the provisions, restrictions, limitations, and conditions *in regard to selection and location of lands, and otherwise," of the act of congress of March 3, 1863, heretofore noticed. Subsequently, with the assent of the state, the Atchison, Topeka & Santa Fe Railroad Company transferred to the defendant all its interest in this grant, and on the twenty-sixth of July, 1866, congress passed a new act granting lands, of which the title and the first section are as follows:

"An act granting lands to the state of Kansas, to aid in the construction of a southern branch of the Union Pacific Railway and telegraph, from Fort Riley, Kansas, to Fort Smith, Arkansas.

"Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, the same being a corporation organized under the laws of Kansas, to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho river to the southern line of the state of Kansas, with a view to an extension of the same through a portion of the Indian Territory, to Fort Smith, Arkansas, there is hereby granted to the state of Kansas, for the use and benefit of said railroad company, every alternate section of land, or parts thereof, designated by odd numbers, to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten alternate sections per mile. But in case it shall appear that the United States have, when the line of said road is def-

initely located, sold any section, or any part thereof, granted as aforesaid; or that the right of pre-emption or homestead settlement has attached to the same; or that the same has been reserved by the United States for any purpose whatever,—then it shall be the duty of the secretary of the interior to cause to be selected, for the purposes aforesaid, from the public land of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid; which lands, thus indicated, by the direction of the secretary of the interior, shall be reserved and held for the state of Kansas for the use of said company by the said secretary, for the purpose of the construction and operation of said railroad, as provided by this act: provided, that

*24 any *and all lands heretofore reserved to the United States by any act of congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the president of the United States: and provided, further, that said lands hereby granted shall not be selected beyond twenty miles from the line of said road."

The Union Pacific Railroad Company, Southern Branch, named in said act, is the defendant here, the name having been subsequently changed to that of the Missouri, Kansas & Texas Railway Company. Between the fifth and twentieth of September, 1866, the defendant caused its line to be surveyed and made on the ground adjacent to the lands in controversy; which survey and location was approved by the board of directors of the defendant, and a map thereof filed in the office of the secretary of state of the state of Kansas, on November 14, 1866, and in the office of the secretary of the interior, December 16, 1866. On the ninth of June, 1870, the defendant's road was completed to the south line of the state, accepted by the governor, and by him certified to the secretary of the interior as a first-class railroad, and thereupon accepted by the president.

This constitutes the defendant's chain of title.

Looking merely to the granting clause in these acts under which defendant claims, and the words used are words of present grant,—“that there be, and is hereby, granted.” Now, if there were any designation of specific tracts, or any reference to existing lines, whether natural or artificial, from which, by mere survey and measurement, the specific tracts could be ascertained, it might well be said that the title to those tracts passed immediately, subject to be defeated by a failure to perform the conditions of the grant. Perhaps, too, if there

were no other limitation than the want of a definitely located line of road, the location of the road would make the grant operative from the day of its date, and thus cut off all *intervening claims. But other limitations appear in both the acts of March 3, 1863, and July 26, 1866. It is provided that "in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, *or that the same has been reserved by the United States for any purpose whatever*, then it shall be the duty of the secretary of the interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land * * * as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated," etc. This limitation operates to exclude from the grant any lands which at the time the line of road is definitely fixed have been by the United States reserved for any purpose whatsoever. It leaves the specific sections undetermined until the definite location of the road, and then excludes from the grant any lands to which adverse rights and interests have attached. Now, from the findings, it appears that the line of defendant's road adjacent to these lands was not definitely fixed until between the fifth and twentieth of September, 1866; but on the twenty-sixth of July prior thereto they had been by the United States duly reserved, in pursuance of positive and direct legislation therefor. It seems to us that they were, by the very terms of the acts under which defendant claims, excluded from the operation of its grant, and that, therefore, there is nothing in defendant's claim to interfere with the title which passed to the plaintiff by the completion and acceptance by the president of the United States of its road. As the facts seem to be undisputed, we can but think the case of *Johnson v. Towsley*, 13 Wall. 72, leaves the courts free to apply the law correctly to those facts; and as, in the view we have taken of the law, the plaintiff has the better title to these lands, it becomes our duty to so adjudge. Inasmuch as no exception appears to have been taken to the facts as found, it

*26 is also our duty, under the law, to *make, so far as the courts of this state are concerned, a final disposition of the case. The judgment of the district court will therefore, as to the lands adjudged by it to the defendant, be reversed, and the case remanded, with instructions, as to those lands, to enter judgment for the plaintiff, as prayed for in the petition.

(All the justices concurring.)

LAWRENCE R. WHEELER v. JOHN T. BRADY.

July Term, 1875.

Elections and Electors: School-District Elections: Women as Voters.

A person having all the qualifications of an elector, as defined by section 1, art. 5, of the constitution, except that such person is a woman, has the right to vote at an election regularly held for the election of a school-district treasurer.¹

Error from Nemaha district court.

Quo warranto, brought by Wheeler, to test the right to the office of school-district treasurer of district No. 51, Nemaha county. At the annual district meeting held in March, 1872, Brady, the defendant, was elected such treasurer, and thereafter qualified, and entered upon the duties of his office. At the annual district meeting held in March, 1873, 140 votes were cast, of which Wheeler, the plaintiff, received 70, and one George H. Adams received 70. Of those voting for Wheeler, 60 were men and 10 were women; of those voting for Adams, 50 were men and 20 were women. The election board held that there was no election, (canvassing for each candidate 70 votes,) and "adjourned the election for further proceedings" until April 5th, and the "election was subsequently, by several adjournments, further postponed until April 19th." In the mean time a call for a "special election" was signed by 60 of the electors of said district,

*27 *and such special election was called for April 19th. On that day the electors of said district met at the proper place, and proceeded to elect a treasurer, and for that purpose 60 votes were cast, all for said Wheeler. Wheeler afterwards qualified as such treasurer, and demanded the books and papers from Brady, who was holding over for want of a duly-elected and qualified successor. Upon Brady's refusal to surrender the office, Wheeler commenced this action. Trial at the October term, 1873. When the plaintiff rested, Brady demurred to the evidence. The district court held that women had the legal right to vote at said school-district meeting for school-district officers; that as Wheeler and Adams had each received 70 votes, there was no election; that the "adjournments" of said election were unauthorized and void; that as the call for a "special election" was not signed by a majority of the electors of the district, such special election was illegal and void; and that, as Wheeler had not shown any right to the office, he could not main-

¹Female persons, with all the legal qualifications for electors, except that they are not *males*, are not legally entitled to vote in Kansas for either state or county superintendent of public instruction. *Winans v. Williams*, 5 Kan. 133.

tain the action. The court dismissed the petition, and adjudged costs against Wheeler.

Johnson & Falloon, for plaintiff.

If the second clause of section 20 of chapter 92 of the General Statutes is constitutional, the judgment is right, unless the adjournment kept alive the powers of the electors until April 19th; for our call was not signed by a majority of all the voters, if females are voters, and that was illegal too. If the plaintiff has mistaken the law in this case, it arises from a misinterpretation of the constitution by the light of the case of *Winans v. Williams*, 5 Kan. *227. At common law females had no such right, having no political *status* whatever. Maine, Anc. Law, 140; Cooley, Const. Lim: 599; Bl. Comm. 171. Article 5 of our constitution limits political power to males, thus following the laws and usages of all our western civilization, which has grown up from the Roman civilization, or been influenced by its laws.

*28 *On the other side, it is claimed that section 23 of article 2 of our constitution confers this right in school elections. This section confers nothing, enlarges nothing, removes no disability, and neither declares nor creates any new right; but merely imposes a limitation upon the legislature, to-wit, that in the regulation and formation of schools no distinction shall be made between males and females; and it seems to us that its terms prohibit the distinction of a right, rather than confer any new ones. The equality perhaps related to the pupils, teachers, taxation, and possibly to the enumeration of inhabitants in the creation of districts. If the clause had provided that no distinction should be made between whites and blacks, it could hardly be claimed that this was sufficient to confer suffrage where it did not exist before. Such terms in a constitution do not enlarge rights. *Bradwell v. State*, 16 Wall. 130. The case of *Susan B. Anthony*, though not the opinion of an appellate court, by holding that the amendments to the federal constitution do not confer suffrage on females, supports this principle.

It was argued at the trial that the law authorizing women to "vote" at school meetings is not the exercise of suffrage any more than it would be to vote at a church meeting. We think this view not tenable. School-districts are municipal corporations, clothed with the exercise of dominion which belongs to the state. If it were not so, this action would not lie, as the office would not be a public one. *Dill. Mun. Corp.* 32, note. Nor can any distinction be maintained upon the meaning of the words "voters" and "electors." Webster makes no distinction; neither does Bouvier. Section 4 of article 2 of the constitution provides no one but a qualified "voter" shall be eligible to the legislature. If females are "voters," they are also eligible to office, unless, in law, "voter" and "elector" mean entirely different things.

Nathan Price and W. D. Webb, for defendant.

The principal question here is as to whether women had the right to vote. Plaintiff relies upon the case of *Winans v. Williams*, 5 Kan. *227. That was a case in which the party attempted to vote at a *general* election. The constitution (article 4) provides for two elections, and article 5 defines who shall be qualified electors; but a school-district meeting does not come within the provisions of either of these articles. A school-district is simply a *quasi* corporation, organized for the purpose of the education of the children within a certain district of country. Now, if the legislature should allow the people within certain districts of the state to organize themselves into *quasi* corporations for the purpose of caring for and protecting the poor, would any one say that women must be excluded from such corporation, or that a law which gave them a voice in the management of its affairs would be unconstitutional? This case is, however, much stronger. Section 23 of article 2 of the constitution expressly provides that "the legislature, in providing for the formation and regulation of schools, shall make no distinction between the rights of males and females." Now, how females can have the same rights in "regulating" a school without having the right to vote in the school meeting in which all its affairs are regulated, we are unable to see. Consequently, the law which gives them such right is not only constitutional, but any law which attempted to take it from them would be unconstitutional. If we are right in this view, there was no election at the regular school meeting. As to the question of the adjourned meeting, we say there is simply nothing in it. The meeting could not "adjourn" the election, and it is conceded that if women are legal voters at a school-district meeting the call for the special election was insufficient.

VALENTINE, J. The only question involved in this case—or, rather, the only question which we need consider—is whether persons having all the qualifications for electors, as defined by section 1 of article 5 of the constitution, except that they are women, have the right to vote at an election regularly held for the election of a school-district treasurer. This case differs widely from the case of *Winans v. Williams*, 5 Kan. *227. While we have no statutory or constitutional provision authorizing women to vote for either state or county superintendent of public instruction, and while the constitution would seem impliedly at least to prohibit such a thing, yet we have statutory provisions which expressly authorize women to vote for school-district treasurers. Section 19 of article 3 of the school law provides that "the inhabitants qualified to vote at a school meeting, lawfully assembled, shall have power * * * (3) to choose a director, clerk, and *treasurer*, who shall possess the qualifications of voters." Gen. St. 918. And section 20 of the same article provides that "the following persons shall be entitled to vote at any dis-

trict meeting: *First*, all persons possessing the qualifications of electors, as defined by the constitution of the state, and who shall be residents of the district at the time of offering to vote at said elections; *second*, all white female persons over the age of twenty-one years, not subject to the disqualifications named in section second, article fifth, of the constitution of the state, and who shall be residents of the district at the time of offering to vote." Gen. St. 919.

But it is claimed that the second subdivision of said section 20 of the school law is unconstitutional and void, as being in contravention of section 1, art. 5, of the constitution, which reads as follows: "Every white male person, of twenty-one years and upward, belonging to either of the following classes, who shall have resided in Kansas six months next preceding any election, and in the township or ward in which he offers to vote at least thirty days next preceding such election, shall be deemed a qualified elector: *First*, citizens of the United States; *second*, persons of foreign birth who shall have declared their intention to become citizens conformably to the laws of the United States on the subject of naturalization."

Now, does section 1, art. 5, of the constitution, have any application to the election of school-district treasurers? The constitution provides for two, and only two, elections, to be held by the people, to-wit, general elections, and township elections, (Const. art. 4, § 2;) and it does not anywhere even mention school-district elections or meetings. It provides for, or at least recognizes, the election of various officers: *First*, all the state officers provided for by the constitution, to-wit, the governor, lieutenant governor, secretary of state, auditor, treasurer, attorney general, and superintendent of public instruction, (Const. art. 1, §§ 1, 2, 14;) *second*, members of the legislature, (Id. art. 2, §§ 2, 4, 5, 8, 9, 13;) *third*, judges of the supreme court, (Id. art. 3, §§ 2, 11;) *fourth*, judges of the district courts, (Id. art. 3, §§ 5, 11;) *fifth*, clerks of the district courts, (Id. art. 3, § 7;) *sixth*, probate judges, (Id. art. 3, §§ 8, 11;) *seventh*, justices of the peace, (Id. art. 3, §§ 9, 11;) *eighth*, county superintendent of public instruction, (Id. art. 6, § 1;) *ninth*, township officers, (art. 9, § 4.) But the constitution does not anywhere even mention the election of any school-district officer. The constitution does not require that all the offices which it creates or recognizes should be filled by an election of the electors mentioned in section 1 of article 5 of the constitution, or even by an election at all. For instance, the clerk and reporter of the supreme court are appointed by the judges, (Const. art. 3, § 4;) a judge *pro tem.* of the district court is elected by the bar, (Id. art. 3, § 20;) trustees of the public benevolent institutions are appointed by the governor, (Id. art. 7, § 1;) directors of the penitentiary are appointed or elected as prescribed by law, (Id. art. 7, § 2;) militia officers are also appointed or elected as provided by law, (Id. art. 8, § 3;) and vacancies in various offices are filled in various ways, generally by appointment, (Id. art. 1, §§ 11, 13, 14; v.15k.—3

Id. art. 2, § 19; Id. art. 3, § 11; Id. art. 7, § 3.) And the constitution itself specifically provides that all officers whose election or appointment is not provided for in the constitution shall be elected or appointed as may be prescribed by law. Thus section 19, art. 2, of the constitution provides that "it [the legislature] shall have the power to provide for the election or appointment of all officers, and the filling of all vacancies not otherwise provided for in this constitution;"

and section 1, art. 15, provides that "all officers whose election or appointment is not otherwise provided for shall be chosen or appointed as may be prescribed by law."

Now, as we have before stated, there is no school-district election or meeting provided for in the constitution; there is no provision as to how school-district officers shall be elected, appointed, or chosen; and we suppose no one will claim that they are, by the terms of the constitution, to be elected at either of the elections provided for in the constitution. Hence it would seem that the legislature would have full and complete power in the matter; that the legislature might provide for the election or appointment of school-district officers as it should choose, when it should choose, in the manner it should choose, and by whom it should choose. This would follow even if section 1 of article 5 of the constitution were by its terms capable of being made applicable to school-district elections. But said section cannot be made applicable to such elections except by a change of its terms. If it applies in its present form, then every person who is in other respects qualified, and who has resided "in the township * * * in which he offers to vote at least thirty days next preceding such election, shall be deemed a qualified elector;" that is, a legal voter of any school-district in any township would be a legal voter of every other school-district in that township. In every school-district of that township he could certainly swear that he was a legal elector "in the township in which he offers to vote." And if said section applies, then this right to vote in every school-district in the township in which an elector resides is a constitutional right, which cannot be abridged by the legislature, or by any other power except the entire people of the state by way of amendment to the constitution. Probably nearly every township in the state contains more than one school-district. In the county from which this case comes there are seventy-eight school-districts and only fourteen townships. In many of the counties the proportion of school-districts to the number of townships is much greater. For instance, in Crawford county there are one hundred school-districts and only nine townships.

*38 Now, if section 1 of article 5 of the constitution does not apply to school-district elections, then what is there to prevent the legislature from conferring the right of suffrage in school-district elections upon women? There is nothing in the nature of things, or in the nature of government, which would prevent it. Women are members of society,—members of the great body politic, citizens,—as

much as men, with the same natural rights, united with men in the same common destiny, and are capable of receiving and exercising whatever of political rights may be conferred upon them. We must answer the main question involved in this case in the affirmative; and therefore the judgment of the court below must be affirmed.

(All the justices concurring.)

BOARD OF EDUCATION OF THE CITY OF PAOLA v. F. M. SHAW and others.

July Term, 1875.

1. **Building Contract: Performance: Decision of Arbitrator Conclusive, unless Impeached for Fraud or Mistake.** In an action against the sureties on a penal bond, given to secure the fulfillment of a building contract, it was shown that, according to the contract, the contractor was to build a certain school-house for his employers, the board of education of the city of Paola, in accordance with certain plans and specifications furnished, and to be furnished, by the architect, who was the duly-authorized agent of said board, and appointed by them; and said school-house was to be built under the direction and to the satisfaction of said architect, who had power to make such changes and alterations in any of the plans and specifications as he might choose. The contractor constructed said building in accordance with the instructions of the architect, and to his satisfaction, and at the time of the final estimate by the architect he received a final certificate from the architect certifying to the final and proper completion of the building. The board of education then took possession of said building, receiving the keys thereto from the contractor, and they still remain in possession thereof. The building, however, was not constructed in accordance with the original plans and specifications, and the building constructed was worth about \$15,000 less than the one which the original plans and specifications called for. *Held*, that these facts do not constitute a cause of action in favor of the board of education and against the sureties on said bond.
2. ———. Where the parties to a building contract agree upon an architect, and stipulate and agree to rely upon his judgment, skill, and decision as to the character, amount, and value of work to be done, they must abide by his judgment and decision, or impeach it upon the ground of fraud, mistake, undue influence, or some other good cause.
3. **Pleading: Reply Deemed Controverted.** Allegations in a reply of the plaintiff are, under our system of pleading, to be deemed controverted by the defendant without any formal denial of the same on the part of the defendant.
4. ———: **Construction of Contract.** Allegations in a pleading denying the legal import of a written contract (a copy of which written contract is given in the pleadings, and admitted to be correct by both parties) will not be considered by the court.

5. ——— : **Contradictory Averments.** On the trial of a case the whole of the pleadings are considered together; and where any two allegations of the same party are inconsistent with each other, the allegation most unfavorable to such party will be deemed to override the other allegation.

Error from Miami district court.

Action by the board of education of the city of Paola, as plaintiff, against L. E. Post, F. M. Shaw, A. A. Smith, J. B. Hobson, W. G. Rainey, H. Pardee, and C. A. Leighton, as defendants, to recover the sum of \$7,000 as liquidated damages, and being the penal sum named in a certain bond executed and delivered by the defendants to the plaintiff to secure the faithful performance of a contract made and entered into between the plaintiff and said Post as principal, with the other defendants as his sureties. Trial at the September term, 1873, of the district court, J. B. S., judge *pro tem.*, presiding. Demurrer to plaintiff's evidence sustained, petition dismissed, and judgment for defendants for costs.

- *35 *B. F. Simpson, for plaintiff in error.

Action on a building contract against the contractor and his sureties, on his bond for a faithful performance. The essential conditions of the contract are the "contractor shall well and substantially, and in the best and most workman-like manner, with the best material of their respective kinds, and under the direction of the architect, make, execute, finish, and complete, and deliver to the proprietors," the school-house mentioned in the contract. Allegations of breaches are "that said Post did not or has not constructed said school-house throughout in the best workman-like manner, with the best quality of new materials of their respective kinds, or in a thorough, substantial, and workman-like style, and in accordance with the plans and specifications and drawings; that the material furnished by said Post in the construction of said school-house was not the best in quality that could be procured for the purpose, but, on the contrary, was of inferior quality;" specifying particularly the inferior work and material. These provisions are distinct and independent, and a failure to perform one gives the cause of action. It is not necessary that the default or omission shall extend to and embrace all of the separate, distinct, and independent provisions. The labor of construction may have been performed in the best and most workman-like manner, and yet the material furnished be very bad; and will it be claimed that no cause of action arises on account of the defects in material? See, on this point, the case of *Glacius v. Black*, 50 N. Y. 145. There may have been bad workmanship and worse material, and yet all done under the direction and with the acceptance of the architect, and even then a cause of action accruing to the plaintiff. Where a contract is entered into, with specifications, for the erection of a building, the contractor must perform in every *essential particular*, unless performance is waived. *Van Buskirk v. Murden*, 22 Ill. 446; *Mitchell v. Wiscotta L. Co.*, 8 Iowa, 209; *Mon-*

roe Female University v. Broadfield, 30 Ga. 1; Waugh v. Shunk, 20 Pa. St. 130; The Harriman, 9 Wall. 161; Swain v. Seamens, Id. 254; Williams v. Androsoggin & K. R. Co., 86 Me. 201; Witherow v. Witherow, 16 Ohio, 238.

*36 Again, it is alleged, by way of reply to the answer of defendants, claiming an acceptance of the building by the architect, that the acceptance was a fraudulent one, and not binding on plaintiff; and this is in accordance with the books, as see Finegan v. L'Engle, 8 Fla. 413; McAuley v. Carter, 22 Ill. 53; 11 Shep. 214; Baltimore & O. R. Co. v. Polly, 14 Grat. 447, 473; Mansfield & S. R. Co. v. Veeder, 17 Ohio, 385.

W. R. Wagstaff and T. M. Carroll, for defendants.

When a building contract provides that the last installment shall be paid by the proprietors when all the work is completely finished, and certified to that effect by the architect under whose direction the work was to be done, production of the certificate of the architect is conclusive upon the proprietors, unless obtained through fraud or mistake. Wyckoff v. Meyers, 44 N. Y. 143; Smith v. Brady, 17 N. Y. 173; Jackson v. Wood, 24 Wend. 445; McAuley v. Carter, 22 Ill. 53.

If the parties to an executory contract make a provision in it that any dispute that may arise between them on the subject of the contract shall be determined by an individual named, whose decision shall be final, no action will lie for a breach of the agreement by one against the other; but they must resort to the tribunal appointed by themselves, from whose award there is no appeal. If parties, by contract, appoint an arbiter to settle their differences, they are bound by his award, although he may be interested in the contract which was the subject of difference, (*Monongahela N. Co. v. Fenlon*, 4 Watts & S. 205; *Leech v. Caldwell*, 5 Amer. Law Reg. (N. S.) 280; *Delaware & H. C. Co. v. Pennsylvania C. Co.*, 50 N. Y. 250; *Memphis, C. & L. R. Co. v. Wilcox*, 48 Pa. St. 161; *Easton v. Pennsylvania & O. C. Co.*, 13 Ohio, 79; *Jackson v. Wood*, 24 Wend. 445;) and fraud and collusion must be affirmatively shown, (*Stebbins v. Guthrie*, 4 Kan. *354; 1 Greenl. Ev. § 80; 3 Greenl. Ev. § 254.) The mistake on the part of the architect, to be available, must be one which should clearly show that he was misled, deluded, and so far misapprehended the facts that he did not exercise his real judgment in the case. *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53. The case of *Glacius v. Black*, 50 N. Y. 145, the authority relied on by the plaintiff, differs from the case at bar so widely in its facts as to have no bearing on the question here. In this case the architect is made the arbitrator

between the contractors, and the character and amount of the *37 work to be done are made subject to any modification the architect may direct. The contractor is made subject to the direction and instruction of the architect, regardless of plans and specifications. It seems plain that the contractor was bound to do the

work as the architect should direct, and it seems equally clear, to make the defendants answerable in damages, a breach on the part of the contractor, in failing to build as directed by the architect, should be shown. This was not done. The plaintiffs did not aver fraud in their petition, and offered no proof of fraud on the trial.

VALENTINE, J. This was an action on a penal bond given to secure the fulfillment of a building contract. The action was commenced against L. E. Post, as principal, and F. M. Shaw, A. A. Smith, J. B. Hobson, W. G. Rainey, H. Pardee, and C. A. Leighton, as sureties; but as no service of summons was ever made on Post or Smith, and as neither of them ever appeared in the case, the action was prosecuted in the court below against the other defendants alone. The following facts are admitted by the pleadings: The bond and contract above mentioned were duly executed by the respective parties. The contract contained an agreement on the part of Post to build a school-house for the plaintiffs below, the board of education of the city of Paola, a city of the second class. The house was to be built according to certain plans and specifications, and under the direction of one A. J. Kelley, an architect, who was the duly-authorized agent of the said board of education, and appointed by them. Said Kelley had power, under the contract, to make additional plans and specifications, and to make such alterations and changes in any of the plans and specifications as he might choose. Post was to receive as compensation for building said house the sum of \$35,000, to be paid in monthly installments as the work progressed, the work and the amount to be paid to be estimated by the architect; but in no case was he to receive (until after the building was finally
 *38 completed) more than 80 per cent. of the *amount due on any estimate of the architect, and he was to receive full payment within thirty days after the final completion and acceptance of the building. Where alterations were made from the original plans and specifications, Post was to receive more or less than the contract price in proportion as the alterations involved a greater or less expense. Post constructed the building in accordance with the instructions of the architect, and to his satisfaction, and at the time of the final estimate by the architect he received a final certificate from the architect, certifying to the final and proper completion of the building. Post received from the board of education 80 per cent. of said \$35,000, to-wit, \$28,000, and \$7,000 thereof still remains unpaid. The board of education then took possession of said building, receiving the keys thereto from Post, and they still remain in possession thereof.

We quote the following portions of the contract as indicating the power of the architect in the premises: "In the construction of these presents, when the contract will admit of it, the term 'contractor' shall mean the said L. E. Post; the term 'proprietors' shall mean the said board of education, for and on behalf of the said school-district;

the term 'architect' shall mean A. J. Kelley, *employed by the proprietors* to superintend the erection and completion of the works; and the term 'works' shall mean all the works, matters and things specified and described in the specifications, plans, and other drawings as furnished, *from time to time*, by the architect, and also such other works, matters, and things as are hereby contracted to be done and performed by the contractor." "The contractor shall," "under the direction of the architect, make, execute, finish, and complete" "the several works, matters, and things, and acts mentioned and referred to in the specifications, plans, and drawings furnished, *and to be furnished*, by the architect, with such additions, *enlargements, and alterations of and deviations from* said plans and specifications (if any) as the architect may, *from time to time, during the progress of the work, direct.*" "The proprietors shall pay the contractor, for the full and perfect completion of this contract, the sum of \$35,000, in lawful currency of the United States;

but if the architect shall direct any additions to, or omissions
 *39 of, or variations from, *the plans and specifications, the value of such additions, *omissions, or variations* shall be added to or deducted from the said sum of \$35,000, as the same may be. The payments to be eighty per centum of the works, according to the architect's *estimate, and his certificate.*"

These are probably sufficient specimens to show the nature and extent of the power of the architect in the premises. They really show that the architect had all the power that the board of education itself had. He could make such alterations and changes as he chose. The contractor had but little, if any, choice in the matter. He was required to construct the building just as directed by the architect, and if he did so, and to the satisfaction of the architect, he fulfilled his contract. The pleadings admit that the building was constructed to the satisfaction of the architect, and therefore it would seem that judgment might have been rendered for defendants on the pleadings. It is claimed, however, that the building was not constructed in accordance with the original plans and specifications. This was not necessary. The contract itself made the subsequent directions of the architect paramount to the original plans and specifications. Where the subsequent directions of the architect differed from the original plans and specifications, the contractor was bound by his contract to follow the subsequent directions of the architect, and to abandon to that extent the original plans and specifications. The original plans and specifications served merely as general guides to work by, where no subsequent directions were given, and served in all cases as criterions of the value of the work done. If the flooring used was worth \$10 per thousand feet less than that which the original plans and specifications called for, then \$10 for each and every thousand feet of flooring used should have been deducted from the contract price of the building. If the steps used were worth \$920 less than those which the original plans and specifications called for,

then \$920 should have been deducted for the steps. If the whole house was worth \$15,000 less than that which the original plans and specifications called for, then \$15,000 should have been deducted from the contract price for the house, and the plaintiffs should have paid only \$20,000 for the house, instead of \$28,000, as they in fact did pay. The fact, however, that the plaintiffs paid the contractor \$8,000 more than the house was really worth does not make these defendants liable. They did not enter into bond that the contractor should not receive \$8,000, or any other sum, more than he was entitled to receive under the contract. They simply entered into bond that he would fulfill his contract, and, if he did that, (and the pleadings in effect admit he did,) then the condition of their bond was fulfilled; and what the contractor received or did not receive for his work is merely a question between the contractor and the plaintiffs. If the architect—the agent of the board of education—made unwise changes and alterations in the plans and specifications for the building, and if the board unwisely paid more than the building was worth, that was their own misfortune. The sureties on the bond (the defendants) did not agree that the architect and board should always act wisely. That it may be seen what these defendants did in fact agree to, we here quote the condition of their bond in full. It reads as follows: "If the above-bounden L. E. Post shall well and truly comply with and perform each and every condition, requirement, and obligation of said contract in writing, as it now is, or may be hereafter *changed or modified*, then the above obligation to be void; otherwise of full force and effect in law."

But it is alleged in the reply of the plaintiffs that the acts of the architect in accepting said building, in approving the work done thereon, and in issuing said final certificate, was *fraudulent*. And it is also alleged in said reply that said acts of the architect were performed through a mistake, the architect believing at the time that the building was in fact completed in all respects in accordance with the original plans and specifications. And it is also alleged in said reply that when said board received said building from Post, that they did not receive it as a finished or completed building, but received it only for what it was worth. These allegations in the reply are, under our system of pleading, to be deemed controverted by the defendants without any formal denial of the same on their part. Civil Code, §§ 86, 128. These are about the only contested allegations in the pleadings; and evidence can, of course, be introduced only to prove contested allegations. *Reed v. Arnold*, 10 Kan. *104.

We shall take no notice of such allegations in the pleadings as deny the legal import of the contract sued on, for such allegations, in legal effect, amount to nothing. The contract is in writing, set forth in full in the plaintiffs' petition, not denied by the defendants, and it must speak for itself. Neither shall we take any notice of any alle-

gation in any pleading where other allegations made in a pleading by the same party show that said first-mentioned allegation is untrue, for on the trial of a case the whole of the pleadings are considered together; and where any two allegations of the same party are inconsistent with each other, the allegation most unfavorable to such party is deemed to override the other allegation. *Butler v. Kaulback*, 8 Kan. *668, *671. The evidence introduced on the trial shows that the building was not constructed in accordance with the original plans and specifications, and that the building constructed was worth about \$15,000 less than the one which the original plans and specifications called for. This evidence, as we have already seen, was, under the pleadings in the case, and in the absence of any showing of fraud or mistake on the part of the contractor and the architect, wholly immaterial. In just what the supposed fraud or mistake consisted we are not informed. No details of fraud or mistake are given. But even if the pleadings had been amply sufficient upon this subject, still the evidence failed to show such fraud or mistake as would authorize an action. In this connection, see the case of *Baasen v. Baehr*, 7 Wis. 516. There was not the least showing of fraud by the evidence, and the only mistakes made were in supposing that

*42 *the materials, the work, and the building were worth more than they really were. But as we have already said, the sureties on the bond did not agree that no mistakes of this kind should occur. They substantially agreed that the contractor should construct the building to the satisfaction of the architect, and nothing more; and in this respect their contract was fulfilled. But in any case it would probably be difficult to imagine such a mistake on the part of the architect or the board of education as would give the board of education a cause of action against the sureties on said bond. But what chance had the architect to make such mistakes as would affect injuriously the board of education? The board appointed a building committee from their own number to watch the architect, to watch the contractor, and to watch the work as it progressed. This committee was cognizant at all times of the manner in which the building was being constructed; and although they made *no written report* concerning the matter, yet they made verbal reports to the board, and it must therefore be presumed that the board was cognizant at all times of the manner in which the building was being constructed. Yet the board took no action in the matter except to continue to pay the contractor the 80 per cent. on the architect's estimates. Under such circumstances it must be presumed that the changes that were made in the plans and specifications, or in the work done, were made by the consent of all the parties, and, perhaps, at the instance of the board itself; and under such circumstances the board should have paid the contractor just what the work on the building was worth, taking the original contract price of the building as the proper criterion of the value thereof. Taking the pleadings and the evidence al-

together, no cause of action was shown in favor of the plaintiffs and against the defendants; that is, take the undisputed facts as admitted by the pleadings, and the controverted facts as proved by the evidence, and all together do not constitute a cause of action against these defendants, the sureties on the contractor's bond. Upon the *43 facts thus admitted and thus proved, the judgment *should have been for the defendants. After the plaintiffs had introduced all their evidence, the defendants demurred to the evidence. The court below sustained the demurrer, dismissed the plaintiffs' action, and rendered judgment for costs in favor of the defendants and against the plaintiffs. We perceive no error in this. The judgment of the court below will therefore be affirmed.

(All the justices concurring.)

SCHOOL-DISTRICT No. 13 v. STATE OF KANSAS *ex rel.* etc.

July Term, 1875.

School-Districts: Division of: Apportionment of Property. On August 29, 1871, the superintendent of public instruction of Pottawatomie county formed a new school-district from territory previously belonging to school-district No. 13 of said county, and designated said new district as district No. 63. Everything pertaining to the formation of said new district was regular, except that the superintendent did not, at the time of such formation, apportion the amount of the property to which each district was entitled. The school-house and other property remained in the old district. Afterwards, and on March 25, 1872, the superintendent did apportion said property, and in the apportionment determined that school-district No. 13 should pay the new district the sum of \$131.10 as its proper proportion. *Held*, that the apportionment is valid, notwithstanding it was not made at the time the new district was formed, but was made nearly seven months afterwards.¹

Error from Pottawatomie district court.

Mandamus, brought in the name of the state by school-district No. 63, to compel the school-district board of school-district No. 13 to

¹When taxes are levied, and a school-house built, in a certain school-district, and afterwards a portion of the territory of such school-district is detached, and allowed to remain unorganized, and outside of any school-district, for about one year, at which time such territory, along with other territory, is organized into a new school-district; and in about three years and one month thereafter the county superintendent for the first time makes an apportionment of the property, and awards that the old school-district, which retains all the property of the district, shall pay to the new school-district \$697.86, as its proportion of the value of all the property retained by the old school-district: held, that such award is valid and binding upon the old school-district, notwithstanding the delay of the county superintendent in making the award, and notwithstanding the fact that the territory detached from the old school-district was not organized or placed in any other school-district for one year. *School-district v. School-district*, 32 Kan. 123; 8 C. 4 Pac. Rep. 189. See, also, *School-district v. State*, 29 Kan. 57.

levy a tax on the property of the district last named, to pay the sum apportioned to district No. 63 as its proportion of the property of original district No. 13. The district court, at the February term, 1873, gave judgment awarding a peremptory *mandamus*.

Case & Putnam and R. S. Hick, for plaintiff in error.

District No. 63 was formed under the law of 1868. Gen. St. 926, §§ 50, 51. Under these sections the superintendent was required, at the time of forming such new district, to ascertain and determine the proportion of the value of the property justly due the new district. Under section 51 the parties could have appealed at any time, if they were aggrieved. They were not aggrieved by the division of the territory, and did not appeal. Under section 15 of said act (p. 916) the superintendent gave the notice of the first meeting.

The superintendent, on the twenty-fifth of March, 1872, four days after the law of 1872 (p. 872, §§ 1, 2) took effect, ascertained and determined the proportion of the value of the property due the new district. When this was done there could be no appeal, because by section 2, c. 185, Laws 1872, the appeal must be taken within 10 days from the time of posting the notices of its formation, which was done six months before the action of the superintendent as to the distribution of the property, and the law of 1868, (section 51, *supra*), was repealed by section 3 of said chapter 185, Laws 1872.

As to the time for doing an act required by statute, the court has no *dispensing* power. *Moot v. Parkhurst*, 2 Hill, 372. The nature of the act to be performed, and the language used in the section, show that the designation of the time was intended as a limitation upon the power of the officer. There is nothing in the act that justifies the inference that the valuation could be made at any other and subsequent time. The language is imperative that it shall *then* be done, or not done at all. The rule, "thus the law is written," commends itself to the good sense of every lawyer, both for brevity and solid logic. It is dangerous to attempt to be wiser than the law, and, when its requirements are plain and positive, the courts are not called upon

to give reasons why it was enacted. *Dillingham v. Snow*, *45 5 Mass. *557; *Reeds v. Morton*, 9 Mo. 878. It is admitted there are cases when the requirements may be deemed *directory*. But it may be safely affirmed that it can never be when the act, or the omission of it, can, by any possibility, work advantage or injury, however slight, to any one affected by it. In such case it can never be omitted. *Mayhew v. Davis*, 4 McLean, 213; *Chandler v. Spear*, 22 Vt. 388; *Hanson v. Lafayette*, 9 La. 546; *Sharp v. Johnson*, 4 Hill, 99; *Corwin v. Merritt*, 3 Barb. 343; *Atkins v. Kinnan*, 20 Wend. 249; *Torrey v. Millbury*, 21 Pick. 64; *People v. Michigan S. R. Co.*, 13 Mich. 498.

Even if it were possible to construe this valuation part of the section into a *directory* clause merely, before the repeal of the appealing

section, how could it be so considered after that, when such construction would leave the district at the mercy of the superintendent, when he could say, "The district has now no appeal, and I can do as I please?" for if his finding is to have the force of a judgment, and he can divide the territory, and wait until the legislature has repealed the right to an appeal from his decision, and then make a valuation, which is conclusive, it gives him the power to plunder one district for the benefit of another.

Merritt & Jeffries, for defendant in error.

It was the duty of the county superintendent, upon the formation of the new school-district, to ascertain and determine the proportion of the value of the school-house and other property retained by district 13 justly due to district 63; and upon his failure and refusal, or refusal, to perform such duty, *mandamus* would lie against him to compel the performance of this act specially enjoined as a duty resulting from his office; and if he could be compelled by *mandamus* to perform such act he could perform it voluntarily.

The refusal or neglect of the county superintendent to make the apportionment as provided by section 50, c. 92, Gen. St., would not give district 63 the right to appeal to the board of county commissioners. Their only remedy would be by *mandamus* to compel the superintendent to make the appointment. The county board would have

no power or authority to take any action in relation to the
 *46 apportionment. *They could only inquire into the grievances of any person or persons who claimed to be injured in the formation or alteration of the district, which can refer to nothing but the territory of the district. The language of section 50 is very clear, and the apportionment of the property is no part of the formation or alteration of the district. If it is, the formation or alteration is not complete until the apportionment is made. If it were held that, to make the apportionment by the county superintendent valid, it must be done at the time of the formation or alteration of the district, then the superintendent could easily defeat the new district from its share of the school property retained by the old district. If the apportionment had been made by the superintendent at the time of the formation, and district No. 13 was injured or wronged by the action of the superintendent, its remedy was not by appeal to the county board; for the law gives that board no authority or power to interfere with or regulate the apportionment of the property. This power and authority rests entirely with the superintendent. The legislature has vested him with this power, and if it is too great it is for the legislature, and not for the courts, to apply the cure.

VALENTINE, J. On August 29, 1871, the superintendent of public instruction of Pottawatomie county formed a new school-district from territory previously belonging to school-district No. 13, of said county, and designated said new district as district No. 63. Everything per-

taining to the formation of said new district seems to have been regular, except that the superintendent did not, at the time of such formation, apportion the amount of the property to which each district was entitled. The school-house and other property remained in the old district. Afterwards, and on March 25, 1872, the superintendent did apportion said property, and in the apportionment determined that school-district No. 13 should pay the new district the sum of \$131.10 as its proper proportion. The only question now

*47 presented to us for consideration is *whether said apportionment is void or valid. We think it is valid, although there are some very strong reasons tending to lead to a different conclusion. The objection to the apportionment is that it was not made at the time of the creation of the new district, and this is the only objection. Of course, under the law, it should have been made at the time of the creation of the new district. Gen. St. 926, § 50. But does its validity depend upon its being made precisely at that time? Is time of the essence of the law in this respect? We think not. It is fair and just and equitable, when a school-district is divided into two new districts, that each should have its fair proportion of the value of the property belonging to the old district at the time of the division. Or, what is the same thing, it is fair, when a new district is carved out of an old one, that the new district should have its fair proportion of the property, or value thereof, which belonged to the old district at the time the new one was created. And this fairness, equity, and justice, we think, is more of the essence of the law than mere time in making the apportionment. Will it be claimed that the new district must lose its proportion of the property, or the value thereof, if the superintendent should for a single day after creating the new district fail or neglect to make the apportionment? If neither of the districts, nor any person having any interest in either of the districts, has any right to appeal from the action of the superintendent in making or failing to make any apportionment, then there would seem to be but little reason for requiring that the apportionment should be made on any particular day, provided it be made within a reasonable time after the new district is created. And the statute (Gen. St. 926, § 51; Laws 1872, p. 372, § 2) does not, in terms, seem to give the right of appeal to either of the districts as a corporate entity, but merely to some *person* or *persons* who shall feel aggrieved. The word "person" or "persons," as used in the statute, may, however, include the corporation as well as real persons; for the corporation itself is in one sense a person,—an artificial person. And the right

*48 of individual *persons to appeal may be confined to *personal* grievances alone, and may not be extended to grievances which directly affect only the district as a corporation, and which indirectly affect all the individuals alike, one as much as another. As to private individuals championing the rights of the public, see *Bridge Co. v. Wyandotte Co.*, 10 Kan. *326, *331, and cases there cited; *Miller v. Town of Palermo*, 12 Kan. *14.

Besides, a question may be raised under the statute whether the right to appeal extends merely "to the formation or alteration of a school-district," and no further, or whether it extends as well to all matters incidental "to the formation or alteration of a school-district." For the purpose of this case, we shall assume that the right of appeal exists, and has existed, to the fullest extent, ever since said new district was created. It would seem unreasonable that the legislature should not give an appeal in cases of this kind; and, with a liberal construction of their language, probably, they have given it. Then, if we are correct so far, we think it follows that the superintendent, after he created said new district, had the right, at any time, and of his own volition, to make said apportionment; that the new district had the right, at any time after the failure to make said apportionment, to compel him to do so by an action of *mandamus*; that any person or persons feeling aggrieved by such failure had a right to appeal to the board of county commissioners, (Gen. St. 926, § 51;) and, after the superintendent made the apportionment, any person or persons who felt aggrieved thereby had a right to appeal. If any right to an appeal from an apportionment has ever existed, it is because the apportionment is incidental to the creation of the new district, and the alteration of the old. And if the apportionment may be made at any time after the new district has been created, it is also because of its connection with creation of the new and the alteration of the old. And therefore, as the right to make the apportionment follows (whenever made) as an incident to the creation and alteration of the two districts, the right of appeal also follows

*49 (provided it exists in any case of *apportionment) as incidental to such creation and alteration, and may be exercised by any person feeling aggrieved by the apportionment whenever the same is made. If there should be any fraud in the apportionment, we should also think that the district defrauded would have a remedy, either as plaintiff or defendant, by a proceeding in the nature of a bill in equity.

With reference to taking an appeal from said apportionment, it has been said that the law was so amended in 1872 (just four days before the apportionment was made) that an appeal would be impossible in this particular case. Laws 1872, pp. 372, 373, §§ 2, 3. This may be true, if the law of 1872 is to govern; but, under section 1 of the act concerning the construction of statutes, (Gen. St. 999, § 1, sub. 1,) we think the law of 1872 would not govern in this case, but that the provisions of the previous laws would govern. *Willetts v. Jeffries*, 5 Kan. *473; *Gilleland v. Schuyler*, 9 Kan. *569; *State v. Boyle*, 10 Kan. *113; *Morgan v. Chapple*, Id. *224; *State v. Crawford*, 11 Kan. *32; *Jenness v. Cutler*, 12 Kan. *500, *511, *512; *Ayres v. Probasco*, 14 Kan. *175.

The judgment of the court below is affirmed.

(All the justices concurring.)

L. C. CHALLISS v. BOARD OF COM'RS OF ATCHISON Co. and others.

July Term, 1875.

1. **Injunction: Temporary: Motion to Dissolve: Hearing.** Where a preliminary injunction has been granted without notice, a motion to dissolve may, upon notice, be made at any time before the trial, and this notwithstanding a demurrer has been previously filed.¹

*50 2. **Taxation: Restraining Collection: Equity.** Equity will not interfere to restrain by injunction the collection of taxes where the property is subject to taxation, the tax legal, and the valuation not excessive, simply because of irregularities in the tax proceedings. And this rule applies alike to general and special taxes, and whether the application be to restrain a sale or enjoin the execution of a deed.²

Error from Atchison district court.

Injunction brought by Challiss to restrain the board of county commissioners, the county treasurer, and county clerk from transferring certain tax-sale certificates held by Atchison county on his property, and to enjoin the county clerk from issuing tax deeds thereon. The district judge granted a temporary injunction. The defendants thereafter filed a demurrer. In this condition the case passed two regular terms of the district court. In January, 1874, defendants filed two motions to dissolve,—one going to all the property, the other to a part only. The district judge sustained the second motion.

W. W. Guthrie, for plaintiff.

We insist that it was error to hear defendants' motion to dissolve while the case stood on their demurrer to plaintiff's petition. High, *Inj.* § 879. There were twenty-two certificates, and on each a separate deed was authorized. The time had nearly expired for deeds. The law made it the duty of the treasurer to certify to the clerk, and he to assign, and then issue deeds. In a brief time a great number of tax deeds would cover plaintiff's property, each being a cloud, and requiring many suits to remove. We insist that then was the time to enforce his remedy. Should deeds issue in case at bar, they would constitute several clouds, and would be set aside in an action

¹See *Wood v. Millspaugh*, *ante*, *14.

²This case followed, *Stebbins v. Challiss*, *post*, *59; *Hagaman v. County of Cloud*, 19 Kan. 394. See *Ottawa v. Barney*, 10 Kan. 206, and note. A lot-owner, whose lot has been sold for taxes, and who has neither paid nor offered to pay the taxes, cannot, when the lot was subject to taxation, the levy legal, and the valuation not excessive, maintain an action to quiet title against the holder of the tax-sale certificate. *Knox v. Dunn*, 23 Kan. 683. Before a suit is commenced to set aside a tax-sale certificate, the plaintiff should pay or tender all taxes embraced therein which the public records show are valid, and which he is under obligation to pay. *Miller v. Ziegler*, 81 Kan. 417; *S. C. 2 Pac. Rep.* 601. See, also, *Pritchard v. Madren*, 24 Kan. 436; *McKeen v. Haxtun*, 25 Kan. 696.

to remove such clouds. And however void such deeds, such remedy exists. *Dean v. City of Madison*, 9 Wis. 402; *Knowlton v. County of Rock*, Id. 410. In these two cases injunction was allowed to restrain making a tax deed; and in *Agawam Bank v. Strever*, 18 N. Y. 510, and *Key City G. L. Co. v. Munsell*, 19 Iowa, 305, injunction was allowed to prevent a sheriff's deed on a sale on execu-

*51 tion not against the owner. Why not, for like reason, *enjoin, where redemption existed, the issuance of a certificate of sale, and its assignment in many different parts? The office of injunction is the protection of jeopardized rights in real property, and this must be equally so whether threatened by public officers or individuals. Here it is not sought to restrain *the collection of a tax*. Such tax was merged in a sale years ago, as a note merges in a judgment recovered on it. Were the certificates held by an individual, it would not be questioned that the public would have no interest in the controversy; for the law clearly is that in all cases where courts will interfere to remove a cloud, on a like state of facts the courts will enjoin acts which necessarily result in clouding a title. *Tucker v. Kenniston*, 47 N. H. 267; *Pettit v. Shepherd*, 5 Paige, 493; *Scott v. Onderdonk*, 14 N. Y. 9; *Christie v. Hale*, 46 Ill. 117; *Pixley v. Hug-gins*, 15 Cal. 127; *Fowler v. City of St. Joseph*, 37 Mo. 238; *Leslie v. City of St. Louis*, 47 Mo. 474. Here is no case of proceedings to embarrass the collection of the public revenues. Every step to collect these taxes has been taken; now there only remains, upon expiration of time for redemption after sale, those steps requisite to final confiscation. Is it more or less hurtful to the property owner, or more or less beneficial to the public, after sale, that the certificates are in the hands of individuals, or held by the county? But, if so, specific provisions have been made for such cases. Chapter 196, Laws 1872. Or is it more or less the collection of a tax, that suit is brought now, or brought to set aside the deeds which we now ask to enjoin?

This case stands not on "mere irregularities," but on substantial defects, creating between this property and the tax deeds sought to be enjoined from being placed thereon legal gullies that cannot be jumped or bridged with the plea of "the public good." "Mere irregularities," within section 113 of the tax law, are only such as without such provision courts of equity would disregard. *Weller v. City of St. Paul*, 5 Minn. 100, (Gil. 70;) *Blackw. Tax Titles*, 82. There was no notice given of expiration of time limited for redemption, as required by section 110 of tax law. Plaintiff was entitled to that notice to prepare to avoid the forfeiture of his property. Without it he cannot be in default. The object of that provision is to

*52 afford to property *owners "at least four months" within which to make preparations to save their property. Can the public take his property finally, and vest the title in another in entire disregard of that positive *essential* provision? Plaintiff has not waived

any right, for at no previous time could he have acted. *Davis v. Farnes*, 26 Tex. 296; *Brady v. Offutt*, 19 La. Ann. 184. But all tax proceedings under *ex parte provisions* are *stricti juris*, and rights are not divested only when the law has been fully complied with. The rule of judicial proceedings does not apply.

S. H. Glenn and D. Martin, for defendants.

The county could not set up the taxes in an action like this, as the holder of a tax deed may do under section 117, Gen. St. 1057; and the certain result of granting an injunction would be to deprive the government of its revenue. That equity cannot be invoked for such a purpose, see *Chicago, B. & Q. R. Co. v. Frary*, 22 Ill. 34.

Plaintiff's counsel contended that a motion to vacate should not be entertained while the case stood on general demurrer; but, whatever may be the rule in the absence of statute, the injunction in this case having been granted without notice, we had a right to apply for its vacation "at any time before the trial." Civil Code, § 250.

BREWER, J. This is an action to restrain the issue of sale certificates, and the execution of tax deeds, upon a number of lots belonging to plaintiff in the city of Atchison. It seems to us that this case is pretty fully covered by decisions already made in this court, and that there is scarcely any new question in it for consideration. A preliminary matter is, however, thus presented: Upon the filing of a petition a temporary injunction was granted. The defendants filed a demurrer to this petition, and thereafter a motion to dissolve the injunction. Now, the contention of counsel is that it was error to hear

*53 defendant's motion to dissolve while the case stood on demurrer to the petition. Whatever may be the rule elsewhere, or might be the rule here, independent of statute, we think this closes the question. Section 250 of the Civil Code provides that, "if the injunction be granted without notice, [and this was so granted,] the defendant, at any time before the trial, may apply, upon notice to the court in which the action is brought, or any judge thereof, to vacate or modify the same." The application here was not to restrain a sale for taxes, but the issue of sale certificates and execution of tax deeds. Upon this counsel says: "Here is no case of proceedings to embarrass the collection of the public revenues. Every step to collect these taxes has been taken. Now, there only remains, upon expiration of time for redemption after sale, those steps requisite to final confiscation."

As the property in controversy was, for lack of other bidders, all struck off to the county, and not a dollar of money has yet passed into the county treasury, it would seem that any stay of proceedings would most seriously interfere with the collection of the public revenues. But this question has already been before us, and decided. *City of Lawrence v. Killam*, 11 Kan. *499. It was there held that "equity will not interfere to restrain, by injunction, the collection of

taxes, when the property is subject to taxation, the tax legal, and the valuation not excessive, simply because of irregularities in the tax proceedings. And this rule applies alike to general and special taxes, and whether the application be to restrain a sale or enjoin the execution of a deed." That decision disposes, not only of this question, but also of nearly every question made by counsel.

The objections to the tax proceedings are stated by plaintiff as follows: (1) That no due assessment and valuation of each parcel of real estate within the township and city of Atchison was made for the year 1869, and returned duly verified, etc., before June 1, 1869, nor was plaintiff's real property so assessed and returned in a book, etc., as required by law; (2) that the pretended assessment was made for 1869 without the assessor having received the assessment roll of 1868, before March 1, 1869; (3) that more than half the taxes

*54 were percentage levied *by the mayor and councilmen of the city of Atchison, and the same were not certified to the county clerk before August 15, 1869, or at any other time, for 1869; (4) that the treasurer did not cause notice to be published stating the amount of taxes, etc., on each hundred-dollars valuation, and that he or his deputy would attend at the places of holding elections to receive the taxes, nor did he or his deputy attend in the First, Third, or Fourth wards, etc., to receive taxes for 1869; (5) that the sale was made without notice thereof being published for four consecutive weeks, commencing between March 1 and 10, 1869, describing the land and lots as on the tax-roll, etc., with a notice that so much of each tract or lot as might be necessary would, on the first Tuesday of May, etc., be sold at public auction at his office, for the taxes, etc., nor was such notice posted up for four consecutive weeks, etc.; (6) that the county treasurer did not, prior to February 1, 1873, cause to be published in a newspaper any list of unredeemed lands and lots sold for taxes of 1869, describing the same, etc., with a notice specifying the days limited for the redemption thereof.

Now, it is unnecessary to determine how these defects would be regarded in an action at law, in which the validity of a deed based upon these proceedings was involved. It may be that they would defeat the title, either before or after the running of the statute of limitations, or it may be that they would be considered mere irregularities such as are covered by section 113 of the tax law. Gen. St. 1057. The principles which would control in such an action are entirely different from those which obtain here. Here the question is whether, in equity and good conscience, the plaintiff ought to have paid these taxes; and to this question the answer must manifestly be in the affirmative. He makes no pretense that the property was not subject to taxation. Nothing is intimated to impeach the justice of the tax. True, he says that more than half was levied by the authorities of the city of Atchison, and not duly transmitted to the county clerk; but he does not question the right of those authorities

to make the levy, or that it was in the slightest degree in excess of the amount absolutely necessary, or for any illegal or im-
 *55 *proper purpose. Nor does he show any excessive or unfair valuation, or valuation by the wrong officer. The objections run to the *manner* in which that valuation was reached,—to alleged omissions and deviations from the statutory mode of procedure, and not to the result. Thus for aught that appears in his petition, his property ought to have been charged with these taxes; the taxes were legal, just, and fair; and the valuation of his property, made by the proper party, exactly what it ought to have been. It seems as though the mere statement of these propositions was enough to show that he makes no case for the interference of a court of equity.

The judgment will be affirmed.

(All the justices concurring.)

W. R. STEBBINS and another v. L. C. CHALLISS.

July Term, 1875.

1. **Taxation: Restraining Execution of Tax Deeds.** The fact that the sale certificates have been disposed of by the county, and belong to individuals, will not change the rule laid down in the cases of *City of Lawrence v. Killam*, 11 Kan. *499, and *Challiss v. Commissioners Atchison Co.*, *ante*, *49, in reference to restraining the execution of tax deeds.¹
2. —: **Assessment of Lands as Town Lots.** Where the plaintiff was the owner of a tract in the city of Atchison, liable to assessment and taxation as a single tract of so many acres, and portions of it were, by descriptions through which they can be identified, assessed, and taxed as lots surrounded by streets and alleys, *held*, that an injunction ought to issue restraining the collection of taxes upon such assessment.²

Error from Atchison district court.

Injunction, brought by Challiss, as plaintiff, against Benjamin B. Gale, county clerk, and Stebbins, as defendants. The petition alleged that Challiss was the owner of 21 certain lots in Challiss'
 *56 addition to the city of Atchison, describing *them; and also the owner of certain real estate in Spring Garden addition, which he alleges was formerly divided into lots and blocks, describing them, but that these last-mentioned lots and blocks, prior to 1869, had been vacated by the county board; that the county treasurer had advertised that the time for redemption of lands and lots sold

¹ See *Challiss v. Atchison Co.*, *ante*, *49, and note.

² Necessity of assessment, see note to *Worthington v. Whitman*, 25 N. W. Rep 126; effect of misdescription, see note to *Carnes v. Peacock*, 2 N. E. Rep. 168.

would expire between May 3 and June 27, 1873, three years from the several sales, etc.; that Stebbins claimed to hold tax certificates for said lots in Challiss' addition and Spring Garden addition, and was about to apply to the county clerk for a tax deed thereon, which would vest the title thereto in Stebbins, or cast a cloud over the title, etc. The petition then says "that each and all of such certificates of sale are irregular, null, and void, and do not authorize the execution of any tax deed or deeds thereon, for, among others, the following reasons, to-wit," (setting up the six grounds mentioned in the opinion of the court in the preceding case of Challiss v. Commissioners of Atchison Co., *ante*, *53.) Upon this petition, properly verified, Challiss applied for and obtained a preliminary injunction, restraining the county clerk from issuing tax deeds to Stebbins on any of the tax certificates held by him on sales of lots in the two additions above mentioned. The defendants appeared, and demurred. Afterwards and in January, 1874, the defendants, on motion and notice, applied to the district judge, at chambers, for an order vacating the injunction as to all the property, in both additions, which motion was by said judge overruled and denied.

C. G. Foster and D. Martin, for plaintiffs in error.

It is not claimed by Challiss that his lots and land are not subject to assessment and taxation, but his whole case is based upon "irregularities" on the part of the several officers in the proceedings to enforce the collection of taxes. Challiss has not offered to pay *57 any part of these taxes, but permitted *the real estate to be sold in 1870, and the purchaser to pay the taxes for 1870, 1871, and 1872, without objection; and not until a few days before the deed is to be issued does he object, and then he comes into court and invokes the interposition of equity in his behalf. By remaining quiet, Challiss was getting his taxes paid; but he must not permit a deed to be issued, for then, if the deed was set aside, he would have to pay the purchaser the taxes, costs, and interest provided by the statute. Section 117, Tax Law. When a person seeks equity, he must do equity. He must come into court with clean hands, and without laches or delay.

The decisions of this and other courts have settled all there is in this case. This action cannot be maintained unless the tax is *illegal*, and the execution of a tax deed is a *proceeding* to enforce the collection of the same. Civil Code, § 253. On what ground can it be claimed that the tax is illegal? It is not claimed that the property is exempt from taxation. It is not claimed that the state, county, or city had no power to levy taxes. It is not even claimed that the assessment or taxation is greater by reason of the real estate in Spring Garden addition being described in lots and blocks, and not as a whole. The only objection made to the city tax is that it was not properly certified to the county clerk. The petition alleges that the tax was made on the "real and personal property in such city." There

is nothing alleged in this petition that renders the tax illegal and void. Dill. Mun. Corp. § 737; Missouri River, Ft. S. & G. R. Co. v. Morris, 7 Kan. *210, *228.

Mere irregularities do not render a tax illegal or void. Gen. St. 1057, § 113; Missouri River, etc., R. Co. v. Morris, 7 Kan. *225; Kansas Pac. Ry. Co. v. Russell, 8 Kan. *558, *561; Smith v. County of Leavenworth, 9 Kan. *296, *300; Missouri River, etc., R. Co. v. Blake, Id. *489; Exchange Bank v. Hines, 3 Ohio St. 1; Mills v. Gleason, 11 Wis. 470. Courts of equity will not interfere unless the collection of the tax would be inequitable and unjust. Missouri River, etc., R. Co. v. Morris, 7 Kan. *210, *228; Kansas Pac. Ry. Co. v. Russell, 8 Kan. *558; Parker v. Challiss, 9 Kan. *155; Smith v. County of Leavenworth, Id. *296; Missouri River, etc., R. Co. v. Blake, Id. *489; Warden v. County of Fond du Lac, 14 Wis. 618; High, Inj. § 355. Plaintiff must tender what is right and equitable before he is entitled to an injunction. Missouri River, etc., R. Co. v. Morris, 7 Kan. *210; Merrill v. Humphrey, 11 Amer. Law Reg. 208; Bond v. Kenosha, 17 Wis. 284; Evansville v. Pfisterer, 34 Ind. 36; Lafayette v. Fowler, Id. 141; Smith v. Pacific M. S. S. Line, 1 Cal. 455; Kellogg v. Ely, 15 Ohio St. 64; 2 Story, Eq. Jur.

*58 § 959a. The plaintiff *must not have been guilty of laches or delay. He should have enjoined the *levy* of the tax, or, at the latest, the *sale*. He cannot wait until the relief asked would work an injury to the other party. High, Inj. §§ 7, 397; Hill. Inj. § 43; Tash v. Adams, 10 Cush. 252.

It is difficult to understand the position taken by defendant in error as to the *status* of Spring Garden addition. He refers to a pretended vacation, yet he alleges that the property is situate in the First, Third, and Fourth wards of the city. If this addition was legally vacated, then the N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ section 7, township 6, range 21, was no part of the city, but an outside tract of 80 acres of land; and a tax deed on "lot 10, block 3, Spring Garden addition," would be no cloud upon the title of the 80-acre tract. If it was outside of the city, it was not injuriously affected by city taxes, for they were levied only on the property in the city. Even if the property should have been assessed in acres, it does not appear from the petition that the taxes would have been less if they had been so levied. And if the tract of land was in the city, a tax deed on lots and blocks that had no existence would cast no cloud upon the title of the tract of land. Under the decisions of this court, the granting of an injunction to restrain the collection of a tax, for the irregularities complained of here, would be held inequitable, and against public policy.

W. W. Guthrie, for Challiss, defendant in error, submitted the same views presented in his brief in the preceding case of Challiss v. County of Atchison, *ante*, *50, and he added the following:

One other question is here presented as to the Spring Garden addition lots. Before the assessment for the tax for which the sale was

made this property had ceased to be lots, and was only taxable as acres. Section 2, c. 128, Laws 1864, p. 241. There was, then, no assessment; the attempt made was a nullity. *Henry v. Mitchell*, 32 Mo. 512; *Abbott v. Lindenbouer*, 42 Mo. 162; Gen. St. 1082,

§§ 32, 36, 37, 39, 40. Challiss was only required to inquire *59 *for and to pay taxes on N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, section 7, township 6, range 21; yet here are patches of clouds to be scattered over his land, absolutely without any warning which he had any right to expect. Neither, after vacation, would such property be within the city, and subject to city taxation. It never was in the city except as an addition. Section 1 of act of February 12, 1858, defined the boundaries of the city; and section 1 of act February 11, 1859, makes additions, after plat filed, a part of the city, and as such subject to taxation. This tract went into the city by virtue of said act of 1859, when it ceased to be acres, and became lots; and went out of the city by virtue of said chapter 128, Laws 1864, when it ceased to be lots, and became acres. It was an addition only by virtue of the filing a plat, and, of course, as it rested on this fact, it existed within the city no longer than the fact existed.

BREWER, J. Many of the questions in this case are similar to those in the case of *Challiss v. County of Atchison*, *ante*, *50, just decided. They need not, therefore, be considered here. One principal difference is that here the sale certificates were held by the plaintiff in error Stebbins, and it may with more propriety be said that an injunction will not "embarrass the collection of the public revenues." The county has received the money, and the controversy is one simply between two individuals,—one seeking to free his property from an apparent incumbrance, and the other seeking to perfect a title to that property,—a title which he has acquired for but a small fraction of the value of the property. Yet, notwithstanding the difference in the positions which the defendants in the two cases occupy, the same decision must be made in each, for the claim of the plaintiff in each rests upon the same foundation. It matters little what wrong a defendant may be doing, unless the plaintiff's claim is equitable; and in each of these cases the plaintiff, without paying a cent towards the public revenues, is asking a court of equity to release him from *60 all obligations to pay. And *though the county is no longer the holder of these certificates, yet, if this action be sustained, it will be compelled to refund to the defendant the money he has paid for them; so that the ultimate result would be to release the plaintiff from his share of the public burdens, to deprive the county of this portion of the public revenues, and to cast a so much heavier burden on the other citizens and property holders. True, something might be done towards avoiding this result by a reassessment, levy, and sale, if authorized by the legislature; but, owing to the delay and expense, this would only be a partial avoidance.

One other question is presented, which affects a part of the property only. At one time there had been what was known as the "Spring Garden" addition of the city of Atchison. This was duly laid off into lots and blocks, and some of the tax certificates held by the defendant were upon lots in this addition. But before any of these tax proceedings were had this addition had been duly vacated, so that the lots and blocks had ceased to exist. It is insisted that by the vacation this addition ceased to be a part of the city, or subject to city taxation. On the twelfth of February, 1858, an act was passed by the territorial legislature concerning the city of Atchison, by the first section of which the boundaries of the city were defined. The property in controversy was outside of those boundaries. On the eleventh of February, 1859, another act was passed, in the first section of which it was provided, among other things, that "all additions which have been, or may hereafter be, made, shall become and be a part of said city, after the plat thereof shall have been filed, as required by law, twelve months, and shall be liable for taxes as other city property after the commencement of the first fiscal year of said city thereafter." By this act this addition became a part of the city. And the act provides for no temporary or conditional annexation. The ground platted is not to be a part of the city so long only as it remains platted, but it is to become and be a part of the city permanently. The act provides

*61 a way in, none out of, the city. But in *1864 an act was passed providing for the vacation of town-sites and additions, (Laws 1864, p. 241,) and in that it is declared that, in case of a vacation, "all surveys for the subdivision of such lands are expunged from record, and declared null and of no avail in any court of this state, and the lands hereby restored to their original condition under the surveys of the United States government, as if no platting for a town had taken place." This language is very broad, and it may possibly sustain the claim of counsel; but we do not care to decide the question, as we deem it unnecessary for the disposition of this case; for though this still be a part of the city of Atchison, and subject to its taxation, we think the injunction must, as to it, be sustained. In the second section of the act last cited it is provided that after the vacation the "land shall be as if never a town site, and shall be taxed as parcels of land by appropriate descriptions in acres." These lots were assessed in disregard of this plain and positive requirement, and it is an error which involves something more than a mere irregularity of description. It must be presumed that the assessment was fairly made as an assessment of lots with streets and alleys surrounding them, and the fact that these streets and alleys exist, or are supposed to exist, is an element which enters into and forms a part of, and to that extent increases, the valuation. How materially they did affect the valuation in this particular instance we cannot say. Perhaps it cannot, in the very nature of things, be shown. The elements which enter into and determine the value are so essentially different in the

case of town lots and open fields that it seems as though they were almost incapable of exact pecuniary measurement. As the case at present stands, there is no attempt at it. More than that, the ground covered by the streets and alleys, being then private property, and subject to taxation, may yet be reached and compelled to bear its proportion of the public burdens; for though the supposed streets and alleys may have increased the value of the supposed lots, yet they do not thereby become themselves exempt from taxation. We

*62 think, therefore, the district judge *did not err in overruling the motion to vacate the temporary injunction as to these lots.

The case may be thus summed up: The plaintiff is the owner of a certain tract in the city of Atchison which is liable to assessment and taxation as a single tract of so many acres. Portions of it, by descriptions through which they can be identified, are assessed and taxed as lots surrounded by streets and alleys. Such assessment includes, and is based upon, elements of value which do not exist in the case of unplatted ground, and which, so far as now appears, have no exact pecuniary measurement. The supposed existence of streets and alleys, while it increases the valuation of the ground assessed as lots, does not exempt from taxation the ground covered by the streets and alleys, which may hereafter be assessed and taxed. The assessment, therefore, is both irregular and unjust. It presents a case for equitable interference.

The order of the district judge refusing to dissolve the injunction will therefore be reversed, except as to the lots in the so-called "Spring Garden Addition," and as to them it will be affirmed. The costs will be divided.

(All the justices concurring.)

GEO. W. McMILLEN, Co. Clerk, etc., v. THOS. H. BUTLER.

July Term, 1875.

Officers: Action against Public Officers to Restrain Them from Removing Their Offices, etc., when not Maintainable. Where a private individual brings an action against the county officers for the purpose of obtaining an injunction to restrain such officers from removing their respective offices from the town of O. to the town of E. during the pendency of a certain suit in the supreme court, and in his petition alleges, in substance, that he is a resident, a citizen, an elector, and a tax-payer of said town of O.; that prior to the commencement of this suit he commenced an action against the county clerk to perpetually enjoin

*63 him from moving his office from *said town of O. to said town of E.; that in said action a temporary injunction was granted; that on the final hearing of said action judgment was rendered against the plaintiff and in favor of the defendant, and said town of E. was declared to be

the county-seat; and that the plaintiff then took the case to the supreme court, where it was still pending when this present action was commenced: *held*, that said present action cannot be maintained.¹

Error from Neosho district court.

The case is stated in the opinion.

John T. Voss, for plaintiffs in error.

W. S. Carroll, for defendant in error.

VALENTINE, J. This was an action brought by Butler against McMillen and the other county officers, to enjoin said officers from moving their respective offices from the town of Osage Mission to the town of Erie, Neosho county, pending a certain suit in the supreme court. The petition below states, in substance, that Butler, the plaintiff below, "is a resident of the town of Osage Mission, and a taxpayer, a citizen, and elector of said county of Neosho; that Butler had previously commenced an action in the district court of said county against said McMillen, county clerk of said county, to perpetually enjoin him from moving his office from said town of Osage Mission to said town of Erie; that a temporary injunction was granted in that case; that the case was finally tried upon its merits; that Butler was defeated in the action,—the judgment therein being rendered against Butler and in favor of McMillen, and deciding that Erie was the county-seat of said county; that Butler then took the case *64 to the supreme court, where it is (at the commencement of this suit) now pending; that the co-defendants of said McMillen are privies in law to him, and as such are bound by the pendency of said temporary injunction;" "that each and all of said defendants are bound to take notice of the pendency of said proceedings, and the appeal therein to the supreme court;" and Butler thereupon prays in this suit for an injunction restraining all the defendants except McMillen from moving their respective offices, as aforesaid, until said case of Butler against McMillen shall be finally decided in the supreme court. That case has been decided in this court, (*Butler v. McMillen*, 13 Kan. *385;) but the decision of that case will not affect the present decision of this case. The defendants demurred to said petition on various grounds, among which was the ground that the petition did not state facts sufficient to constitute a cause of action. The court below overruled said demurrer, and the defendants below now bring the case to this court.

It is difficult to understand upon what principle it is supposed that this action may be maintained. There is no statute authorizing such an action; and we do not think that it can be maintained under any general principles of law or equity. There is a statute authorizing suits to contest county-seat and other elections, (*Laws 1871*, p. 190;) but this action was not brought under that statute. The plaintiff in

¹ As to when public officers are liable to suit, etc., see note to *McElroy v. Swart*, 24 N. W. Rep. 769.

this case does not pretend to found his rights upon any election. He does not allege, except possibly remotely and inferentially, that any election was ever held in Neosho county; he does not at all allege that any election was illegal or void; he does not, except by a very remote inference, allege that Osage Mission ever became the county-seat by virtue of any election or otherwise; and, above all, he does not attempt in this action to *contest* any election. The substance of his petition is that at one time he filed a petition in another case, in which he alleged that Osage Mission was the county-seat of Neosho county; that there had been an election under which the county commissioners had declared that Erie was the county-seat of said *65 county; that under said election said *McMillen was about to move his office of county clerk to Erie; but either that said election was void, or that Osage Mission had become the county-seat thereunder and by virtue thereof. But we do not understand that the plaintiff below claims that he brought his action under said statute, and it is not necessary, therefore, to say anything further with reference thereto. The plaintiff is not a public officer, prosecuting for the benefit of the public; and he does not show that he has any special or private interest in the subject-matter of the action which calls for any special interposition of the courts of justice for his particular benefit. Merely being a resident, a citizen, an elector, or a tax-payer, or all combined, does not authorize a private individual to summon the public officers into the courts of justice to answer for their official conduct. *Bridge Co. v. Wyandotte Co.*, 10 Kan. *326, *331, and cases there cited; *Miller v. Town of Palermo*, 12 Kan. *14. His interest must be private and special in order to invoke the special intervention of the courts in his favor.

But under no view that we may take of the circumstances, should the courts interfere in this particular case. If the judgment of the court below in the case of *Butler v. McMillen* is right, and in the absence of anything to the contrary we must presume that it is right, then no new injunction should be granted to restrain the county officers from moving their offices to Erie, for the court in that case determined that Erie was the county-seat. But even if said judgment is wrong, still if the theory of the plaintiff, that all the county officers are in privity with each other, that all are bound by said temporary injunction, and that said temporary injunction is still in force, is correct, then the plaintiff does not need any further injunction, and the injunction should be refused in this case for that reason alone. Why should the plaintiff want two injunctions against the same persons for the same thing? It will be remembered that the injunction prayed for in this case is only to restrain the officers until the other case can be decided in the supreme court.

*66 *The judgment of the court below is reversed, and cause remanded for further proceedings.

(All the justices concurring.)

JOHN R. SWALLOW v. CHESTER THOMAS, Jr., Sheriff, etc.

July Term, 1875.

Taxation: Partnership Property, where Listed. In 1872, S. and A. were partners in an unincorporated bank in Marion county. S. resided in Shawnee, and A. in Marion, county. A. was the cashier and principal accounting officer. As such, he listed the entire personal property of the bank for taxation in Marion county. *Held*, that this listing must be sustained, and that the entire property was taxable in that county. [Ottawa Co. v. Nelson, 19 Kan. 242.]

Error from Shawnee district court.

Swallow, as plaintiff, filed his petition against Thomas, as sheriff of Shawnee county, as defendant. The petition stated that on the first day of March, 1872, the plaintiff and one Peter Aller were the owners of a banking business in Marion county, as partners, with a capital of about \$6,000, of which said sum they had invested \$2,500 in real estate, for the purpose of carrying on their business; that on the said first day of March, 1872, and for eight years preceding, said plaintiff had continuously resided and domiciled in the city of Topeka, Shawnee county; that in April, 1872, he had duly listed, for said year, all personal property which by law he was required to list, either on his own account or on behalf of others, duly verified, and delivered the same to the assessor of the city of Topeka, and that he had paid to the treasurer of Shawnee county all taxes levied on said personal property assessment. The petition then alleges that the said Aller, or some other person to the said Swallow unknown, in May, 1872, in the name of "J. R. Swallow & Co.," unlawfully made out and delivered a pretended list of personal property in Doyle township, Marion county, and unlawfully returned the same to the township assessor of said township of Doyle; "that the sum of \$17,240, included in said list, is fraudulent and false, except as hereinbefore stated, and that the said list was so made out and returned without the knowledge and consent of the said Swallow." On said assessment there was levied against J. R. Swallow & Co. taxes to amount of \$768 by officers of Marion county. These taxes remaining unpaid, except the sum of \$95.75 paid by some one unknown to Swallow, the treasurer of Marion county, in June, 1873, issued and transmitted to Thomas, as sheriff of Shawnee county, a warrant for the collection of the sum of \$729.10. This action is brought to enjoin the collection of said Marion county taxes. The defendant demurred to the petition, which demurrer was sustained by the district court at the December term, 1873.

Guthrie & Brown, for plaintiff in error.

This case is settled in the case of *Griffith v. Carter*, 8 Kan. *570. The maxim of the common law was *mobilia personam sequuntur*. The

domicile of the owner draws to it his personal estate, whatever it may happen to be. Section 8, Tax Law; *State v. Matthews*, 10 Ohio St. 437; *City of Baltimore v. Stirling*, 29 Md. 48; *Tappan v. Merchants' Nat. Bank*, Alb. Law J. May 9, 1874, p. 305.

L. F. Keller and Frank Doster, for defendant in error.

Aller, the cashier and principal and only accounting officer of the banking firm of Swallow & Co., the managing partner thereof, who had charge of, and personal supervision over the business of the firm where the property of the bank was, and where the only business office of the firm was located, was the proper person to list the whole undivided interest of the firm in the township wherein he
 *68 *resided, and at the place where the business of the partnership was transacted. The facts in the case of *Griffith v. Carter*, cited by plaintiff, are so unlike the facts here, that said case does not govern.

BREWER, J. In the year 1872 plaintiff and one Peter Aller were the owners, as partners, of the Marion County Bank, an unincorporated bank in the town of Florence and county of Marion. Plaintiff resided in Shawnee, and Peter Aller in Marion, county. The latter was the cashier and principal accounting officer. As such, he listed the entire personal property of the bank for taxation in the county of Marion. Was it properly all taxable in that county? Or only the interest of Aller there, and the interest of plaintiff in the county of his residence? This is the question presented in this case; and it is a question involving merely the construction of our statutes; for of the power of the legislature to separate, for the purposes of taxation, the *situs* of personal property from the domicile of its owner, there can be no doubt, (*Tappan v. National Bank*, 19 Wall. 490;) nor any of the fact that, unless it has so separated it, it is taxable at his domicile. This general doctrine of the common law, expressed as it is by the maxim, *mobilia personam sequuntur*, finds also recognition in our tax law: "All personal property shall be listed and taxed each year in the township or city in which the person charged with the tax thereon resided on the first day of March." Gen. St. p. 1023, § 8. This clause came up for consideration in the case of *Griffith v. Carter*, 8 Kan. *565. There the plaintiffs, partners in business, all resided in Douglas county, but had a stock of goods in Coffey county in charge of an employe. The former was held the *situs* of the stock for taxation. A better rule has been since established by the legislature. Laws 1874, p. 210.

Counsel for plaintiff mainly rely upon this case of *Griffith v. Carter*, and consider it decisive; and if the clause of the statute quoted
 *69 was the only one bearing upon the question, *there would be no room for doubt. But in section 7 we find this provision: "The property of persons or corporations, whose assets are in the hands of receivers, shall be listed by such receivers, and the property

of every other corporation, company, or firm, subject to taxation under this act, shall be listed by the principal accounting officer, or by an agent or partner thereof." This seems to contemplate that the property of a firm should be listed as a whole, and not that each partner should list his property separately. The partnership is here regarded, as it is for so many other purposes in the law, as distinct from the individuals composing it,—as if it were a third person; and it, as a single owner of so much property, is compelled to list the same for taxation. Corporations, companies, and firms are placed upon the same basis. They are treated as separate, independent owners of property. The same thing appears elsewhere in the tax law. See sections 4, 5, 6, and 8, in which mention is frequently made of "person, company, or corporation." Now, effect must be given if possible to every portion of a law. By sustaining the listing made by Aller we do in this case give effect to both provisions quoted. The property of the firm was listed as an entirety; it was listed by the principal accounting officer, and a partner; and it was listed in the township in which the person charged with the tax resided, for each member of a firm is chargeable with its entire debts. In fact, a partner's interest in the partnership property is a right to his share of whatever remains after all the partnership debts are paid. The whole of this tax was chargeable upon Aller, and might have been collected from his separate property. The firm, too, so far as it had a residence distinct from the residence of the different partners, resided in Marion county. This case differs from that of Griffith v. Carter in this: that all the partners there resided, and the firm of Griffith, Duncan & Duncan, which owned the goods, was located in Douglas county, so that there was no one in Coffey county who could properly be said to be chargeable with the tax, or whose property would be at all diminished by its payment. Listing the *property in Douglas county, they listed the property of the firm as a whole, listed it by the partners, and listed it in the township in which all the persons charged with the tax resided. The difference is obvious and vital. Upon the facts as stated, while the case is not free from doubt, we think the listing by Aller must be sustained, and the judgment of the district court will be affirmed.

(All the justices concurring.)

CITY OF INDEPENDENCE v. T. P. TROUVILLE.

July Term, 1875.

1. **Municipal Corporations: City Liable to Marshal for Services Rendered under Ordinance.** Where an ordinance of a city of the second class, in 1872, prohibited dogs from running at large in any public place in said city unless the owner of each dog should first pay to the city a tax, and should cause a collar and check (which were to be furnished by the city) to be worn by each dog, and said ordinance made it the duty of the city marshal to kill and bury every dog found running at large in violation of said ordinance, and provided that the marshal should receive from the city, as compensation for his services in this respect, one dollar for each and every dog killed and buried, *held*, that the marshal has a right to recover from the city, in a proper action therefor, one dollar for each and every dog he has actually killed and buried in accordance with the provisions of said ordinance.
2. ———: **Ordinances: How Proven.** It was not error for the court below to permit, in such an action, the ordinance to be proved by the introduction of the original ordinance book of said city.
3. ———: **Judgments against: How Collected.** Where no provision is made by statute for the collection of judgments against cities of the second class, it would seem that an execution may issue on such judgments.

Error from Montgomery district court.

At the December term, 1873, of the district court, Trouville, as plaintiff, recovered a judgment against the City of Independence *71 *ence for \$168, and costs, and execution was awarded on the judgment.

Nathan Cree, for plaintiff in error.

That portion of the ordinance which gives the city marshal one dollar for each dog killed and buried is void. The power to give compensation for killing dogs cannot be derived from the authority conferred upon the city to regulate the compensation of the city marshal. Laws 1872, p. 197. The mayor and council had no more power to prescribe, by ordinance, the duties of the marshal than of the mayor, police judge, justices of the peace, or constables. They had as much power to make it the duty of the mayor to kill and bury dogs as to force that duty upon the marshal. A corporation cannot enlarge its own powers. Dill. Mun. Corp. § 231. Section 6 of the ordinance, making it the duty of the marshal to kill dogs, is *ultra vires*, and confers no right to sue for fees. The compensation of the marshal must be regulated by ordinance. Laws 1872, p. 197. Does not this provision require that there must be a separate ordinance or ordinances for that purpose, and exclude the power of the council to insert regulations on that subject, through the ordinances, at will, making perhaps a dozen disjointed regulations concerning the compensation of officers? The duties of the marshal are fixed by the

statute, and the mayor and council have no power to add to them. The compensation allowed to the marshal as such by the city must be for the services fixed by the statute, and none other.

We deny the power of the mayor and council to authorize the marshal to destroy dogs in the manner pointed out in this ordinance. Well-settled principles, applicable to the forfeiture of animals running at large, require some notice to the owners, some inquiry to first determine whether he was permitting animals owned or harbored by him to run at large contrary to the provisions of the ordinance, and some warrant, issuing from the council or police judge, to destroy *72 dogs *found at large unlawfully. By the terms of the ordinance in question the marshal is made the sole judge of all facts constituting a violation of the ordinance. He may determine, without any notice to the owner of the animal, and without any inquiry, whether or not such owner is violating an ordinance, and upon such determination may destroy his property. The power to make such regulations has not been delegated to any of our municipal corporations. See Dill. Corp. §§ 281-286.

The court erred in permitting the ordinance to be read to the jury. Section 10 of the second-class city act does not pretend to make the ordinance book evidence, but merely means to provide a method of directing the inquirer to the sources of evidence. If that section makes the ordinance book evidence of the existence of an ordinance, then it also makes it evidence of the passage and publication of the ordinance, for these, too, must be set forth in the ordinance book. It can hardly be claimed that the legislature meant to do that.

It was error to award execution against the city. Property of a municipal corporation cannot be sold on execution. Dill. Corp. § 64; *Merwin v. City of Chicago*, 45 Ill. 133. Error will lie upon an award of execution. *Harger v. County of Washington*, 12 Pa. St. 251; *Phillips v. Russell*, 1 Hemp. 62; *Powell*, App. Proc. 155.

Armstrong & Gamble, for defendant in error.

VALENTINE, J. On June 27, 1872, the city of Independence, a city of the second class, passed an ordinance that no dog should be permitted to run at large in any public place in said city unless the owner of the dog should first pay to the city a tax of one dollar for each male owned by him, and five dollars for each female, and should cause a collar and check, which were to be provided by the city, to be worn by each dog. Said ordinance also made it the duty of the city marshal to kill and bury every dog found running at *73 *large in violation of said ordinance, and also provided that the marshal should receive from the city, as compensation for his services in this respect, one dollar for each and every dog killed and buried. Under this ordinance, and from July 9 to December 30, 1872, the marshal killed and buried 168 dogs. The city then refused to pay him for his services. He then commenced this action

to recover for the same. The plaintiff in error in its brief says: "The defendant in error brought suit against the plaintiff in error in a justice's court to recover the sum of \$168 for services as marshal of the plaintiff in error, under an ordinance. Judgment for that amount was rendered in favor of plaintiff. Defendant appealed to the district court, where the case was tried at the December term, 1873, and judgment for the amount claimed, \$168, was there rendered." The city then brought the case to this court on petition in error.

The city now claims that said ordinance is illegal and void, and imposes no binding obligation upon the city to pay for services rendered under it. It sometimes happens that municipal corporations, as well as individuals, believe that it is eminently legal to incur obligations, but manifestly illegal to fulfill them. This is a kind of frugal respect for law eminently beneficial to those who can successfully exercise it, but not so congenial to those who must innocently suffer by it. Hence what may seem to be a commendable example of prudential economy by the party pleading the illegality may be regarded as a pernicious example of moral obliquity by the other. We perceive no sufficient reason why the plaintiff cannot recover in this case. No sufficient reason has been given, and we perceive none, why said ordinance should be held to be invalid, so far at least as it affects any question involved in this case. It should certainly not be held to be invalid because of the sacredness of the property that may be held in dogs. Property in dogs is of such a low character that it is hardly considered as property at all. And a vast number of dogs running at large upon the public streets, without any
*74 known owner, is always considered as a nuisance. *We do not suppose that property in dogs is of such a sacred character that dogs found running at large upon the public streets, in violation of a city ordinance, cannot be destroyed, but must be taken up and impounded, as a cow or other more valuable animal, and notice thereof given to the owner, and that the dogs must then be offered for sale at public auction to the highest bidder, if the owners thereof (if they have any) should not in a reasonable time pay charges and take them away. The ordinance is made for dogs owned and kept in the city of Independence, and not for dogs casually there. And we must presume, as the record comes to us, that no dog was killed except such as the marshal had a right to kill.

It was not error for the court below to permit said ordinance to be proved by the introduction of the original ordinance book of the city.

There seems to be no provision made by statute for the collection of judgments against cities of the second class. If this is so, then we suppose an execution may issue on such judgments.

The judgment of the court below is affirmed.

(All the justices concurring.)

BURLINGTON Tp. and another v. S. K. Cross and another.

July Term, 1875.

Remedies: Bonds: Kind of Action: When Party must Resort to Legal, not Equitable, Proceedings. A township issued to a firm certain bonds for the purpose of aiding said firm in erecting a certain mill and mill-dam; and, in consideration for said bonds, C., a member of said firm, gave to said township his certain promissory notes and a mortgage. These notes and this mortgage were to be paid in money, or in said bonds, at the option of the payor of said notes and mortgage. No such payment, however, nor offer to pay, has ever been made. None of the bonds

*75 have ever *been returned to the township, and no offer to return any of them has ever been made; and what has become of the bonds, since their delivery to said firm, has not been shown. *Held*, that an action in the nature of a bill in chancery, brought by C. against said township to have said notes and mortgage set aside and canceled, on the ground that said township had no power to issue said bonds, cannot, under the circumstances of this case, even admitting that said township had no power to issue said bonds, be maintained; but the plaintiff must rely upon his ordinary legal remedy.

Error from Coffey district court.

Action by Cross and another to set aside and cancel certain notes and mortgage. The petition described the notes and mortgage, and alleged that they were given without legal and sufficient consideration. The answer contained two defenses: *First*, a general denial; *second*, the contract between the plaintiffs and the township of Burlington, and the issue and delivery of the bonds of said township to plaintiff's firm to the amount of \$10,000, for which bonds said notes and mortgage were given. To the second defense plaintiffs demurred. The district court, at the December term, 1873, sustained the demurrer, and gave judgment in favor of the plaintiffs, adjudging said notes and mortgage to be utterly void, and decreeing that the defendants, Hiram McAllister, as trustee of Burlington township, and said Burlington township, "surrender the said promissory notes and mortgage to said plaintiffs, and that the trustee of said township, within ten days from this date, enter a release of said mortgage on the margin of the record thereof in the Book of Mortgages in the office of the register of deeds of said county of Coffey, and that, in case said defendants fail for ten days from this date to enter a discharge of said mortgage, then this judgment and decree shall operate to fully satisfy and discharge said mortgage on the records of said county; and the said defendants are hereby forever enjoined and restrained from selling or disposing of said notes and mortgage, or from ever trying, in any manner or way, to collect the same."

*76 *A. M. F. Randolph, for plaintiffs in error.

The plaintiffs below in their petition ask for the rescission of a certain contract, and for the delivery up of certain notes and a mort-

gage, and for the cancellation of said mortgage on the records, because of the alleged illegality and alleged failure of the consideration for which said notes and mortgage were given; the consideration thereof being certain bonds of Burlington township issued for the purpose of aiding them in the improvement of their water-power and mill privileges, and putting in operation a flouring-mill at and near the town of Burlington. They claim that the transactions out of which said notes and mortgage arose are vitiated by the illegality of the bonds of said township. They, however, allege no fraud perpetrated upon them by said township, or its trustee, in making said contract; nor do they set up any false and fraudulent representation which induced them to take said bonds, and give for the same said notes and mortgage; nor do they claim that said township, in any manner, took advantage of their ignorance and inexperience; nor do they state facts which show that in case the contract should be rescinded that the parties can be put *in statu quo*; nor do they allege that they have not received value for said bonds; nor have they ever offered to return said bonds, nor do they now offer to do so; nor do they aver that they have suffered any pecuniary loss or damage by reason of the alleged illegality of said bonds. Adams, Eq. 174, 176, 177, and notes. Since plaintiffs below ask for equitable relief, they should remember the maxim, "He who asks equity must do equity."

W. A. Johnson and Redmond & Jenkins, for defendants in error.

VALENTINE, J. This was an action in the nature of a bill in chancery, brought by S. K. Cross and Thomas Cross against Hiram McAllister, as trustee of Burlington township, *and also *77 against said Burlington township, to set aside and cancel five certain promissory notes, and a certain real-estate mortgage made to secure the payment of said notes. One of the notes reads as follows:

"\$2,000.

BURLINGTON, KAN., February 27, 1871.

"One year after date I promise to pay to Burlington township, Coffey county, Kansas, or to the order of the township trustee of said township, in money, or in the bonds of said township issued to D. Cross & Sons, two thousand dollars. Value received.

"S. K. Cross."

The other notes are precisely like this one, except that they are made payable in two, three, four, and five years after date, respectively. They aggregate in amount the sum of ten thousand dollars. They were given for a like amount of the bonds of Burlington township issued to D. Cross & Sons, of which firm S. K. Cross was a member. It is claimed that said bonds are void because they were issued to said D. Cross & Sons merely for the purpose of assisting them in erecting a mill and mill-dam in said Burlington township. It is not claimed

that said bonds are void because of any fraud or mistake of facts, or because of any irregularity in their issue; but it is claimed that they are void solely on the ground that Burlington township had no power to issue them. Now, for the purposes of this case, but without deciding the question, we shall assume that said bonds are void, and void merely because the township of Burlington had no power to issue them; and upon this hypothesis or assumption can the plaintiffs below maintain this action? Upon what ground do they invoke the aid of a court of equity, rather than the aid of a court of law? Not upon the ground of fraud, accident, or mistake; not upon the ground of any breach of confidence or trust; not upon the ground that confiding innocence has been overreached by far-seeing vice,—for none of these things are claimed; not upon the ground that the plaintiffs have no adequate remedy by the ordinary course of proceedings at law; and not upon the ground that the plaintiffs will suffer

*78 any great or irreparable injury, or indeed any injury, which *it would be inequitable for them to suffer,—for presently we shall show that the plaintiffs have an ample remedy at law, and that there is no danger of their suffering more than it is equitable and right for them to suffer.

Admitting that said bonds are void, and that they were the sole consideration for said notes and mortgage, the plaintiffs then claim that they can maintain this action solely upon the ground "that the trustee of Burlington township neglected and refused, on the demand of said plaintiffs, to deliver said notes and mortgage up to said plaintiffs, but thereafter did and does claim that he will collect the same when they become due, whereby said plaintiffs would be liable on said notes and mortgage." We, however, think differently. Said notes are not negotiable instruments. Gen. St. 114, § 1; 1 Pars. Notes, 45 *et seq.*, and cases there cited. Even if it be considered that they are made payable to the order of the township, or to the order of its trustee, so as to make them negotiable in that respect, yet still they are not made payable in "money certain." They are made payable alternatively, either in money or in said supposed worthless bonds, at the choice and option of the payee of the notes. Hence they cannot be transferred to any one so as to defeat any defense which may be set up against them. They can never be collected against the will of the payor, except by an action in the courts; and, whenever such an action may be commenced, the payor, or any one in privity with him, may set up any defense which he may have. Besides, if the payor chooses, he may at any time pay off said notes by returning to the township said worthless bonds. These remedies are certainly ample, and the plaintiffs have no need of the present action. But if no action for the collection of said notes shall ever be commenced, so as to allow the plaintiffs to set up their defense, then the plaintiffs can certainly suffer no injury, or at most none which they ought not to suffer. They lose nothing by waiting. The statute of

limitations will not run against them on said notes and mortgage, but will run in their favor. But, if it be said that the notes and *79 mortgage should not be allowed to hang over them *until the statute of limitations shall bar any action upon them, then it may be answered that the plaintiffs ought not to allow said bonds to hang over said township until the statute of limitations shall bar all action upon the bonds. It will take just as long for the statute of limitations to bar an action upon the bonds as upon the notes and mortgage.

The prayer of the plaintiffs' petition is that the defendant shall be required "to deliver up to said plaintiffs said notes and mortgage, and that said mortgage may be canceled on the records." Now, it would be inequitable and unjust to require the township to deliver up the notes and mortgage, and have them canceled, and yet allow the plaintiffs to retain the bonds, which we suppose are apparently, and upon their face, as good and as valid as the notes and mortgage. We suppose that all the instruments upon their face appear to be valid, although we have no copy of the mortgage, nor of any of the bonds. And as the notes and mortgage were given for the bonds, and the bonds for the notes and mortgage, and as all are apparently valid, but in fact void, it would seem to be just and equitable that, when one set of the instruments is delivered up and canceled, the other set should also be delivered up and canceled. The township has as much interest in protecting its reputation and character for paying its debts, as the plaintiffs have in protecting their reputation and character for paying their debts. The township no more wants bonds, apparently good and unpaid, to be standing out against it, than the plaintiffs want notes and a mortgage, apparently good and unpaid, to be standing out against them. The reputation of repudiating what appear to be valid debts will injure the credit of the township as much as the same thing would injure the credit of the plaintiffs. The township would no more want to go into the market to sell really valid bonds while these apparently valid but void bonds are still outstanding, and apparently due and unpaid, than the plaintiffs would want to go into the market with really valid notes and a valid mortgage while these apparently valid but really invalid notes, and this *80 apparently valid but really invalid *mortgage, are outstanding apparently due and unpaid. Let the plaintiffs do equity before they seek equity. There is no pretense that said bonds have ever been lost or destroyed, or transferred from D. Cross & Sons to any one else; and it will be remembered that the plaintiffs are members of the firm of D. Cross & Sons. If the bonds have in fact been lost, destroyed, or transferred, the plaintiffs should show it. But still we do not suppose that merely showing that the bonds have been transferred, if transferred for *value*, would be sufficient to authorize the plaintiffs to maintain this action. If the plaintiffs, or D. Cross & Sons, have sold the bonds to other persons for a valuable consid-

eration, and are still enjoying the benefits of that valuable consideration, how in the name of equity can they ask to be relieved from paying anything for the bonds, and thereby force the township either to lose the value of the bonds or repudiate the payment? And how in the name of equity can they compel the township to repudiate their bonds, and thereby compel the purchasers of the bonds to lose what they have paid for them? Why do not the plaintiffs gather up these supposed worthless bonds and return them to the township? This would be equity on the part of the plaintiffs; and by doing this the plaintiffs would then have the equitable right to ask that their notes and mortgage should be delivered up to them, and that they be canceled.

The judgment of the court below must be reversed, and cause remanded, with the order that the demurrer to the second defense stated in the answer of the defendant be overruled, and for such further proceedings as may be proper in the case.

(All the justices concurring.)

*81

*MARTIN SMITH v. CITY OF LEAVENWORTH.¹

July Term, 1875.

1. **Municipal Corporations: Streets in: Fee in County.** The fee of all streets, (including that portion of the same on which the sidewalk is constructed,) in any city in Kansas, is in the county in which such city is situated, for the use and benefit of the public.
2. ———: **Use of Streets and Sidewalks.** The only legitimate use that can be made of a street or the sidewalk by any private person is for passing and repassing upon the same. This would probably be different if the private person owned the fee of the land occupied by the street.
3. ———. Any person traveling upon a street has a right to use any portion of the same for that purpose not already otherwise in use.

¹See *Jansen v. Atchison*, 16 Kan. 358, reviewing the cases, on the liability of municipal corporations for defective streets, etc. Though a city builds its sidewalks lifted above the ground, upon posts, leaving openings underneath, or permits the owners of lots abutting to excavate areas under the walk, it does not become an insurer of the strength and sufficiency of the sidewalk above such openings and areas. Its undertaking is to use reasonable care and diligence (reasonable with reference to the risk and danger) in placing and maintaining suitable and sufficient plank or other covering of such openings and areas, and is responsible only in case of a failure to use such care and diligence. *Atchison v. Jansen*, 21 Kan. 560. Liability of cities for defective sidewalks, see the full notes to *McGinty v. Keokuk*, 24 N. W. Rep. 507, and *Bullock v. New York*, 2 N. E. Rep. 2. As to liability in constructing sewers, see *Leavenworth v. Casey*, *McCahon*, 124; S. C. 1 Kan. (Dassler's Ed.) 544, and the note thereto; neglecting to protect embankment, *Wyandotte v. Gibson*, 25 Kan. 236; question for jury, *Osage v. Brown*, 27 Kan. 74; notice of defect, *Salina v. Trosper*, 27 Kan. 544; contributory negligence—knowledge of defect, *Corlett v. Leavenworth*, 27 Kan. 673; *Maulthby*

4. ———: **Right of Lot-Owner.** A lot-owner, or any person under him, has a right to use any portion of a street in front of his lot in passing to or from his lot, and to and from the improvements on the same, including the house, cellar, etc.
5. ———: **Powers of City.** Under existing laws, no city has any power to confer upon any private person any right to use a street, or any portion of the same, for the purpose of a cellar-way, or for any other purpose except for passing and repassing.
6. ———: **Sidewalks: Duty of City.** It is the duty of a city to keep its sidewalks in good repair, and in such condition as to make them safe for the traveling public.
7. ———: **Negligence of City.** It is negligence for a city to allow a cellar-way to be made and left open in a street where persons are in the habit of traveling.
8. ———. A city is not liable for negligence which does not result in the injury of any person; and, in order to make a city liable for negligence, the negligence must still be operating when the injury occurs.
9. ———. While the use of any portion of a street for a private cellar-way is unauthorized by law, yet if the cellar-way were so guarded as to be perfectly safe, under all ordinary circumstances, for persons traveling upon such streets, the city would not be so guilty of negligence, in such a case as to be liable for some unforeseen injury resulting from some fortuitous circumstance which could not, in the ordinary course of events, be expected or anticipated as likely to occur.
10. ———: **Liability for Negligence.** Where a city permits a cellar-way to be constructed in the sidewalk of one of its principal streets, which
 *82 cellar-way is not guarded in any manner except by a *trap-door, and is dangerous for persons traveling on said sidewalk when said trap-door is not closed; and when said city permits the person occupying the adjoining lot, and those acting under him, to open and close said trap-door at their option,—the city is liable for any injury that may occur by reason of any person falling, without fault on his part, into said cellar-way when said trap-door is left open.

v. Leavenworth, 28 Kan. 745; bridge as part of street, *Eudora v. Miller*, 30 Kan. 494; S. C. 2 Pac. Rep. 685.

While, generally speaking, it is the duty of a city to keep its streets in reasonably safe condition for public travel, it is not thereby implied that every street, and the whole width of every street, must be placed and kept in good condition. The city may, without incurring liability, leave certain streets entirely unopened, and in others put only a portion of the width in condition for use. *Wellington v. Gregson*, 31 Kan. 99; S. C. 1 Pac. Rep. 253. An action will not lie against a city of the second class for damages for the injury to adjacent property caused by a change having been lawfully made in the grade of a public street. *Methodist Episcopal Church v. Wyandotte City*, 31 Kan. 722; S. C. 8 Pac. Rep. 527. The control of the streets of a city is vested in the city, and its exercise is not wholly discretionary or judicial or *quasi* judicial or legislative, and is not divided or shared with any other corporation or board or tribunal, but is absolute and exclusive in the city itself. It is imposed upon the city as an absolute and mandatory duty. *Gould v. Topeka*, 32 Kan. 485; S. C. 4 Pac. Rep. 832. The fact that a person uses a street or sidewalk after he has notice that it is out of repair, is not necessarily negligence. *Emporia v. Schmidling*, 33 Kan. 486; S. C. 6 Pac. Rep. 593.

Error from Leavenworth district court.

Action by Smith to recover damages for injuries sustained by him by reason of his falling into an open cellar-way on one of the streets of the city of Leavenworth. Trial at the February term, 1874, of the district court. Upon the facts found, the district court gave judgment in favor of the city.

F. P. Fitzwilliam and L. G. Hopkins, for plaintiff.

The city had full control over the sidewalks, freed from all obstructions, and authority to prevent and remove nuisances. City Charter, (Gen. St. c. 18, §§ 9, 19, 21.) The city had notice of the defect in the sidewalk, that it was unguarded, and dangerous for foot passengers. It made no attempt to protect any one traveling thereon from falling in. Therefore, for neglecting its duty in keeping the sidewalk in a safe condition for travelers, it rendered itself liable to plaintiff for the injury by him received. *City of Atchison v. King*, 9 Kan. *550; *City of Topeka v. Tuttle*, 5 Kan. *311; *City of Chicago v. Robbins*, 2 Black, 418; *City of Nebraska v. Campbell*, Id. 590; *Smith v. City of St. Joseph*, 45 Mo. 449; *Wendell v. City of Troy*, 39 Barb. 329; *Cuthbert v. City of Appleton*, 22 Wis. 642; *Koester v. City of Ottumwa*, 34 Iowa, 41. This liability was not changed because Kirch placed a trap-door over the cellar-way one day prior to the injury. This was done for "his own convenience, and the protection of his own customers." *Requa v. Rochester*, 45 N. Y. 129. The city was not absolved from the performance of its duties and liabilities to the public, in keeping the sidewalk free from defects and in a safe condition for pedestrians, because an obligation also rested on the owner or occupant of the lot to see that the cellar-way was properly

*83 *guarded. The jury finds from the evidence that there was no protection to foot-passengers when the trap-door was not down, and that at the time plaintiff was injured there was no guard, and the city had no knowledge of the trap-door being there, and had taken no steps to secure persons passing along the sidewalk at that point from injury. The city is primarily liable to plaintiff for the injury. *Rowell v. Williams*, 29 Iowa, 210; *Manchester v. City of Hartford*, 30 Conn. 118; *Wright v. Saunders*, 65 Barb. 214; *Balty v. Dubury*, 24 Vt. 163; *Wellcome v. Leeds*, 51 Me. 313; *Oakland Ry. Co. v. Fielding*, 48 Pa. St. 320; *Creed v. Hartmann*, 29 N. Y. 592; *Bloomington v. Bay*, 42 Ill. 503; *Trowbridge v. Forepaugh*, 14 Minn. 133, (Gil. 100); *Lane v. Atlantic Works*, 107 Mass. 104.

Lucien Baker, for defendant in error.

VALENTINE, J. This was an action brought by Martin Smith against the city of Leavenworth, to recover for injuries received by the plaintiff by reason of a defective sidewalk in said city. The facts of the case, as shown by the special verdict of the jury, are as follows:

"First. The defendant is a municipal corporation, a city of the first class, duly organized and existing under the laws of the state of Kan-

sas, and as such has the charge and control of the public streets within the limits of the city.

"*Second.* Shawnee street is a public street of said corporation, graded, curbed, guttered, macadamized, and sidewalked ten feet in width, by said corporation.

"*Third.* On the north side of said street was erected in 1868 a building on lot 9, in block 50. In front of said building was a cellar-way, which extended into the cellar by steps, six feet deep.

"*Fourth.* From the erection of said building until the second day of May, 1873, said cellar-way was unprotected, and several citizens fell therein.

"*Fifth.* On the evening of the third of May, 1873, between the hours of seven and eight o'clock, the plaintiff, in going from his residence to his place of business, using ordinary care, and without any fault on his part, accidentally fell into said cellar-way.

"*Sixth.* On the second day of May, 1873, John Kirch, who was a tenant in possession of said building, caused a trap-door to be
*84 put over said cellar-way. On the third day of May said *trap-door had been repeatedly shut and opened before said accident; but there was no protection to said cellar-way when said door was not down. The defendant, the city, did not know of the fact that Kirch had caused said door to be made and put down until after the injury to the plaintiff. The cellar to which said opening or cellar-way is, was rented and used by a number of hucksters dealing on the sidewalk near by. When said door was down over the cellar-way, it sufficiently protected the same. At the time of the accident to the plaintiff it had been up from twenty to thirty minutes. Mr. Kirch put down the door for his own convenience, and the protection of his customers.

"*Seventh.* The corporation defendant had full notice of the existence of said opening or cellar-way from the time of the erection of said building, and of the condition it was in; but the defendant did not know that said trap-door had been put down by Kirch.

"*Eighth.* From said fall the plaintiff sustained a fracture of his left arm, near the wrist, whereby he was confined to his house for three weeks, and was rendered unfit to attend to his business for over three months, and had to employ assistance to attend to his business while so disabled, and had to employ physicians, and incur expenditures for medical attention.

"*Ninth.* We, the jury, find, if the above facts are sustained by the court, the plaintiff is entitled to recover \$650 damages."

The only question involved in this case, as we think, is whether the plaintiff ought to recover upon the foregoing facts. It is true, the plaintiff suggests some other matters, but we hardly suppose he expects a reversal of the judgment below on account of them. For instance, he asked the court below to instruct the jury to make the following additional findings of fact, to-wit: "That the defendant

was guilty of negligence in permitting said opening to be made and to remain in said sidewalk;" "that the defendant was guilty of negligence in omitting to have said opening properly guarded;" "that said opening never had been, and was not at the time of the injury to said plaintiff, properly and sufficiently guarded." The court refused. He assigned this refusal for error. He mentions the

*85 same in his *statement of facts in his brief, but afterwards he does not even mention the matter. There are several reasons why we should not reverse the judgment of the court below on account of its rulings in this last-mentioned matter: (1) The plaintiff asked the court orally, and not in writing, to instruct the jury to make said additional findings. (2) When he made the request, it would seem that the jury had already been out for some time considering as to what their verdict should be, and had not yet returned into court with their verdict. (3) He asked that the court should instruct the jury to find a particular way, and did not propose to allow the jury to exercise any judgment or discretion in the matter. (4) He made no objection to the verdict at the time the same was rendered because it did not contain these additional findings, but, on the contrary, he seemed to be satisfied with the verdict without these findings. When the jury returned their verdict into court, the court below said to the plaintiff, "Are there any exceptions on the part of the plaintiff?" The plaintiff then made some suggestions, (not mentioning, however, these additional findings,) and the verdict was amended in accordance with his suggestions. The court then said, "Is there anything further by the plaintiff?" and the plaintiff answered, "No, sir." (5) The plaintiff seems finally to have abandoned the matter, for he has not mentioned the same in the argument in his brief.

We now return to the real question in the case, which is, which party should recover upon the facts found by the jury,—the plaintiff or the defendant? This is a difficult question to solve. It seems to be new. There is no case to be found in the books precisely like it, and different minds might reach different conclusions with reference thereto. We suppose, however, that the following propositions will be conceded to be good law: (1) The fee of all streets, including that portion of the same on which the sidewalk is constructed, in any city in Kansas, is in the county in which such city is situated, for the use and benefit of the public. *Randal v. Elder*, 12 Kan.

*86 *257, *261, and cases there cited. (2) The only legitimate use that can be made of a street, or the sidewalk, by any private person, is for passing and repassing upon the same. This would probably be different if the private person owned the fee of the land occupied by the street. (3) Any person traveling upon a street, has a right to use any portion of the same for that purpose not already otherwise in use. (4) A lot-owner, or any person under him, has a right to use any portion of a street in front of his lot in

passing to or from his lot, and to and from the improvements on the same, including the house, cellar, etc. (5) Under existing laws, no city has any power to confer upon any private person any right to use a street, or any portion of the same, for the purpose of a cellar-way, or for any other purpose except for passing and repassing. (6) It is the duty of a city to keep its sidewalks in good repair, and in such condition as to make them safe for the traveling public. (7) It is negligence for a city to allow a cellar-way to be made and left open in a street where persons are in the habit of traveling. (8) A city is not liable for negligence which does not result in the injury of any person; and, in order to make a city liable for negligence, the negligence must still be operating when the injury occurs. (9) While the use of any portion of a street for a private cellar-way is unauthorized by law, yet, if the cellar-way were so guarded as to be perfectly safe, under all ordinary circumstances, for persons traveling upon such street, the city would not be so guilty of negligence, in such a case, as to be liable for some unforeseen injury resulting from some fortuitous circumstance, which could not in the ordinary course of events be expected or anticipated as likely to occur.

We therefore conclude that where a city permits a cellar-way to be constructed in the sidewalk of one of its principal streets, which cellar-way is not guarded in any manner except by a trap-door, and is dangerous for persons traveling on said sidewalk when said trap-door is not closed, and where said city permits the person occupying the adjoining lot, and those acting under him, to open and close said trap-door at their option, the city is liable for any injury that

*87 occurs by reason *of any person falling, without fault on his part, into said cellar-way when said trap-door is left open. The city was unquestionably guilty of negligence, and of gross negligence, in allowing said cellar-way to be constructed and left open, without any guard, for such a great length of time, and, even when the trap-door was put down, the city had no agency in the matter, and no knowledge of the same, and did not even afterwards have any knowledge of the same until after the accident occurred. And it will also be noticed that said trap-door was not put down as a constant and permanent guard for said cellar-way; but it was put down with the unquestioned intention that it should be opened and closed at the option of those using the cellar. Hence the original negligence of the city in allowing a dangerous opening to be made in said sidewalk was not totally terminated and ended by the construction of a guard intended to be constant, permanent, and lasting, but such negligence was merely mitigated by the construction of a guard that would sometimes be sufficient, and sometimes not sufficient. The original negligence of the city continued, merely modified and mitigated; and nothing will wholly terminate the negligence of the city except to so close up the cellar-way as to make it permanently and constantly safe for those traveling on the sidewalk.

The judgment of the court below will be reversed, and cause remanded, with the order that the court below render judgment on the special verdict of the jury in favor of the plaintiff, and against the defendant, for \$650 damages, and costs.

(All the justices concurring.)

*88 *GEORGE BROWN and others v. JAMES W. EVANS, Adm'r, etc.

July Term, 1875.

1. **Agreed Case: Error to Make Findings.** Where the parties to an action pending in the district court submit the case to the court for decision and judgment upon an agreed statement of facts, it is error for the court to make findings of its own, differing from the agreed statement of facts, and then to render judgment upon its own findings.¹
2. ———: **Supreme Court.** Where such a case is brought to the supreme court, and the record contains both the agreed statement of facts and the findings of the court below, the supreme court will ignore the findings of the court, and decide the case upon the agreed statement of facts.
3. **Administration: Estate not Liable for Fraud of Administrator.** An estate of a deceased person cannot be held liable for the false and fraudulent representations of the administrator.
4. ———: **Administrator's Promises.** Neither can the estate be held liable for the promises of the administrator, unless the administrator has the right, in law, to make such promises, or to perform the thing which he promises.²
5. ———. But the estate may be held liable for promises made by the administrator where in law he has the right to make such promises, or where in law it is his duty, without a promise, to do just what he has promised to do.
6. **Administrator's Sale: Payment of Taxes.** Where an administrator in pursuance of an order of the probate court, offers certain lands belonging to the estate for sale, on which lands the taxes which have accrued since the death of the deceased have not been paid, and the administrator, in order to induce defendant to purchase said lands, agrees orally to pay said taxes, and the defendant, relying upon said agreement, purchases said lands, paying therefor \$2,000 down, and agreeing to pay \$1,000 more in two years, and gives his note and mortgage for the deferred payment, *held*, that it was the duty of the administrator, when he sold said lands, to pay said taxes; and *held, also*, that that portion of section 40 of the tax law which provides that, when lands are sold by an

¹ Gray v. Crockett, 80 Kan. 148; S. C. 1 Pac. Rep. 50; Olath v. Adams, *post*, *395.

² An administrator has no power to compromise any claim, debt, or demand belonging to the estate in his hands to be administered, and accruing in the lifetime of the deceased, so as to bind the estate, without the consent of the probate court. *Etna Life Ins. Co. v. Swayze*, 80 Kan. 118; S. C. 1 Pac. Rep. 36. Administration of partnership estates, see note to Carr v. Catlin, 18 Kan. *393.

administrator, the taxes thereon shall be paid out of the proceeds of the sale, is not repealed by sections 132, 133, and 134 of the law concerning executors and administrators.¹

7. —: Taxes Paid by Purchaser may be Recovered from Estate. And where the administrator, after making said agreement and sale, neglects and refuses to pay said taxes, and the purchaser then pays them, and afterwards the administrator sues the purchaser on said note and mortgage, and the purchaser sets up said facts in his answer, and
- *89 *asks relief, *held*, that the judgment should be for the plaintiff for the amount of the note and mortgage, less the amount of taxes which the purchaser paid on said lands.

Error from Franklin district court.

Foreclosure, brought by Evans, as administrator of the estate of L. F. Staples, deceased, upon a mortgage given him by Brown and two others to secure a part of the purchase money for certain lands belonging to the Staples estate, sold them by Evans. The defendants claimed a set-off to amount of \$197.28 paid by them, after their purchase, for taxes, interest, etc., due on the lands at the date of their purchase. Trial at the November term, 1873, and judgment for plaintiff for the full amount claimed in his petition.

Joel K. Goodin and John W. Deford, for plaintiffs in error.

James M. Hendry, for defendant in error.

VALENTINE, J. This was an action on a promissory note and mortgage. The issues were made up by petition, answer, and reply. Afterwards the parties agreed upon the facts of the case, and submitted the case to the court below for judgment upon an agreed statement of facts. The court, however, instead of finding the facts as agreed to by the parties, and rendering judgment thereon, made findings of its own, differing in form if not in substance from the facts agreed to by the parties, and then rendered judgment upon its own findings. Of course, the court below erred. The court below had no evidence upon which to make findings of fact differing from the facts agreed to by the parties, and it should have rendered the judgment upon the facts as agreed to by the parties.

- *90 The latter part of section 559 of the *Civil Code provides that "in cases decided by the supreme court, when the facts are agreed to by the parties, or found by the court below or a referee, and when it does not appear, by exception or otherwise, that such

¹In an action on a promissory note and real-estate mortgage, where there are taxes due on the mortgaged property, the court should, on the application of the plaintiff, in rendering the judgment on the note and mortgage, order that the taxes due on such mortgaged property be first paid out of the proceeds of the sale of such mortgaged property. *Opdyke v. Crawford*, 19 Kan. 604. If the administrator does not need the lands of the estate with which to pay the debts, and does not sell the same, it is not his duty to pay the taxes accumulating on the real estate subsequent to the death of the intestate. *Reading v. Wier*, 29 Kan. 429.

findings are against the evidence in the case, the supreme court shall send a mandate to the court below, directing it to render such judgment in the premises as it should have rendered *on the facts agreed to or found in the case.*" This section tells us what to do when the facts are agreed to *or* found, but it does not tell us what to do when all the facts are agreed to *and* all found. If, however, the facts agreed to and those found were precisely alike, as they in fact ought to be, then there would be no difficulty in determining what should be done in the case. But the difficulty arises when the facts agreed to and the facts found differ from each other. In such a case we think we should follow the facts agreed to, and wholly ignore the facts found. We think this has been substantially decided in the case of *Kansas Pac. Ry. Co. v. Butts*, 7 Kan. *308. The parties certainly ought to have the right to agree upon the facts of their case, and they certainly ought to know better what the facts of the case are than the court. We presume, however, that the facts found in this case are substantially the same as the facts agreed to; but, as it would require considerable labor and study to determine the matter, we have chosen not to give the subject any investigation, but pass at once to the facts as agreed to by the parties, and decide the case upon those facts.

The agreed statement shows, among others, the following facts: On October 9, 1866, L. F. Staples died intestate, leaving certain lands in Franklin county, which he owned at that time. In January, 1867, the plaintiff, James W. Evans, was duly appointed administrator of Staples' estate, and in December, 1868, the probate court duly authorized the plaintiff to sell said lands. During the month of February, 1870, negotiations originated between the plaintiff and the defendants George Brown and David Brown. During these negotiations it appears that "to induce the said Browns to *purchase said lands the said Evans assured them that the said lands were free and clear of all incumbrances, and further assured them, though not in writing, that if said lands were not free and clear of all incumbrances he would make them so, and that he further assured them that the taxes on said lands had all been paid." Said Browns relied upon these assurances, and in pursuance thereof purchased said land, paying therefor \$2,000 down, and agreeing to pay \$1,000 more in two years. On March 17, 1870, the deed from the administrator to said Browns for said land, and the notes and mortgage from Browns back to the administrator for \$1,000, the balance of said purchase money, were executed. At the time of said sale the taxes on said lands for the years 1868 and 1869 had not been paid, but still remained due and unpaid. The lands had at that time already been sold for the taxes of 1868, and were again sold in May, 1870, for the taxes of 1869. The administrator continued to neglect and refuse to pay said taxes, although he had plenty of funds belonging to the estate, both before and after said sale, with which he

could have paid them if he had chosen to do so. May 20, 1872, said Browns paid said taxes, which, with the penalties, interest, and costs, amounted to \$197.28. In August, 1872, the plaintiff, Evans, commenced this action on said note and mortgage. The defendants answered, setting up the payment of said taxes as a partial defense to the action, and the plaintiff replied setting forth a general denial. In November, 1873, the case was submitted to the court below for decision and judgment on said agreed statement of facts; and in December following the court below rendered judgment in favor of the plaintiff, and against the defendants, for the full amount of said note and mortgage.

Was this right, or should the court have allowed the defendants for the amount of the taxes (or some portion of the same) which they paid? This is the only question now remaining for our consideration. We do not think that an estate of a deceased person

can be held liable for the false and fraudulent representations of the administrator. *Dunlap v. Robinson*, 12 Ohio St. 530; *Westfall v. Dungan*, 14 Ohio St. 276. Neither do we think that the estate can be held liable for the promises of the administrator, unless the administrator has the right in law to make such promises, or to perform the thing which he promises. But we know of no good reason why an estate should not be held liable for promises made by the administrator where in law he has the right to make such promises, or where in law it is his duty, without a promise, to do just what he has promised to do. *May v. Taylor*, 27 Tex. 125; *Moore v. Moore*, 22 La. Ann. 226.

The main question, then, in this case is whether the administrator had the right, under the law, either to make the promise he did make, or to pay said taxes whether he made a promise to do so or not. That he made the promise in substance to pay them is unquestioned. Unpaid taxes levied on lands are an incumbrance thereon, (*Stewart v. Clark*, 8 Kan. *210;) and the administrator agreed that, if said lands were not free and clear from all incumbrances, he would make them so.

The only question, then, left, is whether it was the right or the duty of the administrator, under the law, to pay said taxes. We think it was both his right and duty. Section 137 of the tax law (Gen. St. 1062) is some evidence that it was both. Certainly, if an administrator needs the lands of the estate with which to pay debts, it is as much his duty to pay all legal charges that may accrue thereon until he sells them as it is to pay any charges on personal property for the care, preservation, and protection of the same while it remains in his custody. Upon general principles the administrator must have power to keep, preserve, and protect all property, real and personal, placed in his hands for any specific purpose, and must have power to use the funds of the estate to prevent the destruction, loss, or deterioration in value of said property. But the latter part of section 40 of

the tax law (Gen. St. 1034) seems to make it plain that the administrator should pay the taxes when he sells the land. It reads *93 as follows: **"Where any real estate shall be sold at judicial sale, or by administrators, executors, guardians, or trustees, the court shall order the taxes and penalties, and the interest thereon, against such lands, to be discharged out of the proceeds of such lands."*

This provision, when applied to sales of lands by administrators, includes all unpaid taxes which have accrued against the lands, whether they have accrued before or after the death of the deceased owner, and includes all unpaid taxes which have not yet been merged into tax titles; and, as the lien on real estate for taxes is paramount to all other liens or debts, it would seem that the taxes should be first paid out of the proceeds of the sale of the lands. It will be presumed that the order required by the foregoing section was made, and properly made; for, until the contrary is shown, it will be presumed that the probate court did its duty. The order required by said section should be made at the time that the probate court makes the order confirming the sale of the land. But whether either of said orders was in fact made, is not affirmatively shown by the record brought to this court. But even if said first-mentioned order were not in fact made, still we do not think that the omission would materially affect the substantial rights for the defendants. It was not their duty to make the order, nor to see that it was made; and until the whole transaction is finally closed up, we do not think that they would waive any of their substantial rights by suffering the omission to make the order to continue.

But it is claimed that said provision in said section 40 has been impliedly repealed by sections 132, 133, and 134 of the act concerning executors and administrators. Gen. St. 457. Now, repeals by implication are never favored in law. Besides, all these sections were passed by the same legislature; and sections 132, 133, and 134 were passed only one day after section 40. It can therefore hardly be supposed that the legislature intended to repeal said provision in said section 40; and the intention of the legislature must govern whenever that intention can be discovered. We think, how-

*94 ever, that said sections may *all have force by a fair, reasonable, and liberal construction; and, if so, then, of course, said provision in section 40 has not been repealed. This view of the law certainly subserves the ends of justice in this particular case.

This cause will be remanded to the court below, with the instructions that the judgment below be modified by deducting therefrom the sum of \$197.28, with interest thereon at the rate of seven per cent. per annum from May 20, 1872; and the defendant in error will pay the costs of this court.

(All the justices concurring.)

C. D. CRANE and others v. J. E. STONE.

July Term, 1875.

Escape: Sheriff: Liability for Escapes, in Civil Actions. The provisions of the Civil Code, §§ 164, 165, making the sheriff liable as *bail* for an escape, have not wholly abolished the common-law action for an escape; and therefore, where the sheriff has voluntarily permitted the escape of a person held by him on mesne process in a civil action, an action may be prosecuted against such sheriff by the party injured, for the actual damages sustained by such party, although the action in which the party escaping was arrested has never been prosecuted to final judgment.¹

Error from Montgomery district court.

Action by C. D. Crane, H. D. Crane, and A. J. Wightman, as partners, against Stone, for permitting a person in his custody as sheriff, on civil process, to escape. The petition is as follows:

"The plaintiffs, partners as Crane & Wightman, complain of J. E. Stone, defendant, and allege that at the time of the issuing of the order of arrest, and of the escape hereafter mentioned, the said defendant was the sheriff of the county of Montgomery, in this state; that on the twenty-fourth of June, 1872, A. Wharton and H. A.

*95 Baker were indebted to the plaintiffs in the sum of \$408.67, and interest thereon from February 13, 1872; that on said twenty-fourth of June the said plaintiffs commenced an action in the district court of said county of Montgomery to recover said sum, and interest, and costs, and on the twenty-fifth of said June summons in said cause was duly served on the said A. Wharton, one of the defendants in said action; that on said twenty-fourth of June the said A. J. Wightman, one of the said plaintiffs, did then and there, in the office of the clerk of the district court of said county of Montgomery, file his affidavit, and procure an order of arrest to be issued in said

¹ Defective information charging an escape, see *State v. Hallon*, 22 Kan. 580. A person lawfully confined in a city prison for the violation of a city ordinance, under a judgement rendered by a police judge, cannot be convicted for breaking such prison, and escaping therefrom, under section 179 or section 183 of the crimes act. *State v. Chapman*, 33 Kan. 184; S. C. 5 Pac. Rep. 768. Evidence that a hole was made in the wall of a jail where a prisoner was confined, and that afterwards he was at liberty, will authorize an instruction that the jury might consider the escape as a fact in the case. *State v. Fitzgerald*, 19 N. W. Rep. 203. A sheriff cannot bind his county by offering a reward for the recapture of a prisoner escaping from the county jail. *Bemis v. Rice Co.*, 23 Minn. 73. Liability for forcible rescue of person committed for vagrancy. *State v. Wilson*, 24 N. W. Rep. 268. In an indictment for endeavoring to escape from prison, it is not necessary to state that a certified copy of the judgment against the prisoner for the crime for which he was sentenced had been handed to the warden of the prison. *State v. Angelo*, 4 Pac. Rep. 1080. Upon a verdict or finding against a man prosecuted for bastardy, a circuit court may render the same kind of a judgment against the defendant when he is absent upon an escape as it may do when he is in custody, and may then bring him into court upon a bench-warrant as a means of requiring him to abide by and perform the judgment against him. *Lucas v. Hawkins*, 1 N. E. Rep. 358.

action by the clerk of said court, addressed to the sheriff of said county of Montgomery, (they, the said plaintiffs, having filed with the clerk of said court an undertaking as required by law, conditioned and in the sum of \$1,000, with good and sufficient surety,) and caused the said order of arrest to be delivered, together with a copy of the said affidavit, to the defendant herein, then sheriff as aforesaid, and which said order of arrest required the said sheriff to arrest the bodies of the said Wharton and Baker, or either of them, and hold him or them to bail in the sum of \$900, and to make due return of said writ and proceedings thereon on the fifth of July, 1872, with any undertaking of bail which the said Wharton and Baker, or either of them, may have given; that thereafter, and before the said fifth of July, 1872, the defendant, Stone, under and by virtue of said order of arrest arrested the said Wharton in his body, and as such sheriff, then had the said Wharton in his custody at the suit of said plaintiffs in the action aforesaid; that, in violation of his duty as such sheriff, the said defendant, to-wit, on the twenty-seventh of June, 1872, without the license or consent of the plaintiffs, or either of them, permitted said Wharton to escape, and, without any default or neglect on the part of said plaintiffs, voluntarily suffered and permitted the said Wharton to go at large out of the custody of said defendant, sheriff aforesaid, the said claim against the said Wharton and Baker then and still being wholly unpaid to the plaintiffs. Whereby the said plaintiffs have been greatly damaged, and have lost their said claim against said Wharton and Baker; the said Wharton having absconded, and gone beyond the jurisdiction of this court, with all his moneys, goods, and effects, to the damage of the said plaintiffs in the sum of \$408.67, and interest from February 13, 1872, debt, and costs paid in the sum of \$26.75, June 18, 1873.

*96 *Wherefore the plaintiffs demand judgment against the defendant for the sum of \$435.42, and interest on the sum of \$408.67 from February 13, 1872, and interest on the sum of \$26.75 from June 18, 1873, and the costs of this suit."

To this petition Stone demurred, "for that the said petition does not state facts sufficient to constitute a cause of action." The district court, at the December term, 1873, sustained the demurrer, dismissed the petition, and gave judgment in favor of Stone for costs.

Mason & Parkinson, for plaintiffs.

The plaintiffs in this case elected to sue as at common law, instead of bringing said suit under the Code against the sheriff, as bail, and as such the petition does state facts sufficient to constitute a cause of action against defendant. The Civil Code, by abolishing all forms of pleading, has not affected the liability of a sheriff for an escape. The rule of damages should be the amount of the debt in such case, and the interest. 1 *Estee*, Pl. & Pr. 356; *Smith v. Knapp*, 30 N. Y. 581; *McCreery v. Willett*, 23 How. Pr. 129; *Whithead v. Keyes*, 1 Allen, 350; 2 Hil. Torts, c. 31, § 7.

J. D. McCue, for defendant.

The only question is whether the common-law remedy for an escape is abolished by our Code. If it is, the order sustaining the demurrer was proper. We maintain that all proceedings of arrest and bail are statutory, and all rights of action, whether against the defendant arrested, his bail, (if any be given,) or against the officer making the arrest, are governed by the statute; and until the liability of the officer is fixed as provided in sections 164 and 165 of the Code, no right of action has accrued. By the express terms of the Code, the liability of the sheriff for an escape, either upon mesne or final process, is that of bail, and it "shall be the amount of the judgment, interest, and costs." But the return of "not found" upon an *97 execution against the body is a prerequisite to the *right to maintain this action. Is there any other liability? We think not. The plaintiffs cite the case of *Smith v. Knapp*, 30 N. Y. 581. A fair examination of that case, with the subsequent doubts expressed by the same court, will show that it is not an authority in this case. It is true that the same question was presented in that case as in this, and decided in favor of the common-law liability; but the decision was placed upon the ground that the right of action was presumed by a section of their statute of limitations which reads: "Section 94. Within one year, an action against a sheriff or other officer, for an escape of a prisoner arrested or imprisoned on civil process." Wait's Code, 105. We have no such statute in this state; and the recognition of the right of action being based upon the statute we have cited, and the action in 30 N. Y. maintained upon it, and it alone, the case cannot be considered an authority. But the position assumed by the court in *Smith v. Knapp* is very much shaken by the doubts expressed by *INGRAHAM, J.*, in *Metcalf v. Stryker*, 31 N. Y. 257. He says: "Whether the statutory liability imposed by the Code in these cases does not take the place of the action for an escape from mesne process, admits of some doubts." We think there can be no doubt in this state. Section 147 of our Code provides that arrests can be made in the manner prescribed by the Code, *and not otherwise*. This negative clause we think applies to all proceedings under that article, and applies to the action against officers as well as against the bail.

VALENTINE, J. This was an action against *J. E. Stone*, sheriff of Montgomery county, for voluntarily permitting the escape of a party held by him on mesne process in a civil action. The defendant demurred to the plaintiff's petition on the ground that it did not state facts sufficient to constitute a cause of action. The court below sustained the demurrer, and the plaintiffs now bring the case to *98 this court. *We are at a loss to know why it is supposed that the petition below is insufficient; and the defendant has taken no trouble to inform us, either by brief or oral argument. The petition seems to state a good cause of action at common law, or, at

least, we have discovered no good reason why it does not do so. We have given the subject, however, but very little critical examination, as we do not consider it to be our duty to assist either party by laboriously hunting for weak places in the other party's case. The petition, however, does not seem to state a good cause of action against the sheriff as *bail*, under sections 164 and 165 of the Code. Gen. St. 659. This is probably the reason why it is supposed that the petition does not state any cause of action against the sheriff. We think, however, that the only other facts needed, in addition to those already stated, to make the petition a good petition under the Code, as well as at common law, are the following: The petition does not allege that the original case in which the party escaping was arrested was ever prosecuted to final judgment, or that such party had failed to "render himself amenable to the process of the court" on such judgment, (Code, § 159,) or that an execution issued on such judgment against the body of such party had ever been returned "not found," (Code, § 165.) Now, as the petition in this case states a good cause of action at common law, and not a good cause of action under the Code, the only question involved in the case is whether the common-law action in any form still survives. We think it does. While it has, no doubt, been modified to some extent by our laws and institutions, yet we do not think that it has been wholly abolished. *Smith v. Knapp*, 30 N. Y. 581. According to the weight of authority, we think the damages recoverable in the two actions are different. In the common-law action, as it now exists, only the actual damages sustained can be recovered; while in the action given by the Code the plaintiff may recover as damages the amount of the judgment rendered in the original case, with interest and costs. Code, § 165. The common-law action, as it now exists, is analogous to the old common-law action on the case for an escape. The action under the Code for an escape is analogous to the old action of debt under the English statutes for an escape.

With these views, it follows that the judgment of the court below must be reversed. The cause will therefore be remanded to the court below, with the order that the demurrer to the petition be overruled, and for further proceedings. Judgment reversed.

(All the justices concurring.)

GEORGE W. BARKLEY and another v. STATE OF KANSAS.

July Term, 1875.

1. Pleadings: Sufficiency of Petition: When and How Questioned.

Where the question of the sufficiency of a petition is raised for the first time by an objection to the introduction of any evidence under it, and not raised otherwise, courts will always construe the allegations of the petition very liberally, so as to sustain the petition if it can be sustained; and if anything should intervene between the filing of the petition and the final rendering of the judgment which could, by a fair and reasonable intendment, be construed to cure the defective allegations of the petition, the courts will hold that such defective allegations are thereby cured. [Hoge v. Norton, 22 Kan. 379; Reeve v. Downs, Id. 334; Grandstaff v. Brown, 23 Kan. 178; Barons v. Brown, 25 Kan. 411; State v. School-district, 8 Pac. Rep. 211.]

- 2. ———.** Therefore, where the petition alleges and shows that the instrument sued on was an obligation of the defendants, in the form of a criminal recognizance taken by a justice of the peace on a preliminary examination in a criminal proceeding, requiring the appearance of one of the defendants at the next term of the district court to answer to the charge of embezzlement, and designated the instrument as a "recognizance," and alleged that the defendants were, at the said next term of the district court, "three times solemnly called, but came not, and made default, and thereby forfeited their recognizance;" and where the evidence clearly shows that not only the recognizance, but all the other papers connected with said preliminary examination, were duly filed in the district court before said default or forfeiture occurred, and long before the suit on the recognizance was commenced, and no objection was made in the district court to said petition for insufficiency, except by objecting to the introduction of any evidence under it: *held*, that the supreme court will not reverse the judgment of the district court rendered in favor of the plaintiff, and against the defendant, on said recognizance, merely because said petition did not in terms allege that said recognizance had ever been filed in the district court.

- 3. ———: Recognizance: Name: Variance.** Where the petition alleges that the defendant G. W. Barkley as principal, and the defendant George Patterson as surety, executed the recognizance sued on, and that they made default in not complying with the conditions of their recognizance,—the petition giving a copy of the recognizance in full; and the record of the subsequent proceedings in the case shows that the defendant Barkley made his appearance in the case both under the name of "G. W. Barkley" and "George W. Barkley," and the record of the default and forfeiture shows that "George Barkley" as principal, and George Patterson as surety, made the default; and the recognizance is so described in said last-mentioned record—the date, the amount, the name of the justice before whom the recognizance was taken, the parties thereto, and other matters descriptive thereof being given—that there can be no possible doubt but that the persons who executed the recognizance, and who are now sued thereon, made the default charged against them: *held*, that the variance in the name of the defendant Barkley, as stated in the petition, and as stated in the record of said default, is not material.

- 4. Recognizance: Entering Default.** It is not necessary, in a suit upon a forfeited recognizance, that it should be shown that the default or

forfeiture was ever in fact entered of record. *Ingram v. State*, 10 Kan. *680. The material question in such a case is whether a default was actually made or not; and therefore an answer that merely alleges that there is no record of such default or forfeiture states no defense.¹

Error from Bourbon district court.

Action brought by the county attorney, in the name of the state as plaintiff, against G. W. Barkley and George Patterson, upon a forfeited recognizance. The petition filed was as follows:

"The plaintiff herein complains of G. W. Barkley and George Patterson, defendants, and for cause of action says that said defendants, on the twenty-sixth of November, 1872, entered into an obligation with said plaintiff, in the words and figures following, that is to say:

"STATE OF KANSAS, COUNTY OF BOURBON—IN JUSTICE'S COURT, BEFORE WM. MARGRAVE, Esq., J. P.

"*The State of Kansas against G. W. Barkley.—Charge of Embezzlement.*

"We, G. W. Barkley as principal, and Geo. Patterson as surety, of Bourbon county, acknowledge ourselves to owe and be indebted *101 unto the state *of Kansas in the sum of one thousand dollars, to be levied of our and each of our goods and chattels, lands, and tenements if default be made in the condition following, to-wit: Whereas, the above-named defendant, G. W. Barkley, has been brought before the undersigned, a justice of the peace of said county, charged with having, at said county of Bourbon, on the twenty-ninth of October, 1872, fraudulently embezzled and converted to his own use the sum of \$2,800 of the money of his employers, to-wit, the Missouri, Kansas & Texas Railway Company; and whereas, said justice having held a court for the examination of said defendant on said charge, and having found that said offense has been committed, and that there is probable cause to believe said G. W. Barkley guilty of committing the said offense, has required said defendant to give bail in the above-mentioned sum for his appearance to answer said charge: now, therefore, the condition of this recognizance is such that if the said G. W. Barkley shall personally appear before the district court of Bourbon county, at the next term thereof, to be held in the court-house in the city of Fort Scott, in said county, on the first day of said term, then and there to answer the charge aforesaid, and to abide the order of said district court in the premises, and not depart said court without leave, then this recognizance to be void, otherwise of force.

"G. W. BARKLEY.

"GEORGE PATTERSON.

"Subscribed and acknowledged before me, and taken and approved by me, this twenty-sixth day of November, 1872.

"WM. MARGRAVE, Justice of Peace."

¹Petition in action on forfeited recognizance held sufficient. *Swerdsfeger v. State*, 21 Kan. 477. See *Gay v. State*, 7 Kan. 246, and note.

"And plaintiff further avers that the said G. W. Barkley was legally in custody, charged with the crime of embezzlement, and was discharged from said custody by the reason of his giving said recognizance; and that at the December term, 1872, of said district court for the said county of Bourbon, the same being the next term thereof, on the fifth day of said term, to-wit, on the thirteenth day of December, 1872, the said cause being called for trial, the said G. W. Barkley, being three times solemnly called in open court, came not, but made default therein, and the said George Patterson, being three times solemnly called in open court, and ordered to bring the body of the said G. W. Barkley into court, as by the terms of their said obligation he was bound to do, answered not, but made default therein, and it was thereupon ordered and adjudged by the court that said recognizance be forfeited; wherefore the plaintiff prays judgment against said defendants for the sum of one thousand dollars, and the costs of this action."

Trial at the September term, 1873, of the district court; C. W. B., judge *pro tem.*, presiding. The findings and judgment, appearing in the record of the trial, are as follows:

"And the court having heard all the evidence introduced,
*102 *and being fully advised, finds as follows, to-wit: That the recognizance sued upon herein is good and valid in law; that the forfeiture of the said recognizance is in due form, and properly and legally entered. The court further finds that there is due the plaintiff from the defendant, on the forfeiture of the recognizance set out in plaintiff's petition, the sum of \$1,000. It was thereupon considered, ordered, and adjudged that the plaintiff have and recover of and from the defendants, G. W. Barkley and George Patterson, the said sum of \$1,000 so as aforesaid found due, together with its costs of this action expended, to be taxed."

R. H. Galloway and W. C. Stewart, for plaintiffs in error.

The petition filed in the court below does not state facts sufficient to constitute a cause of action against plaintiffs in error. An action on a recognizance is, in contemplation of law, an action on a *record*, and must be declared on as such. *Bridge v. Ford*, 7 Mass. 209; *People v. Van Eps*, 4 Wend. 393; *People v. Huggins*, 10 Wend. 472. The state should therefore have averred and shown in its petition that a memorandum of the proceedings had before the justice, including the recognizance, was duly certified by the justice to the district court, and that it was there filed by the clerk of said court; all of which is prerequisite to the legal existence of a record in said court,—a fact indispensable to constitute a cause of action in such case,—as well as to the proper averment of the same in such petition. *Crim. Code*, § 144. It does not appear from the petition that there was any record or certificate of the proceedings had before the justice, or of the recognizance, existing in the court where the petition was filed, at the time of the alleged forfeiture of the recognizance, or at the time

of the institution of this action. The petition fails to show that the district court was in possession of the case at the time of the alleged forfeiture, and it utterly fails to allege any record on which said action could be brought. *Bacon v. People*, 14 Ill. 312. The record alone constitutes the basis upon which the state may proceed in this *103 class of *actions, and such record must therefore be averred in the petition. *Gay v. State*, 7 Kan. *402; *Bridge v. Ford*, 7 Mass. 210. But the defendant in error may seek shelter under section 145 of the Criminal Code, which, although it very much relaxes the rule in relation to recognizances so far as the *irregularity* of the acts of the justice or officer taking the recognizance is concerned, yet cannot be so construed as to relieve the pleader from stating such facts as will show the *existence* or fact of a filing of the transcript duly certified by the justice, and the filing or record of the recognizance in the court to which the defendant is recognized to appear, *at or before* the declaration of forfeiture and the institution of suit to collect the penalty. Such a construction would not only nullify section 144 of said act, and render it utterly meaningless, but would remove all necessity for making a record in the district court of the proceedings of an examining court, and of recognizances taken out of court, and thus dispense with all that portion of the statute which is intended to put the court in possession of such cases, and of such jurisdictional facts as will authorize it to declare a forfeiture on default of the recognizors.

The court erred in permitting the plaintiff below to introduce any evidence in support of said petition on the trial of the cause, over the objections of defendants that the petition did not state facts sufficient to constitute a cause of action. A party cannot be permitted to prove what he does not aver. He cannot be allowed to make another and different case, by the introduction of evidence, from that stated in his petition. He must stand or fall by the case he makes by his pleadings. The plaintiff averred in its petition, substantially, that, at the next term of the district court after the recognizance was taken, the action in which the defendant "George W. Barkley" was recognized to appear, was called, and that said George W. Barkley was called, as was George Patterson, his surety, and that, both making default, their recognizance was forfeited. The defendants answered separately. Both pleaded *nul tiel record* as to the recognizance, and the forfeiture thereof, to which Barkley adds a *104 general denial of the entire petition. Upon the issues thus formed the plaintiff below offered in evidence on the trial a journal entry or record purporting to be an entry of a forfeiture of a recognizance of "George Barkley" and George Patterson, while the petition described the parties therein referred to as "George W. Barkley" and George Patterson. The plea of *nul tiel record* put in issue the existence of the identical record and journal entry set out and described in the petition. The defendants objected to the introduc-

tion of the record offered, on the ground of variance, and on the further ground that the evidence offered did not support or tend to prove the allegations of the petition. The journal entry offered was clearly not the record declared on, but *another and different one*, and therefore incompetent. A record such as that in question must be strictly proved as alleged. *Whitaker v. Bramson*, 2 Paine, C. C. 209; *Barringer v. Boyd*, 27 Miss. 473; *Central Bank v. Veasey*, 14 Ark. 672; *Lockwood v. Jones*, 7 Conn. 434; *Jordan v. Hyatt*, 3 Barb. 279. The variance was material. 1 Greenl. Ev. §§ 60, 64, 66, 70; *Lawrence v. Willoughby*, 1 Minn. 87, (Gil. 65;) *Smith v. Smith*, 17 Ill. 482; *Torbet v. Coffin*, 6 Ohio, 274; *State v. Dudley*, 7 Wis. 664; *Com. v. Brown*, 2 Gray, 358; *Moore v. Com.*, 6 Metc. 243. It certainly needs no argument to prove that "George Barkley" is not "George W. Barkley." The want of identity is palpable, and a record of a judgment against "George Barkley" is no proof of an alleged judgment against "George W. Barkley." *Com. v. Perkins*, 1 Pick. 388; *Com. v. Hall*, 3 Pick. 262; *Price v. State*, 19 Ohio, 423; *O'Brien v. People*, 41 Ill. 456. No amendment of the petition was asked for, and none could be made, as an amendment of the petition so as to conform its allegations to the proof of forfeiture would necessarily have created a similar variance between the petition and the recognizance. The petition and recognizance described the Barkley in them mentioned as "George W. Barkley," while the journal entry of forfeiture offered describes the Barkley therein referred to as George Barkley in the title, and in every recital therein contained. There was therefore not only a material variance, but a failure of proof in general scope and meaning. Civil Code, § 135. There was no proof, and the record offered did not tend to prove the default of George W. Barkley, or the forfeiture of his recognizance, the most material allegation in the petition.

*105 *The defendants requested the court to make separate findings of the conclusions of law and fact, which it was, on request, bound to do. Civil Code, § 290. But the court utterly failed and refused to find conclusions of fact, whether George W. Barkley was discharged by reason of his giving the recognizance sued on, and whether George W. Barkley failed to appear in the district court at the term to which he was recognized; and it failed to find whether the principal recognizer, George W. Barkley, was in *legal custody* when the recognizance was given, and whether his recognizance was legally and duly forfeited.

J. N. Binford, Co. Atty., for defendant in error.

The issues as made by plaintiffs in error admit the execution of the recognizance, and all it recites, to-wit: That Barkley was in legal custody; that he was charged with a public offense; that he was discharged therefrom by reason of the giving of said recognizance; that Patterson undertook that Barkley should appear before the district court at the December term, 1872; that the said recog-

nizance was subscribed and acknowledged before and approved by the committing magistrate. Plaintiffs in error rest their argument entirely on the theory that it is absolutely necessary that the state declare upon a record of the district court. This theory is not sustained either on principle or authority. Crim. Code, §§ 153, 154; *Gay v. State*, 7 Kan. *402. The petition alleges that the said G. W. Barkley was legally in custody, charged with a public offense; that he was discharged therefrom by reason of the giving of the said recognizance. The recognizance is set out *in hæc verba*, and is made a part of the petition, and shows that the surety undertook that the defendant Barkley should personally appear before the district court for trial for such offense. That is sufficient. Crim. Code, § 154; *Lawrence v. People*, 17 Ill. 174; *Gay v. State*, 7 Kan. *394; *McLaughlin v. State*, 10 Kan. *581; *Ingram v. State*, Id. *630. The petition further alleges that the said Barkley wholly failed to appear, but made default.

It is true that the plaintiff's cause of action is, in one sense
 *106 *of the word, a record; but the recognizance is that record; and sections 153 and 154 of the Criminal Code show that the recognizance is the cause of action *per se*. The defendants, by entering into and signing the recognizance, admit all the facts set out in the recognizance, and make their own record of the same,—the jurisdiction of the justice, the legal custody, the charge of the offense, and the discharge of the defendant by giving the recognizance, and that the defendants were bound for the personal appearance of the said G. W. Barkley at the court therein mentioned. *O'Brien v. People*, 41 Ill. 459. The default was not denied by the defendants' answers. The proof of default is shown by the entire record of the district court.

Barkley was arrested, examined, held to bail, gave his written recognizance, obligated himself to appear at court, and was discharged as "G. W. Barkley." Suit was brought, and service had in this action on "G. W. Barkley." He appears by his attorneys, and answers in this action as George W. Barkley. There is but one Barkley in the entire proceedings, so there can be no confusion of names, and no doubt as to who is meant. The plaintiffs in error do not deny that default was made by G. W. Barkley on said recognizance. The journal entry of the default, by the oversight of the clerk of the court, described the said Barkley as "George Barkley." If this supposed variance is not fully explained by the record, still the plaintiffs in error did not below, nor do they now, show how or in what respect they were misled or prejudiced. Civil Code, §§ 133, 140.

VALENTINE, J. This was an action on a criminal recognizance; and, while some of the proceedings on the part of the plaintiff below (defendant in error) may not have been technically as exact as they might have been, yet we think no substantial error was committed by the court below.

It is objected that the petition below did not state facts sufficient to constitute a cause of action. This objection was made for *107 the first time in the court below by objecting to the introduction of any evidence under it. Such an objection, made at such a time and in such manner, is never favored by the courts. *Mitchell v. Milhoan*, 11 Kan. *617, *625, *626, and cases there cited. Justice would be better subserved if the question of the sufficiency of the petition were always raised and determined before the commencement of the trial. Hence, where the question of the sufficiency of a petition is raised for the first time, and only, by an objection to the introduction of any evidence under it, courts will always construe the allegations of the petition very liberally, so as to sustain the petition if it can be sustained; and if anything should intervene between the filing of the petition and the final rendering of the judgment which could, by a fair and reasonable intendment, be construed to cure the defective allegations of the petition, the courts will hold that such defective allegations are thereby cured. See same case as above, and other cases there cited, and *Irwin v. Paulett*, 1 Kan. *418. The only objection urged against the petition in this case is that it does not in terms allege that said recognizance was ever filed in the district court as required by law, (see *Crim. Code*, §§ 41, 64, 144;) and therefore it is claimed that the petition does not show that said supposed recognizance ever became a record, or that it ever in fact became a recognizance; for, as is claimed, a recognizance is merely "an obligation of record." *Morrow v. State*, 5 Kan. *566; *Gay v. State*, 7 Kan. *394, *402; *State v. Weatherwax*, 12 Kan. *463, *465.

The instrument sued on in this case was an obligation of the defendants below, in the form of a criminal recognizance, taken by a justice of the peace on a preliminary examination in a criminal proceeding requiring the appearance of the defendant George W. Barkley at the next term of the district court to be held in Bourbon county, to answer to the charge of embezzlement. The petition designates this instrument as a "recognizance." It was in form a recognizance.

And the petition further alleged that the said Barkley and his *108 surety, the other defendant, George *Patterson, were at said next term of the district court three times solemnly called, but came not, and made default, and thereby forfeited their "recognizance." Now, according to the theory of the plaintiffs in error, (defendants below,) they could not have made default, or forfeited their "recognizance," if the instrument sued on had not, at the time of the supposed default and forfeiture, been filed in the district court; for in that case it would not have been a "record," and therefore would not have been a recognizance, and therefore could not have been forfeited as such. But the petition does allege that the defendants did make "default," and did "forfeit their recognizance;" and therefore, if the theory of the defendants below is correct, the petition does allege, inferentially and by implication, that the instrument sued on had been filed in the district court and had become a record

and a recognizance. This allegation would not, of course, have been considered sufficient if it had been attacked by a demurrer, or motion to make more definite and certain; but it is certainly sufficient under the circumstances of this case. It was cured by the evidence subsequently introduced, and by the findings and judgment of the court below. The evidence clearly shows that not only the recognizance, but all the other papers connected with the preliminary examination, were duly filed in the district court before said default or forfeiture had occurred, and long before this suit was brought. It is doubtful, however, whether the theory of the defendants below is correct, and more doubtful whether any allegation of the filing of the recognizance is required. *Crim. Code*, § 154. But even if correct, and the allegation necessary, still the defective allegations of the petition were cured by the evidence, findings, and judgment. The execution of the recognizance was not put in issue by any pleading verified by an affidavit, and therefore, under section 108 of the *Civil Code*, the execution of the recognizance must be taken as admitted. *Ingram v. State*, 10 Kan. *680, *686. Whether the execution of the recognizance means merely the execution of the same before the *109 magistrate, or whether it means that and also the filing of *the same in the district court, we need not now determine. Probably under the pleadings in this case judgment should have been rendered for the plaintiff on the pleadings.

It is claimed that there was a substantial variance in the proof and the allegations of the petition. The alleged variance is that the petition alleges that "G. W. Barkley" made default in not complying with the condition of his recognizance, while the proof shows that it was "George Barkley" who made the default. Now, the petition alleges that "G. W. Barkley" as principal, and George Patterson as surety, executed the recognizance sued on, and that they made the default; the petition giving a copy of the recognizance in full. The record of the subsequent proceedings in this case shows that the defendant Barkley made his appearance in this case both under the name of "G. W. Barkley" and "George W. Barkley;" and the record of the default and forfeiture shows that "George Barkley" as principal, and George Patterson as surety, made the default. And the recognizance is so described in said last-mentioned record (the date, the amount, the name of the justice before whom the recognizance was taken, the parties thereto, and other matters descriptive thereof being given) that there can be no possible doubt but that the persons who executed the recognizance, and who are now sued thereon, made the default charged against them; and all this may properly be shown, although slight differences in giving the name of some of the parties may occur in the different records. *Gay v. State*, 7 Kan. *394; *O'Brien v. People*, 41 Ill. 456.

But there are other reasons why the findings and judgment of the court below upon this particular matter should not be disturbed. The

plaintiff alleged in its petition below that the defendants made said default. The defendant Patterson did not in any manner deny this. Upon this point he simply alleged in his answer that there was *no record* of the default or forfeiture. Such an answer states no defense.

It is not material, in a suit upon a forfeited recognizance, that
 *110 it be shown that the default or *forfeiture was ever in fact entered of record. Crim. Code, § 154; Ingram v. State, 10 Kan. *630. The only material question in such a case is whether a default was actually made or not. Of course, a record of every default should be made. Crim. Code, § 152. But so, also, should a record of every compliance with the recognizance be made, (Crim. Code, § 138;) but still the mere failure on the part of the clerk to make such record would hardly interfere with the substantial rights of any party. The defendant Barkley was in default in this case for want of an answer to the plaintiff's petition. He therefore "asked and obtained leave of the court to file a similar answer to that filed for the defendant Patterson, and the same is [was] filed accordingly." The remarks already made with reference to the answer of Patterson will equally apply to this answer of Barkley, for the two answers are precisely alike. But afterwards Barkley filed another answer. He filed his second answer without any leave of the court or consent of the plaintiff. It contained a general denial of all the allegations of the plaintiff's petition. Whether the court below took any notice of this second answer or not we cannot tell. Probably the court did not.

But there is still another obstacle in the way of the plaintiff in error, which obstacle will not only reach to the question now under consideration, but will also reach to every question which we may hereafter discuss in this case. It is not shown in any proper way that all the evidence that was submitted to the court below has been brought to this court. The record brought to this court is a transcript of the record of the proceedings of the court below; it is not a "case made" for the supreme court, nor a copy of any such "case made;" and hence we can consider nothing therein contained except what property belonged to or was made a part of the record of the proceedings of the court below. Now, there is nothing in the *record* of the proceedings of the court below that shows that all the evidence has been preserved, or brought to this court. In the record

*111 *brought to this court, with the other papers attached to the petition in error, we have the following: *First*, the proceedings which go into the record without any special order of the court; *second* a bill of exceptions ordered to be made a part of the record, and signed by the judge who tried the cause; *third*, then comes a certificate of the judge who tried the cause, who was merely a judge *pro tem.*, not embodied in a bill of exceptions, not ordered to be made a part of the record, not a journal entry, not any proceeding of the court, as a court, which certifies "that said bill of exceptions contains and refers to all the evidence offered on the trial of said action;"

fourth, then comes the usual certificate of the clerk appended to such records. Such a certificate as the one signed by the judge is unknown to any practice of the law that we are acquainted with, (*Bartlett v. Feeney*, 11 Kan. *594;) and there is nothing except said certificate that pretends to show how much of the evidence was brought to this court. Now, for the purpose of promoting justice, all courts are generally very liberal in construing irregular modes of getting cases into court, or irregular modes of presenting questions for the consideration of the court. But we are not aware that any court has ever felt itself bound to resort to far-fetched presumptions for the purpose of defeating justice. Therefore, where parties are attempting to defeat justice by mere technicalities, they ought to be careful to have the record of the proceedings made so technically exact that everything favorable to themselves should be affirmatively shown.

The special findings of the court we think are sufficient. It is true, the court might have entered into greater detail in stating the facts found if it had chosen to do so; but as the plaintiffs in error did not point out any specific matters upon which they desired further or more definite findings to be made, and did not express any desire that the court should go into any greater detail in its findings, we

think the findings as they were made are sufficient. Besides, *112 as we have before said, it is probable that judgment *should have been rendered for the plaintiff on the pleadings; but, as the pleadings of both the plaintiff and the defendants were defective, we do not now wish to decide that question. The evidence was amply sufficient to sustain the findings and judgment of the court below. The recitals of the recognizance, which were admissions on the part of the defendants, were of themselves sufficient evidence *prima facie* to show that Barkley was in legal custody when the recognizance was entered into.

The judgment of the court below is affirmed.

(All the justices concurring.)

JOSEPH McCORM and others v. AMANDA CORBY, Ex'x, etc.

July Term, 1875.

1. New Trial: Conflicting Evidence: Review in Supreme Court.

Where the district court has set aside the verdict of a jury, and granted a new trial, on the ground that the verdict is against the evidence, and there appears to have been conflicting testimony upon all the essential facts, this court will not reverse the ruling of the district court, and order judgment on the verdict. [*Day v. Harris*, 23 Kan. 217; *Brown v. Atchison, T. & S. F. R. Co.*, 29 Kan. 189.]

2. ———: **Effect of Order.** Where, in addition to the general verdict, answers are returned by the jury to particular questions, a motion to set aside the verdict and grant a new trial, if sustained, sweeps away both verdict and answers, and leaves the case as though no trial had been had.

Error from Doniphan district court.

Action by Amanda Corby, as executrix, etc., plaintiff, against McCrum and three others, defendants. This action was once before in this court, and is reported in 11 Kan. *464. A new trial of the case was had in the district court at the March term, 1874. On the trial, findings of fact were submitted to the jury, and a general verdict for the defendants returned. *A motion was made by the plaintiffs to set aside the verdict, and was sustained, and a new trial ordered. From this order of the district court the defendants appeal.

The action was brought to foreclose notes and mortgage executed by Willis J. Vancuren and Henrietta Vancuren to H. W. Boone. They were made payable to order, and were *not indorsed*. The petition alleged "that on the twenty-sixth of November, 1865, said Boone sold, transferred, and delivered said notes," etc. Vancuren and wife answered, admitting the execution of the notes and mortgage, but denied all other allegations of the petition. They further answered, that in April, 1869, at a term of the district court for Doniphan county, Willis J. Vancuren confessed a judgment on said notes and mortgage in favor of H. W. Boone; that, at the time of the confession of said judgment, said Vancuren had no notice of any transfer of said notes to said John Corby, plaintiff's testator; that afterwards said McCrum became the assignee of said judgment; and that before the commencement of this action he paid large sums of money on said judgment, and without any knowledge of any claim of Corby; and averring that, at the time of such payment, said Corby was not the owner and holder of said notes. Boone answered by a general denial. McCrum answered, by general denial, that the notes sued upon were, in February, 1869, deposited with John Corby, who was a banker at St. Joseph, Missouri, for safe-keeping; and setting up the judgment recovered by Boone on the notes, and the transfer of the judgment to him, and praying a foreclosure of the mortgage as against Henrietta Vancuren. Replies to these several answers by denial were filed. [Before the commencement of this suit an action had been commenced by Vancuren and wife against McCrum and others, by injunction, to restrain the collection of his judgment, which action was consolidated with this. At the March term, 1874, the order consolidating said action with this was set aside, and that action dismissed.]

On the trial, one Culligan, for plaintiff, testified that in 1866 these notes were deposited with John Corby as collateral security for money loaned by Corby to Boone, and for advances of money that Corby should make to Boone from time to time; that,

about a year after, Boone deposited with Corby notes of one Robbins for a like purpose; that Boone has not yet paid all the indebtedness for which these notes were pledged; that on November 28, 1868, Boone executed for his indebtedness to Corby a note of \$2,437.56, which is now due, except the sum of \$256 paid by Robbins on one of his notes in Corby's hands, and that Boone also executed a mortgage on property in St. Joseph to secure this note; that the property in St. Joseph was worth about \$2,500; that the property in St. Joseph was incumbered by deeds of trust to Boylan, to O'Keefe, and Devors; that in 1869 the property in St. Joseph was advertised for sale under the Boylan deed of trust; that Corby purchased said Boylan, Devors, and O'Keefe notes, stopped the sale, and immediately sold it under his deed of trust, subject to the other deeds of trust, and Corby became the purchaser. The testimony of the defendants showed the judgment recovered on these notes. The testimony of McCrum, the purchase of the judgment without notice of any claim of Corby; that, after such transfer, Vancuren paid on said judgment \$273.47. Willis J. Vancuren testified that he had no knowledge or notice, at the time the judgment was confessed, that the notes were owned or controlled or in the possession of Corby. Boone testified that these notes were deposited with Corby as security for the delivery to Corby of St. Joseph city bonds, upon which advances of money were being made by Corby to him; that the agreement was that the notes were to be returned to him when the bonds should be delivered; that the bonds were delivered. Boone also testified that when the note of \$2,437.56 was executed, and a mortgage to secure it, it was the understanding and agreement between him and Corby that Corby had no lien on the Vancuren note or the Robbins notes. Boone testifies that a settlement was had with Culligan, Corby's clerk, in February, 1869, and the St. Joseph city bonds were then all delivered; that the

*115 package *containing the notes was handed him by Culligan, and they were returned, to be kept at the bank for him. Two witnesses testify to the same fact. The jury, in their findings of fact, found that Vancuren, at the time of the confession of judgment, had no notice of any claim of Corby to the notes; that McCrum, at the time he purchased the judgment, had no notice of any claim of Corby to the notes; that at the time of the execution of the \$2,437.56 note, and the mortgage to secure it, the Vancuren notes were released. They found that the \$2,437.56 note was executed in Missouri, and upon usurious interest.

Albert Perry and B. O'Driscoll, for plaintiffs in error.

The court set aside the verdict and granted a new trial on the ground that it believed Culligan rather than Boone. It had no legal authority to grant a new trial in the case, and the order is reviewable. *Com. v. Manson*, 2 Ashm. 31; *State Bank v. Hunter*, 1 Dev. 107; *Bobb v. Lambdin*, 7 Mo. 601; *White v. Trinity Church*, 5 Conn. 187; *Norwich & W. R. Co. v. Cahill*, 18 Conn. 484; 4 *Gilmore*, 11; *Houghton v. Slack*,

10 Vt. 520. A discretion of a court is a sound legal discretion. *Reab v. McAlister*, 8 Wend. 114.

A court can set aside a verdict and grant a new trial because the verdict is against the evidence, or the weight of evidence. But when, upon a question which is decisive against either party, there is evidence on one side to support a verdict, and none on the other side, and a verdict is returned for the party who has offered evidence, it is error to set aside the verdict. 3 Grah. & W. New Trials, 1284, 1312; *Rathbone v. Stanton*, 6 Barb. 141; *Noyes v. Hewitt*, 18 Wend. 141; *Hope v. Deaderick*, 8 Humph. 1; *Sweany v. Bledsoe*, Id. 612; *Elswick v. Newsom's Adm'r*, 9 Dana, 260; *Grimke v. Houseman*, 1 McMul. 131; *Hall v. Page*, 4 Ga. 428; *Williams v. Brasfield*, 9 Yerg. 270; *Kincaid v. Turner*, 2 Gilman, 618; *Pell v. Grigg*, 4 Cow. 426. The jury found that at the time of the execution of the note of \$2,437.56, and mortgage to secure it, (which note embraced all the indebtedness of Boone to Corby,) it was the intention to release the notes Corby had of Boone in his hands. Boone swears that such was the agreement between him and Corby. Culligan does not deny it. Boone testifies that Culligan's ground for refusal to give up the notes in March, *116 1869, was that there was *more due on the Boylan note than Boone had represented; and Culligan in his testimony does not deny this. This one fact found against the plaintiff is decisive of the case against her. And in other respects Boone is corroborated.

BREWER, J. The only error complained of in this case is the granting of a new trial. This, under our statute, is doubtless an order which is reviewable; but, as was said in the case of *Field v. Kinnear*, 5 Kan. *238, "this court will require a much stronger and clearer showing of legal error, or abuse of judicial discretion, before it will interfere when the new trial has been granted than where it has been refused, for the very obvious reason that where a new trial has been granted an opportunity is afforded for another full and fair trial upon the merits of the case; but where it has been refused it operates as a final adjudication between the parties." Here the new trial was granted because, in the judgment of the district court, the verdict was against the evidence. That there was a contradiction in the testimony is conceded. Indeed, it is stated in the record that the court sustained the motion for a new trial upon the ground that it "believed the testimony of Culligan rather than that of Boone." Now, it is peculiarly the province of the trial court to see that the jury have not erred in weighing the testimony. Not unfrequently jurors, little used to the sifting and weighing of evidence, are misled, and give undue importance to some of the testimony, or undue credence to some of the witnesses. It is essential to the due administration of justice that there be some tribunal to correct these errors, and none so competent or fitting as the court who, with them, has listened to all the evidence, seen all the witnesses, noticed all the indications

in each witness of truthfulness or falsehood. In the very nature of things, an appellate court, which sees only so much of the case as can be reduced to writing, is wholly inadequate to such a duty. Hence great reliance is placed upon the judgment of the trial court.

*117 When it approves the finding of *the jury, and decides that there was evidence sufficient to sustain it, very rarely is that decision disturbed. The records of this court abundantly show that upon any question of fact that is almost invariably the end of controversy. It is useless to cite cases. On the other hand, when the trial court fails to approve the findings of the jury, this court must, for the same reasons, accept that as the legal and proper conclusion. The number of witnesses does not always decide the weight of evidence; and though Boone's testimony may, as counsel state, have been supported by other witnesses, yet Culligan's solitary testimony may properly have outweighed all on the other side. The district court so thought, and we cannot say there was any error in so holding.

Again, counsel for plaintiff in error contend there was error in the ruling of the district court because the motion for a new trial was not broad enough. The jury returned a general verdict, and with it answers to some questions of fact which had been duly submitted to them. The motion was "to set aside the verdict, and grant a new trial." Nothing was said in the motion about the answers returned by the jury. Counsel claim that, as no motion was made to set them aside, they still stand, and must control any subsequent verdict, and therefore a new trial is unnecessary and improper. We do not so understand the law. When the verdict was set aside and a new trial granted, everything appertaining to the verdict fell; and the case stands for trial as though no trial had ever been had. We see no fact established by undisputed testimony conclusive against the claim of the plaintiff.

The judgment will be affirmed.

(All the justices concurring.)

*118 *GEORGE H. WINSOR v. GEORGE W. GODDARD and another.

July Term, 1875.

Judgment: Proceedings to Set Aside: Unavoidable Casualty and Misfortune. Where the vacation of a judgment is sought on the ground that, through unavoidable casualty and misfortune, the defendant in the judgment was prevented from making his defense; and where the facts are that defendant left Sumner county, the county of his residence, to go to Miami county, to be absent ten or twelve days, leaving at home his wife and eight children, (the oldest son twenty-one years old,) was detained on the way by sickness for a week, and did not return for a
v.15k.—7

month, and during his absence suit was commenced before a justice. service made at his usual place of residence, judgment taken, but not taken until the fifteenth day of his absence, and the time to appeal past; and where it does not appear that any effort was made by his family to postpone or defend the suit, or take an appeal, or communicate to defendant the fact of the suit, nor for what purpose his trip was taken, whether business or pleasure, nor why he was detained so much longer than he intended, other than by the week's sickness: *held*, that there was no unavoidable casualty or misfortune preventing the defendant from making his defense.¹

Error from Harvey district court.

Action commenced by Winsor as plaintiff, against George W. Goddard and Byron S. Goddard as defendants, in the district court of Sumner county, to set aside a certain judgment. The venue was changed to Harvey county, where the action was tried at the April term, 1874.

Hackney & McDonald, for plaintiff.

Pendery & Goddard, for defendants.

BREWER, J. In the winter of 1871-72 the defendants in error obtained judgment against the plaintiff in error before one FRANK WISE, a justice of the peace of Sumner county. Winsor was absent from

the county at the time of the commencement of the action, *119 and of the judgment, and for more *than ten days thereafter.

Service was made at his usual place of residence. Upon his return he took the judgment up on petition in error, it being too late for an appeal. Both the district and this court affirmed the judgment, there appearing no error in the record. *Winsor v. Goddard*, 10 Kan. *625. Thereupon he commenced this action, seeking to have the judgment vacated on the ground that it was obtained by fraud on the part of the Goddards, and through unavoidable casualty and misfortune on his part. The district court, before whom the case was tried, found that there was no fraud on the part of the Goddards, and no unavoidable casualty on his part. He now alleges error.

As to the charge of fraud, there is a manifest want of harmony between the testimony on the two sides. The contradiction is so strong and decided as scarcely to be explainable upon any theory of the imperfections of memory. It is more than probable that one side or the other has willfully trespassed on the truth. The district court, with that contradiction before it, found that the charge of fraud was not made out. We cannot, under well-settled rules, reverse that finding. It is supported by clear and positive testimony.

The district court found that there was no unavoidable casualty or misfortune by which Winsor was prevented from defending before the justice. It appeared that Winsor left home on the twentieth of December to go to Miami county, and did not return until the twenty-

¹ See *Mehnert v. Thieme*, *post*, *368; *Hill v. Williams*, 6 Kan. 17, and note.

first of January. He was detained a week at Leroy, by sickness. This was as he was going from his home to Miami county. He claims to have told one of the Goddards, before he left, that he intended to go and be absent ten or twelve days. On the twenty-third of December suit was commenced before the justice. The return-day was the 27th. On that day the plaintiffs appeared, but, the defendant not appearing, the justice of his own motion continued the case to the fourth of January. Then, the defendant still failing to appear, the judgment was taken. Winsor left his family at home.

His family consisted of a wife and eight children; the oldest *120 son being then twenty-one years of age. It does *not appear that any effort was made by any of them either to postpone or defend the action, to take an appeal, or communicate to Winsor news of what was taking place. No other explanation is given of Winsor's absence than the week's detention by sickness. He says he was "otherwise detained;" but whether by business, pleasure, or the difficulties of travel, we are not informed. Indeed, for aught that appears, the whole trip of Winsor may have been merely for pleasure. Under those circumstances, we cannot say that there was any error in the finding of the district court that there was no unavoidable casualty or misfortune which prevented him from defending.

As to the question whether the justice could enter a judgment "by default" upon the bill of particulars, it appears upon the face of the record, and should have been raised on the proceedings in error. It is not now a proper matter for consideration. We do not, however, mean to be understood as holding that the record carries with it necessarily the idea of a judgment rendered without any testimony, but simply that whatever of question there may be should then have been raised. The judgment must therefore be affirmed.

The case of Winsor v. Cole is similar, and the same order will there be entered.

(All the justices concurring.)

A. JAEDICKE v. C. G. SCRAFFORD.

July Term, 1875.

Instructions Inapplicable. There is no error in refusing an instruction which, however good in the abstract, is inapplicable to the facts in the case on trial, as testified to by either party. [Grant v. Pendery, *post*, *248.]

Error from Washington district court.

Scrafford obtained a judgment against Jaedicke, at the August *121 term, 1874, of the district court, for \$200 damages, *for breach of contract for the sale and delivery of corn.

T. J. Humes and J. W. Rector, for plaintiff in error.

S. Conwell and W. C. Webb, for defendant in error.

BREWER, J. This was an action to recover damages for the breach of a contract to deliver corn. Two questions are presented by counsel for plaintiff in error in their brief: *First*, it is claimed that the court erred in ruling out a deposition; and, *second*, that it improperly refused an instruction.

The undisputed facts are that on the twenty-sixth of December, 1873, the parties made a contract by which plaintiff in error (defendant below) agreed to deliver 2,000 bushels of corn on the cars at Hanover, within thirty days, at thirty cents a bushel. Before the thirty days were passed corn was worth forty cents, and no corn was delivered. At the time of the making of the contract Scrafford gave Jaedicke a check for fifty dollars on the banking-house of Lappin & Scrafford, and Jaedicke signed what was both a receipt and also a memorandum of contract. By the terms of this memorandum two hundred dollars more was to be paid on the delivery of 1,000 bushels, and the balance on the delivery of the other thousand. Scrafford testified that the further agreement was that Jaedicke, when he was ready to deliver the corn, should call upon the station agent at Hanover for the cars, who, by previous arrangement, was to furnish the cars whenever notified. Jaedicke, on the other hand, testified that Scrafford was to procure the cars, and notify him when they were at Hanover ready for the corn. Jaedicke never called on the agent for the cars, and never bought the corn. Upon this disputed testimony the court charged the jury very fairly and clearly. No objection is made to the charge in this respect; indeed none could be.

On the twenty-sixth of January, 1874, Scrafford wrote this letter to Jaedicke:

"DEAR SIR: When you are ready to deliver the corn, call on the station agent at Hanover for the cars. C. G. SCRAFFORD."

This letter was received on the day it was sent. On the twelfth of February, Jaedicke wrote this reply:

"Inclosed please find your draft of fifty dollars. In reply I will state that I must have cash money here to do business with. Therefore I send the draft back. If you will send the money for the draft, the 2,000 bushels of corn are engaged and bargained for, but I cannot buy them without the cash money, and I am not able at present to go ahead, as I have stated."

This letter was directed, with the draft or check previously given by Scrafford inclosed, to "Lappin & Scrafford," but was not taken by them out of the post-office, and subsequently returned to Jaedicke. This last letter, and a deposition of the postmaster at Seneca as to the receipt and return of the letter, and what was said by Scrafford in reference to the refusal to take the letter out of the office, were offered in evidence, and ruled out as irrelevant. The language of the

deposition is, "I can't now give the reason assigned by him, but it was something about an anticipated lawsuit about a corn contract with the sender of the letter." This ruling is one of the alleged errors. We fail to see any error in it. Counsel for plaintiff in error contend that the letter of Scrafford was a waiver of the thirty-days clause in the contract, and an offer to extend indefinitely the time for the delivery of the corn, and that the letter of Jaedicke was an acceptance of this offer, and that, therefore, before any action would accrue to Scrafford, he must prove a tender of the money and demand of the corn. We do not think either letter justifies fully the construction placed upon it. While from Scrafford's letter a willingness might be implied to receive the corn, though the thirty days had elapsed, and he testified that he would have been willing, *123 we do not understand it as convey^{ing} any proposition for a change of the contract. It was properly admitted by the court, as tending to throw light upon the disputed terms of the original contract, but beyond that we think it has no force. Neither the letter of Jaedicke, nor the deposition of the postmaster, throws any light upon the terms of the contract, or affects in any way the right of recovery, or the measure of damages. So far as the testimony of the postmaster in any respect conflicts with that of Scrafford, it was upon a purely collateral matter.

The instruction refused was "that if, by the terms of the contract, the defendant was to deliver to the plaintiff certain corn within thirty days from the making of said contract, and that plaintiff was to pay for said corn at the time of said delivery, then, before plaintiff can recover, he must show that at the expiration of said thirty days he made demand of defendant for said corn, and paid defendant, or tendered him payment, therefor." It was sufficient reason for refusing this instruction that it was inapplicable to the contract as testified to by either party, and omitted matters which in either case were vital to the question of the right to recover.

There being no other error complained of, the judgment must be affirmed.

(All the justices concurring.)

STATE OF KANSAS v. SIDNEY A. BREESE.

July Term, 1875.

1. **Mandamus to Compel Performance of Official Duties: Application for, where Made.** An application to compel the performance, by an officer of the district court, of a duty devolving upon him by virtue of such office, should ordinarily be made, in the first instance, to that court.¹

¹Discretion of court, *State v. Anderson Co.*, 28 Kan. 70; *Evans v. Thomas*, 33 Kan. 476; S. C. 4 Pac. Rep. 883. When *mandamus* will or will not lie, see notes to *Hussey v. Hamilton*, 5 Kan. 278; *State v. Stockwell*, 7 Kan. 64.

2. ———: Power of Supreme Court. While the power of this court is unquestioned, it will generally refuse an application without a showing of satisfactory reasons for not first applying to that court.

*124 *Original motion for *mandamus*.

The county attorney of Chase county, as relator, filed in this court a petition and motion for a *mandamus* to compel Breese, as clerk of the Chase district court, to issue a warrant in a criminal action. The petition shows that one J. W. Ferry was, on the twentieth of February, 1875, arrested and brought before a justice of the peace of Chase county on a charge of assault with intent to kill one Daniel Wood; that a preliminary examination was held by the justice, which resulted in binding Ferry over to appear at the next term of the district court, and that in default of giving the required bail he was committed to the county jail; that on the same day he applied to the probate judge of Chase county for a writ of *habeas corpus*, on the ground that he never committed the offense charged, and for which he was held, and that there was an entire absence of probable cause that he committed such offense; that the writ of *habeas corpus* was granted; that on the fifth of March the county attorney filed an information in the office of the clerk of said district court against said Ferry, charging him with the same offense for which he was bound over by the justice; that on the sixth of February, Ferry had a hearing on his writ of *habeas corpus* before the probate judge; that the probate judge, upon such hearing, discharged him; that the county attorney then ordered the defendant Breese, as clerk of the district court, to issue a warrant on the information filed; that the clerk refused to issue the warrant. Upon these facts the county attorney asks this court to issue a writ of *mandamus* to compel the clerk to issue the warrant. The defendant Breese appeared, and admitted that the facts stated in the petition are substantially true, but objects to the issuing a writ of *mandamus* thereon upon the ground that said petition does not state facts sufficient to entitle the plaintiff therein to a writ of *mandamus*.

S. N. Wood, Co. Atty., in support of the motion.

Ruggles & Sterry, for defendant, *contra*.

- *125 *BREWER, J. This is an application for a *mandamus* to compel the defendant, the clerk of the district court of Chase county, to issue certain process. It is addressed, in the first instance, to this court, and no reason is given why the application was not made to the district court. The defendant is an officer of the district court. The duty which he is charged with neglecting is one devolving upon him as such officer. It seems to us there are many reasons why an application to compel him to discharge any of those duties should be addressed in the first instance to that court. There can be no question of the power of that court. It is especially charged with

the duty of regulating the proceedings of its own officers. It will tend to promote harmony in those proceedings to have them all controlled by one tribunal. It will prevent conflicting orders. That court is better acquainted with its officers, can more fully appreciate the reasons for their action, and more justly measure the punishment to be awarded in case of disobedience. There are still other considerations of a different nature, which are generally true. The costs of proceedings in this court are greater than those in the district court. The party is compelled to carry on a litigation away from home, and therefore at greater expense. Testimony will be more by deposition, and therefore less satisfactory. We do not doubt the power of this court, and there may be cases where it would be proper for the application to be first made here; and when such cases arise we shall not hesitate to act. But in this case we see nothing to induce a deviation from that course which seems to us ordinarily appropriate and just. The writ of *mandamus* lies largely within the discretion of the court; and the existence of absolute legal rights in the party, and jurisdiction in the court, does not always compel the issue of the writ. *State v. Marston*, 6 Kan. *525; *Atchison, T. & S. F. R. Co. v. County of Jefferson*, 12 Kan. *127.

*126 The writ will be refused. But this disposition of the case *is not to be taken as an adjudication of the merits of the controversy, or to prevent an appeal to the district court for such adjudication, or to this court a second time, with a showing of sufficient reasons, if any exist, why appeal is not made in the first instance to the district court.

(All the justices concurring.)

THOMAS YARNOLD and others v. CITY OF LAWRENCE and another.¹

July Term, 1875.

1. **Municipal Corporations: Powers of: Street Improvements: Patented Pavements.** The law of 1868 concerning cities of the second class provided that, before any contract for street improvements should be let, the city engineer should make and submit to the council an estimate of the cost thereof, and that in advertising for bids such estimate should be published. *Held*, that thereby the city was not precluded from making a valid contract without any advertisement for bids, and was not compelled, in case of an advertisement, to let the contract to the lowest bidder.
2. ———. May not a city, though expressly required to let all contracts to the lowest bidder, let a valid contract for improving its streets by a process covered by a patent, and subject to a monopoly?

¹Under the laws of Kansas as they existed in 1874 and in 1875, cities of the second class had the power to issue bonds in payment for the building of sidewalks, notwithstanding the fact that the money to be obtained with which to pay said bonds had to be collected as special taxes from the abutting lot-owners; and, after such bonds had been issued and had become due, judgment might properly

3. ———: **Street Bonds: Contract for Improvements.** A contract by a city of the second class for street improvements may be made payable in the street bonds provided for in section 17 of chapter 62 of the Laws of 1871.
4. ———. In such a case all the proceedings anterior thereto, including the estimate of the cost required of the city engineer, may be had upon the basis of the manner of payment.

Error from Douglas district court.

Injunction brought by Yarnold and fifty-eight other lot-owners of the city of Lawrence as plaintiffs, against said city and the treasurer of Douglas county as defendants, to enjoin the collection of certain special taxes. A temporary injunction granted at the com-
*127 mencement of the action *was afterwards, in June, 1873, on defendants' motion, dissolved.

Nelson Cobb and Riggs, Nevison & Simpson, for plaintiffs.

The powers of municipal corporations are strictly construed, (*City of Leavenworth v. Rankin*, 2 Kan. *357; *Paine v. Spratley*, 5 Kan. *543; *Burnes v. City of Atchison*, 2 Kan. *489; *Leavenworth v. Norton*, 1 Kan. *432;) and, where the corporation exercises a power conferred by statute, it must strictly pursue the power, or its acts are void, (*Thompson v. Schermerhorn*, 6 N. Y. 92; *Cuyler v. Village of Rochester*, 12 Wend. 165.) Where a municipal corporation is by law required to let contracts for paving to the lowest bidder, it has no power to let contracts for patent pavements, because that excludes competition. *Charleton v. Treasurer, etc.*, 23 Wis. 590; *Harlem v. City of New York*, 33 N. Y. 309, 323; *Brady v. City of New York*, 20 N. Y. 312; *Dolan v. City of New York*, 4 Abb. Pr. (N. S.) 397; *Burgess v. City of Jefferson*, 21 La. Ann. 143; *Nicolson P. Co. v. Painter*, 35 Cal. 699; *Dill. Mun. Corp.* § 389, and note. When law requires officers to advertise for bids, it is their clear duty to let to the lowest responsible bidder. The only object of the bidding is to secure competition. The ordinance of the city which is unrepealed, is a law; and it can be repealed only by ordinance. The statute and ordinance clearly make it the duty of the city government to advertise for bids, and let its contracts to the lowest responsible bidder, (*Gen. St.* 169, § 81,) and no valid contract could be made without complying with the provision, (*Leavenworth v. Ranklin*, 2 Kan. *367.) No such estimate as the law requires was made by the city engineer. The estimate was of the costs of the pavement, including royalty on the patent-right, and payable in bonds of the city, without estimate of the value of the bonds.

There is no authority for making the contract payable in bonds. There is no authority for doing so in any case. The authority for issuing street bonds to contractors performing work, or furnishing ma-

be rendered on them against the city, notwithstanding the fact that the city had properly levied special taxes against the abutting lot-owners to raise funds with which to pay such bonds, and notwithstanding the fact that such special taxes had not yet been collected. *Wyandotte v. Zeitz*, 21 Kan. 649.

terials, does not authorize the making of contracts for work payable in bonds to pay an indebtedness existing against the city. That clause (subdivision 38, p. 166) is qualified by section 32, p. 169, providing that bonds shall not be sold for less than 90 cents on *128 the dollar. *If bonds could be contracted to be taken in payment in a contract for work and materials, this provision would be entirely evaded, and no check on the power of the public agent as to the price of bonds would remain. If they desire to dispose of bonds at fifty cents discount, they can do so. The law must be so construed as to carry out its policy, and prevent the disposition of bonds at a sacrifice of over ten per cent. *Starin v. Town of Genoa*, 23 N. Y. 439, 453, 458; *Gould v. Town of Sterling*, 1 Amer. Law Reg. (N. S.) 290. Authority to borrow money to pay, is not an authority to issue bonds in payment. *Navigation Co. v. Commissioners of New Bern*, 7 Jones, 275. The city having no authority to issue such bonds, they were void, and the assessment to pay them is void. *Commissioners of Shawnee Co. v. Carter*, 2 Kan. *115. The assessment being illegal, injunction may properly be granted to restrain its collection. Code, § 253; and see *People v. County of Tazewell*, 22 Ill. 147; *Bates v. Sutherland*, 15 Johns. 510; *Norton v. Dow*, 10 Ill. 461; *Hawley v. Truax*, 21 Barb. 361.

Thacher & Stephens, for defendants.

The principal question is whether a municipal corporation has in this state the right to use a patent process of street pavement or not. Upon principle it would seem that there should be no question, unless the use was expressly prohibited by plain legislative enactment. Patents are issued to individuals for meritorious inventions, and the world would go back many years if to-day we could be deprived of all use of articles for the invention of which patents have been issued. The hand-sickle would take the place of the reaper; the ox, with his tread, would replace the threshing machine; the wooden plow would again scratch the ground; the steam-engine would vanish; the post-boy replace the telegraph; and the man who would think of paving the place where Massachusetts street now is, would be justly laughed at as a visionary schemer. And, while the world advances, can there be a reason why municipalities should stand still? Is there anything compelling them to do so, short of the coercion of the legislature? It is not charged that such legislation exists, except inferentially in compelling the advertising for proposals. But the statute un- *129 der which the most of the acts in *ascertaining and assessing these special taxes were done, and under which all were so done which affect this question, contains no provision whatever requiring the contract to be let to the lowest bidder; nor did the statute require the city government to seek for competition in any form. *Laws 1871*, p. 149. The plaintiffs are then bereft of their whole argument. The city government is given full power, in their discretion, to make the improvement. They have exercised that discretion, have

even gone the full length of advertising for proposals for various kinds of pavements, and have accepted such proposal as they deemed best for the interest of the city. Even had they been compelled by statute to so advertise, and to let the work to the lowest bidder, their action is legal, and will be upheld. *Bruyn v. Comstock*, 56 Barb. 1; *Hobart v. City of Detroit*, 17 Mich. 246; *In re Ford*, 6 Lans. 92; *In re Dugro*, 50 N. Y. 513.

BREWER, J. Plaintiffs in error (plaintiffs below) brought their action in the district court of Douglas county, seeking to restrain the defendants from selling their property for the non-payment of certain special taxes, and obtained, without notice, a temporary injunction. Subsequently, upon motion, the injunction was dissolved, and this ruling is the matter brought here for review. Two or three important questions are presented. One, and perhaps the most important, is this: The tax in dispute was for the pavement of Massachusetts street, in the city of Lawrence, with the Wyckoff pavement. It is insisted that this pavement, being covered by a patent, excludes competition, and that, therefore the city, which was by law obliged to let all contracts to the lowest bidder, had no power to let a contract for such an improvement. The right of a city to avail itself of patented inventions in the improvement of its streets, etc., where the law required the letting of contracts to the lowest bidder, has been before the courts of several states, and the adjudications thereon are not uniform. In Wisconsin, California, and Louisiana the right has *130 been denied; while in Michigan and New York it has *been sustained. *Dean v. Charlton*, 23 Wis. 590; *Nicolson Pavement Co. v. Painter*, 85 Cal. 699; *Burgess v. Jefferson City*, 21 La. Ann. 143; *Hobart v. City of Detroit*, 17 Mich. 246; *Matter of Dugro*, 50 N. Y. 513. These cases are alike in these matters: That in each the precise question was as to the power of the city to charge the cost of the improvements on the adjacent lots, and also that the city was expressly required to let the contract to the lowest bidder. They differ in these respects: In Wisconsin it is provided that the estimates of total cost and expense to each lot shall be filed in the office of the city clerk, time fixed for doing the work, and notice thereof given to the lot-owners. If the work is not done by the lot-owners within that time, then it may be let by contract to the lowest bidder. In California the bids are opened and the work awarded to the lowest responsible bidder. Then notice is published of the award, and the owners of a major portion of frontage may take the contract upon the same terms. If they fail to take the contract within the specified time, it is then finally given to the party to whom it was first awarded. In both these states, therefore, it will be noticed that special provision is made for securing to lot-owners the privilege of doing the work themselves,—a privilege the courts consider of no value if the contemplated improvement is covered by a patent, and can only be made by the patentee, or such

person as he chooses to permit. In Louisiana the court notices and lays stress on the fact that the city may, under the general grant of power to improve, etc., avail itself of any patent, by making the cost of such improvement a charge on the general funds of the corporation, and is only restricted to contract with the lowest bidder when it seeks to throw the cost of the improvement on the adjacent lot-owners; while in New York and Michigan there is a general restriction on the power of the city to enter into contracts above a specified amount without letting them to the lowest bidder; thus, as the courts say, if the doctrine announced in the other courts be correct, cutting off the *181 city from the right to avail itself of those improvements *in pavements, sidewalks, etc., which the genius of our inventors is constantly discovering, until after the expiration of the patents therefor.

The question is a doubtful one, and one on which courts will continue to differ. The writer of this opinion is inclined to favor the views of the courts in Michigan and New York upon this question. There is, however, such a distinction between the case before us and those cited as will enable us to dispose of it without definitely deciding this question. In each of those cases there was an express direction that the contract be let to the lowest bidder, and upon that rested the argument of the courts. Here there is no such express direction; nor is it, we think, necessarily implied from any of the express directions. Section 31, c. 19, Gen. St. 1868, p. 169, is the section from which the implication is claimed. That section provides that, prior to any contract, the city engineer shall make and submit to the council an estimate of the cost, and that in advertising for bids the amounts of such estimate shall be published. Counsel contend that the city is required to advertise for bids, and that, therefore, when the bids are received, she must let to the lowest bidder. We dissent from both premise and conclusion. The section does not declare that before any contract is let an advertisement shall be made for bids. It simply says that "in advertising for bids" certain things shall be published. Requiring that, when an advertisement is made, certain things shall be published, is by no means equivalent to requiring that advertisement be made in all cases. We see no reason to doubt the right of the city, under that section, to make a valid contract without any advertisement. Nor does it necessarily follow from the fact of an advertisement for bids, that the contract must be let to the lowest bidder. There is a strong implication that such ought to be the result, but it is not the necessary legal conclusion. We think, therefore, that the contract in question must, under the law in force at the time it was made, be sustained.

Another important question is as to the power to pay, and to *132 contract to pay, for such improvements, in bonds. The *contract provided for the payment in bonds, one-third payable in one year, one-third in two, and the balance in three years; and the

entire transaction, from the first resolution of the council to the acceptance of the work, seems to have proceeded upon the idea of payment in such manner. It is earnestly contended that this was beyond the power of the city. By paragraph 38 of section 30 of the act of 1868 incorporating cities of the second class, (Gen. St. 166,) such cities are authorized "to issue, from time to time, street bonds to contractors * * * on such terms and in such manner as the council may provide." This, it is contended, is limited by a clause in section 32 of same act which declares that "the mayor and council shall have no power to sell or dispose of scrip, orders, or bonds at less than ninety cents on the dollar." If the city may legally contract for labor to be paid for in bonds, this prohibition is practically nullified, and the city disposes of its bonds at just such a value as the contractor places upon them. Therefore all contracts must be made upon the basis of payment in cash, though, after the debt has been contracted, it may be settled by the city, by the issue of its bonds therefor at ninety cents on the dollar. But section 30 was repealed in 1871, (Laws 1871, p. 166, § 81,) and in lieu thereof upon this matter this was enacted: "The assessments [those like the one in question] shall be known 'as special assessments for improvements,' and except as hereinafter provided shall be levied and collected as one tax. * * * But the mayor and council shall have power to issue the bonds of the city for the costs of paving, * * * to be made payable as follows: One-third of the aggregate amount of such bonds of any issue in one year; * * * and, for the payment of said bonds, assessments shall be made in each year," etc. Laws 1871, p. 149, § 17.

Now, the purpose and scope of this enactment was to grant authority to a city to distribute over three years the burden of street improvements. That being the obvious purpose, it is both fair and legal that the city should contract with reference to this authorized mode of payment. It is just to the lot-owners, that they may

*133 know whether to encourage or ob*ject to the proposed improvement; for they might well object to that, the cost of which must be met in a single year, when they would gladly indorse the same work if they could have three years in which to pay for it. It is just to all bidders for the contract, for often the time and manner is as important as the fact and amount of the payment. It must be borne in mind that these bonds are to be paid in the same way, and out of the same property, as though the improvement was paid for in a single year, and by one assessment; so that, though these instruments issued to the contractor are called bonds of the city, yet they are not, like ordinary obligations, primarily chargeable upon its entire property, while the "scrip, orders, and bonds" spoken of in section 32 are doubtless its ordinary and general obligations. We think, therefore, that the city might legally contract for the street improvement upon the basis of payment in the manner provided in the con-

tract before us. It would seem, therefore, to follow that all the other proceedings, including the estimate of the engineer required by section 31, (Gen. St. p. 169,) should be had upon the same basis. These are the principal questions in the record as presented by counsel, and, in them appearing no error, the judgment will be affirmed.

It is understood that the same questions are involved in the case of *McCurdy v. City of Lawrence*, and therefore the same judgment must be entered in that case.

(All the justices concurring.)

GEORGE E. HUTCHINSON and others v. MAURICE HARTTMANN.

July Term, 1875.

1. **Conveyances: Title: Unrecorded Deeds: Possession.** A deed executed September 24, 1855, and never recorded in the county register's office, has never had any validity as against a subsequent innocent *bona fide* purchaser from the same grantor, for a valuable consideration *134 actually paid, where such subsequent purchaser has taken possession of the property under his purchase, and has had his deed duly recorded.
2. **Notice: Public Record: What Notice It Imparts.** The record of a quitclaim deed executed May 2, 1861, and recorded December 5, 1861, simply gives notice of the existence and contents of such deed to all subsequent purchasers from the same grantor. It does not give notice to any person that such grantor had any right to the property, nor does it give notice to any person of any prior unrecorded deeds constituting a chain of title to said grantor.¹

Error from Douglas district court.

Action by Harttmann, as plaintiff, to quiet title to a lot occupied and claimed by him. Both parties claimed title in fee, and from the same common grantor. The district court, at the November term, 1872, gave judgment in favor of the plaintiff, and the Hutchinsons, defendants, bring the case here for review.

Riggs, Nevison & Simpson and *Wilson Shannon*, for plaintiffs in error.

The only evidence offered by plaintiffs in error, and objected to by Harttmann, on the ground that it was secondary, and not the best evidence, was admitted by the court, and no exception was taken by Harttmann. The objection that such evidence, or any part of it, was

¹As to effect of quitclaim deed, see *Young v. Clippenger*, 14 Kan. *148, and note.

secondary, cannot, therefore, be made here. Plaintiffs in error also offered in evidence certain other records, the reading of which was objected to. It was finally stipulated that the records should be read in evidence, subject to the decision of the court upon their admissibility, thereafter to be given. This decision was never given. Plaintiffs in error were thus deprived of their exceptions in case the records were excluded; and, in the event that only a part was received, plaintiffs in error were entitled to notice thereof, that they might supplement the rejected part with other proof. It follows that all the evidence offered by plaintiffs in error must be considered as having been duly received, or as having been erroneously excluded. If the evidence was erroneously rejected, we do not need other
 *135 *grounds for reversal of the judgment. If it was duly received, the court committed an error in reaching the result it did.

The Hutchinson title, derived through Addis' deed to Mott, is good as being the elder, unless there was a law in force on the twenty-fourth of September, 1855, which rendered unrecorded deeds invalid as against subsequent innocent purchasers. 2 Lead. Cas. Eq. 67; Broom; Leg. Max. 345; Boone v. Chiles, 10 Pet. 210. A law requiring deeds to be recorded in the office of the recorder of deeds of the county in which the land was situated is found in St. 1855, p. 182, § 42. But nothing in the official volume fixes the date when the statute took effect. The law, it is true, contained a provision that it should go into effect on its passage; but the date of its passage is not given. The court certainly will not divest a title, otherwise good, on the strength of a *presumption* that a certain law, not published until after November 1, 1855, (see preface to Statutes of 1855,) went into effect before September 24, 1855. If the court, to ascertain the date of the recording act of 1855, should consult the state archives, it will also learn that the first clerk of the probate court of Douglas county was James Christian, whose commission bears date September 29, 1855. The clerk of the probate court was *ex officio* recorder of deeds, (St. 1855, p. 650, § 4;) but the clerk was forbidden to act as recorder until he had filed a certain bond, (St. 1855, p. 651, §§ 5-7.) This bond could not have been of earlier date than the commission, September 29th. It undoubtedly bore a later date. There was therefore no obligation, because it was not possible to record real-estate transactions before September 29th; probably not till long after. The legislature could not impose a duty impossible of performance. Chapman v. Robertson, 6 Paige, 630. The recording act of 1855 did not, therefore, become binding until a registry office was provided. The date of the taking effect of the registration act cannot be earlier than the date of the opening of
 *136 the recorder's office in the county in which the *land was situated. An earlier date would render the law unconstitutional. None of the registration laws of Kansas have, in express language

or by implication, applied to transactions in real estate of earlier date than the date of the law. We concede that a statute may be constitutional which requires the recording of deeds executed before its passage, provided, always, that a reasonable time is given after the law goes into effect in which to make the record, and that reasonable notice is given of the passage of the act. *Ross v. McClung*, 6 Pet. 289. The recording law of 1855 is not, either by express language or by implication, retrospective; and even if it were, as it did not allow a reasonable time in which to make the record of past transactions, and as the law took effect without notice, and long before its publication, (see preface St. 1855,) it follows that the construction claimed is indefensible on every ground, and is supported neither by reason nor authority. The burden of proving when the first registration law of Kansas took effect is therefore cast upon defendant in error, who seeks to avoid a title otherwise good by calling to his aid the registration laws. It is for *him* to show that the common law was supplanted by the recording act before the twenty-fourth of September, 1855.

At the time when Rebecca D. Hutchinson, the ancestor of plaintiffs in error, acquired her title, the deed from Addis to Harttmann was not of record in the county registry office. Mrs. Hutchinson, therefore, bought without knowledge, actual or constructive, of the Harttmann claim. By the terms of the registry law the deed to Harttmann, as to Rebecca D. Hutchinson, was therefore invalid and void. But there was an act passed in 1857, (Terr. Laws 1857, p. 316,) which legalized the Ladd records, and by section 3 thereof all deeds recorded before the date of the act should take effect according to their date, and not according to record. If this law is constitutional, the Hutchinson title is the best, because the conveyance from Addis to Mott was prior to that from Addis to Harttmann. The record was also prior.

*137 **Cobb & Chadwick*, for defendants in error.

Harttmann clearly proved title in himself by his deed from Addis, the common source of title. The defendants proved no title. The only evidence that appears to have been given by defendants below, and received by the court, was a copy from the office of the register of deeds, purporting to be a conveyance of the property from Walter C. Hutchinson and wife to Rebecca D. Hutchinson. The paper purporting to be a copy of a deed from Addis to Mott; also the so-called "power of attorney" from Mott to G. W. Hutchinson; also the copy deed by G. W. Hutchinson to Walter C. Hutchinson; also the letter from Mott to G. W. Hutchinson as to the sale of his property, and the certificate of Mott, indorsing the action of George W. Hutchinson,—were all objected to by plaintiff, and by the consent of counsel taken by the court, subject to the exceptions, to be afterwards decided by the court. The court never announced its decisions upon these objections, and was never requested to do so by counsel, and con-

sequently no exceptions were ever taken to his rulings upon these questions; nor is it known except by inference whether the court admitted or rejected such testimony. It is necessary for the counsel to show error upon the record. They must show the specific error of which they complain, and that it was duly excepted to at the time. They cannot claim that the court erred in rejecting the testimony, for they did not except to any such ruling; nor can they assign error in the alternative, that the court erred in the rejection of testimony, or in the judgment, because the errors in rejecting testimony, if any, were not excepted to, and the motion for a new trial does not make the rejection of evidence a ground of the motion.

Harttmann being admitted by the pleadings to be in possession, and having proved a conveyance to him from Addis, who was admitted on the trial to have been the owner at the time of such conveyance, thereby made out his case. The defendants gave in

*138 evidence a deed of the same property *from Walter C. and

Mary F. Hutchinson to Rebecca D. Hutchinson, and it was admitted that said Rebecca was dead at the time of the commencement of the action, and that the plaintiffs were her only children, and living and of full age at the institution of the suit, and were the only heirs at law of the said Rebecca. This is all the evidence received for the defendants below. Now, no title having been shown in Walter C. Hutchinson or Mary F. Hutchinson, this evidence clearly constitutes no defense to Harttmann's action.

But if the evidence offered had all been received, Harttmann was still entitled to judgment. He was a *bona fide* purchaser, for valuable consideration paid before the deed to Mott was recorded, either according to law or in the book kept by Ladd. His deed bears date March 1, 1856, and the deed to Mott was not recorded anywhere at that time, and it never was recorded according to the laws of the territory or state. The deed of Addis to Harttmann, duly acknowledged, was recorded in the office of the register of deeds, July 30, 1864. The title, as against Mott's unrecorded deed, passed by the payment and conveyance to Harttmann without waiting for Harttmann to record his deed. 2 Lead. Cas. Eq. 182; Steele's Lessee v. Spencer, 1 Pet. 552; Lessee v. Smith, 17 Ohio, 226; Coster v. Bank of Georgia, 24 Ala. 61.

But it is claimed that the act of February 20, 1857, entitled "An act appointing trustees for the city of Lawrence," (Laws 1857, p. 316,) gives Mott's title the preference on account of its prior date. That act can have no such effect. It was not intended to have such effect, as its preamble, title, and subject-matter clearly show. Section 3 of that act, in providing "that no preference shall be given to any person on account of prior registry in said book of record up to this time, when two or more persons shall have a deed to the same lot, but those of the oldest date shall take precedence," was meant only to say that the trustees should deed to the person having the

oldest deed, without reference to Ladd's record, but did not undertake to interfere with the right of the courts to protect rights vested *139 already under *contracts of purchase. But if this law was intended to affect titles like this it could not have such effect, because it would in that respect be unconstitutional and void. When Harttmann made his purchase *bona fide*, and paid his money, and took his deed, Mott's deed not having been recorded according to the laws of the territory, or in any other manner, Harttmann's title vested. He acquired all the title Addis had to convey before the deed to Mott, because Mott's deed was void as to him. See Laws 1855, p. 182, § 42; Coster v. Bank of Georgia, 24 Ala. 61; Steele's Lessee v. Spencer, 1 Pet. 552; Lessee v. Smith, 17 Ohio, 226.

Rebecca Hutchinson does not take the title from the plaintiff by prior registry. The registry act protects only subsequent purchasers from the same grantor. Raynor v. Wilson, 6 Hill, 469; Stuyvesant v. Hall, 2 Barb. 151; Bates v. Norcross, 14 Pick. 224; Crockett v. Maguire, 10 Mo. 34; Murray v. Ballou, 1 Johns. Ch. 566; Keller v. Nutz, 5 Serg. & R. 246. Again, if she would make her prior registration available, it could be done only by registering her whole chain of title back to Addis, the common grantor. The registration of a deed is constructive notice only of what the record shows. The record in this case shows a conveyance from Walter C. and Mary Hutchinson, but does not show and is no notice that they had any rights to convey. Roberts v. Bourne, 23 Me. 165; Spencer v. Babcock, 22 Barb. 328. But she is not protected, because it is not proved that she paid the consideration money. See the recording acts in force when her conveyance was taken. Comp. Laws, 355, § 13; Bishop v. Schneider, 46 Mo. 473; Jewett v. Palmer, 7 Johns. Ch. 65; Wood v. Mann, 1 Sum. 506; Wormley v. Wormley, 8 Wheat. 421. And such payment must be proved by evidence other than the deed. As to persons other than the parties to the deed, the acknowledgment of the payment of consideration in the deed is mere hearsay. Even allowing the books kept by Ladd to be legal books of registration, her chain of title would not be recorded. The power of attorney under which the deed from Mott was made, was never registered in Ladd's books. The paper so registered was not a power to convey anything, but if there was any power to convey it was contained in the letters, which were neither acknowledged nor recorded. The power of attorney under which the deed was made was part of the conveyance, *140 and the statute expressly required it to be registered. Laws 1855, p. 182, § 48.

VALENTINE, J. This was an action to quiet title brought by Harttmann against the Hutchinsons. The plaintiff in his petition set up title and possession in himself. The defendants in their answer denied the plaintiff's title; and set up title in themselves, but did not deny the plaintiff's possession. "On the trial it was stipulated v.15k.—8

and agreed that on the twenty-fourth of September, 1855, the legal title to the lot in controversy, to-wit, lot No. 64, on Massachusetts street, in the city of Lawrence, was vested in A. S. Addis, and that both plaintiff and defendants claim title from and under said A. S. Addis." The plaintiff's title is a deed from Addis to himself, dated March 1, 1856, recorded in E. D. Ladd's Register, September 2, 1857, and recorded in the county register's office, July 30, 1864. He was a *bona fide* purchaser of the lot, without notice of any prior deed having been executed by Addis. The defendants' title is as follows: Deed from Addis to John S. Mott, dated September 24, 1855, never acknowledged, nor recorded in the county register's office, but recorded in Ladd's Register, March 23, 1857; an informal and conditional power of attorney from Mott to G. W. Hutchinson to sell lots in Lawrence, (not naming the lots,) dated December 4, 1855, not acknowledged, nor recorded in the county register's office, but recorded at some time (when not shown) in Ladd's Register; two letters from Mott to G. W. Hutchinson, not acknowledged or recorded anywhere; deed from Mott, executed by G. W. Hutchinson as attorney in fact for Mott, to Walter C. Hutchinson, dated March 1, 1857, not acknowledged, nor recorded in the county register's office, but recorded in Ladd's Register, March 23, 1857; deed from Walter C. Hutchinson and wife to Rebecca D. Hutchinson, dated May 2, 1861, acknowledged, and recorded in the county register's office, December 5, 1861.

Rebecca D. Hutchinson is dead, and the defendants are her *141 heirs. Some of these matters were *proved on the part of the defendants by very questionable evidence, but, for the purposes of the case, we shall consider them sufficiently proved. The judgment in the court below was in favor of Hartmann.

We do not understand that the plaintiffs in error claim that the recording of said deeds in Ladd's Register, or the act of the legislature of February 20, 1857, entitled "An act appointing trustees for the city of Lawrence," (Laws 1857, p. 816,) affect the merits of this case in the least. While they may claim that said act gave them a right to read from said register copies of said deeds as evidence, we do not understand that they claim that said act dispensed with any of the requirements of the general registry laws, or relieved any person from any of the consequences that would naturally result in any case from a compliance or non-compliance with said registry laws. Hence we shall have nothing further to say with reference to said Ladd's Register or said act.

The principal portion of the argument of the plaintiffs in error is made upon the hypothesis that the act of the legislature of 1855, "regulating conveyances," (Laws 1855, p. 173 *et seq.*) was not in force on September 24, 1855, when the deed from Addis to Mott was executed; and upon this hypothesis they seem principally to rest their case. But the hypothesis is not correct. Said act took effect and was in force from and after its passage, which was some time

in August, 1855. The legislature that passed said act adjourned *sine die* on August 30, 1855. Now, under said act, (Laws 1855, p. 182, § 42,) said deed never had any validity as against Harttmann, for it was never recorded in the county register's office; and although Harttmann was a subsequent purchaser of the property, yet he was an innocent and *bona fide* purchaser of the same, for a valuable consideration actually paid, and he took possession of the property under his purchase, and had his deed therefor duly recorded in the county register's office. Even if Harttmann's deed under the same act was void as to Mott and the Hutchinsons (as it probably *142 was) until he had it recorded in the county register's office, still he finally had it so recorded. The act of 1859, "regulating conveyances," (see Laws 1859, p. 290, § 13; Comp. Laws 1862, p. 355, § 13,) could not, by its terms, make Mott's deed valid as against Harttmann without being recorded, although such act may have made Harttmann's deed valid as against Mott and the Hutchinsons before it was recorded; for none but Harttmann was a "subsequent purchaser for a valuable consideration, without notice," from Addis, within the meaning of section 13 of that act. Only one deed in the defendants' chain of title from Addis down to Rebecca D. Hutchinson was ever recorded in the county register's office, and that was the deed from Walter C. Hutchinson and wife to Rebecca D. Hutchinson. Now, probably, all the deeds in the defendants' chain of title from Mott down to Rebecca D. Hutchison were void on account of the defective and informal execution of the deed from Mott to Walter C. Hutchinson; but even if they were not void for that reason, still we think they cannot affect the plaintiff's title, because the title of Mott himself is void as against the plaintiff's title. Neither can the recording of the deed from Walter C. Hutchinson and wife to Rebecca D. Hutchinson affect the plaintiff's title. The record of that deed simply gives notice of the existence and contents of such deed to all subsequent purchasers of the property from Walter C. Hutchinson. It does not give notice to any person that Walter C. Hutchinson and wife had any right to the property in controversy; nor does it give notice to any person of any of the prior deeds in the defendants' chain of title. That is, the recording of one deed does not constitute a record of all deeds prior to it, and which with it constitute a chain of title. But the said deed from Walter C. Hutchinson and wife to Rebecca D. Hutchinson does not pretend or purport to show where Walter C. Hutchinson obtained his interest in the property. It is merely a quitclaim deed. The authorities sustaining these propositions will be found in the brief of defendants in error, and in 3 Washb. Real Prop. 285, 591.

*143 The judgment of the court below, in addition to what is necessary to be contained therein, contains an order that the plaintiff shall *recover* the premises from the defendants. Now, while this order is wholly unnecessary, and therefore erroneous, yet we can-

not see how it can affect the substantial rights of the defendants. Of course, the plaintiff does not want to *recover* what he already has. He merely wants to have his title and possession quieted, and this is all that the judgment below should have attempted to do. The judgment may be corrected in this respect, without costs. In all other respects the judgment of the court below will be affirmed.

(All the justices concurring.)

MOSES KEYES v. J. SNYDER.

July Term, 1875.

1. **Stock: Herd Law of 1872.** The act of the legislature entitled "An act to provide for the regulating of the running at large of animals," approved February 24, 1872, commonly known as the "herd law," is constitutional and valid.¹
2. ———: **Order of County Board.** An order made by the board of county commissioners prohibiting certain stock from running at large in a portion of said county only, to-wit, in certain townships thereof, and not in the whole county, is void.²

Error from Morris district court.

Replevin brought by Keyes to recover possession of two head of neat cattle. The defense was that the cattle in question were allowed by Keyes to run at large in Elm Creek township, in which defendant, Snyder, resides, and that they did then and there, and "on the fifteenth of July, 1873, enter upon the farm of said Snyder, and did then and there eat, trample down, and destroy the crops of said defendant then and there standing and growing, and did then *144 and there damage defendant's said growing crops to the amount and of the value of one dollar; that said defendant has never been paid said damages; that he took said cattle into custody until such damages should be paid; that he claims a lien upon said cattle for said damages; and that, within five days after taking such cattle into his possession as aforesaid, he commenced an action against said Keyes before a justice of the peace for said Morris county to recover said damages, and enforce said lien, and said action is now pending," etc. This action of replevin brought by Keyes was commenced before a justice of the peace, and was removed by appeal to

¹The night herd law of 1868 is not repealed, either in terms or by implication, by the general herd law of 1872. *Lauer v. Livings*, 24 Kan. 277

²Under the night herd law, an order of the commissioners requiring animals to be confined in the night-time during the entire year is, if proper prior proceedings are had, within the statute, and valid. *Lauer v. Livings*, 24 Kan. 277. Sufficiency of preliminary steps to order, *Kungle v. Fasnacht*, 29 Kan. 559; presumption, *St. Louis & S. F. Ry. Co. v. Mossman*, 30 Kan. 336; *S. C. 2 Pac. Rep.* 146.

the district court, where a trial was had at the October term, 1878. Snyder justified his taking up and detention of the cattle under an order adopted by the board of commissioners of said county, February 17, 1878, which order is as follows: "Be it ordered by the board of county commissioners of Morris county, Kansas, that the following described animals are hereby prohibited from running at large in the following named townships of the aforesaid county of Morris: This order shall include all horses, asses, and neat cattle in the townships hereinafter named. It shall be in force in the townships of Parker, Clark's Creek, Diamond Valley, Elm Creek, and Ohio; and shall take effect on the first day of April, 1878, and continue in force until the first day of December, 1878. It is further ordered that this order be published for four weeks prior to its taking effect in the Morris County Republican." It was admitted that the townships named in the order were only a portion of the townships in Morris county. The district court, a jury being waived, found that the defendant had a valid lien on said cattle for the amount of the damages claimed by him, and the costs of taking up said cattle and enforcing said lien, and was entitled to the possession of the cattle until said damages and costs were paid; and gave judgment accordingly, and against the plaintiff for costs.

Sharp & McDonald, for plaintiff.

Hughes & Bradley, for defendant.

*145 *VALENTINE, J.. The only questions involved in this case which we shall consider are as follows: *First.* Is the act of the legislature entitled "An act to provide for the regulation of the running at large of animals," approved February 24, 1872, (Laws 1872, p. 384,) commonly known as the "herd law," constitutional and valid? *Second.* Is a certain order made by the board of county commissioners of the county of Morris, prohibiting certain stock from running at large in a portion of the townships of said county, and not prohibiting such stock from running at large in the whole of the county, valid? We must answer the first of these questions in the affirmative, and the second in the negative. That the act is constitutional and valid, see the case of *Noffziger v. McAllister*, 12 Kan. *315; and that the act does not apply to townships, but to counties, see the act itself. Section 1 of the act reads as follows:

"Section 1. The board of county commissioners of the different counties of this state shall have power, at any session after the taking effect of this act, to direct by an order what animals shall not be allowed to run at large within the bounds of their county."

There is no provision authorizing the county board to "direct by an order what animals shall not be allowed to run at large within the bounds of" any township, school-district, road-district, or fraction thereof. The whole power that the commissioners possess to prohibit stock from running at large, they get from said section 1, and,

unless that should clearly give them the power to prohibit stock from running at large in fractions of the county, we should not hold that they possess any such power.

The judgment of the court below is reversed, and cause remanded for further proceedings.

(All the justices concurring.)

*146

*SEYMOUR TARRANT v. JOHN SWAIN.¹

July Term, 1875.

1. **Homestead: Equitable Owner.** Where a person resides upon and occupies a certain piece of land, he may acquire a homestead interest there in under the homestead exemption laws of Kansas, although he may have only an equitable interest in the land. [Moore v. Reaves, *post*, *150; Hixon v. George, 18 Kan. 259; Hogan v. Manners, 23 Kan. 557.]
2. ———: **Owner of Undivided Half.** Where a person owns an undivided half of a certain piece of land, and resides upon and occupies the land with his family, he may acquire a homestead interest in the land, under the homestead exemption laws of Kansas, so far as such interest does not conflict with the rights and privileges of his co-tenant, although he owns only an undivided half of the land.

Error from Cowley district court.

Tarrant owned the undivided one-half of certain real property, which he occupied with his family, and which he claimed as his homestead. Swain owned a judgment against Tarrant, and caused Tarrant's interest in said land to be sold by the sheriff under an execution issued on such judgment. Tarrant moved to set aside said sheriff's sale on the ground that his homestead interest was exempt. The district court, at the March term, 1874, refused to set said sale aside, but made an order confirming said sale.

Alexander & Saffold, for plaintiff in error.

The legal signification of the word "owner" in the constitution is whatever interest the party owns in what constitutes the residence of his family. It may be an equitable interest under a contract of purchase, or simply a leasehold. *Gunnison v. Twitchel*, 38 N. H. 62; *McKee v. Wilcox*, 11 Mich. 358; *Pelan v. De Bevard*, 13 Iowa, 53; *In re Beckerford*, 1 Dill. 45; *Bartholomew v. West*, 2 Dill. 290. It seems to us an anomaly in law that if a debtor be sole owner of realty, he may claim a homestead exemption in it; but if he be so unfortu-

¹ See full note to *Randall v. Edler*, 12 Kan. 276; also *Helm v. Helm*, 11 Kan. 25, and note; *Moore v. Reaves*, *post*, *150.

nate as to own but the half of it, his plea for exemption must be disregarded, and his wife and children thrust out into the street.

*147 *Such could not have been the intention of the framers of our constitution and the makers of our laws.

Pryor & Kager, for defendant in error.

Whether the property is or is not a homestead the court is not bound to decide, on confirming a sale of real estate; and a decision either for or against a party, upon such motion, is not *res judicata* and conclusive between the parties; hence it cannot affect the substantial rights of the party, and will not be considered by this court. But suppose this court should consider this homestead question, then the question would arise in this case as to whether or not a homestead exemption exists in favor of the owner of an undivided half of real estate, and against the owner of the other undivided half. We think our own statute settles this question in the negative, that it does not exist. Can this property be sold under "forced sale" without the consent of husband and wife? If it can, it is not a homestead. Suppose one of the part owners should bring an action for partition, and the property be sold under section 626 of the Civil Code, the husband being part owner, and residing upon the premises with his wife and family, would it be contended that the husband and wife, setting up a claim of *homestead*, could nullify the statute? Then the interest of a part owner may be, and is, subject to forced sale under process of law. And it appears to us that the word "owner," in the exemption law, means "one that has such a title to land that he is by virtue of such title entitled to the exclusive possession thereof." That a tenant in common has no such title in Kansas, see Gen. St. 748, § 597.

VALENTINE, J. This petition in error is prosecuted in this court for the purpose of reversing an order of the district court of Cowley county overruling a motion of the plaintiff in error to set aside a sheriff sale. On the twenty-seventh of October, 1873, said district court rendered two judgments in an action in which Swain

*148 was plaintiff and Tarrant was defendant. *The first judgment was that Tarrant should pay to Swain, on or before December 31, 1873, \$452.63, and that Swain should then convey to Tarrant the undivided half of lot 11, in block 129, in the city of Winfield, Cowley county. The other judgment was in favor of Swain and against Tarrant for \$226.71. This second judgment was merely a personal judgment, and had no connection whatever with said lot. Ever since and before said judgments were rendered, Tarrant and his family have resided on said lot, claiming the same as their homestead. On November 19, 1873, an execution was issued on said second judgment, and levied December 17, 1873, on the undivided half of said lot. Tarrant paid to Swain the amount required by said first-mentioned judgment within the time prescribed by the judgment; and

the said Swain conveyed to said Tarrant by his deed of quitclaim said property, as required by said decree, on the first of January, 1874. On February 9, 1874, said property was sold at sheriff's sale on said execution, and this is the sale now in controversy. We suppose the only question involved in this case is whether said property was exempt from said execution and sale by virtue of the homestead exemption laws. We think it was. Both parties admit, and in fact claim, that at the time said judgments were rendered, and at the time said execution was issued and levied, Tarrant had an equitable interest in said property. Tarrant claims that this equitable interest was sufficient to uphold his homestead claim, and Swain claims that it was sufficient to uphold the levy of said execution. We think it was sufficient to uphold either, in the absence of the other; and as the homestead claim is prior in time to the levy of said execution, and indeed prior in time to the rendering of the judgment upon which said execution was issued, it is prior in right, and paramount to any claim founded upon said execution. If Tarrant's equitable interest in said property was sufficient to uphold the levy of the execution, we know of no good reason why it should not be considered sufficient to uphold the homestead claim; and if it was not sufficient to *149 uphold the levy, then manifestly *the sale of the property should have been set aside. That an equitable interest in real estate, or an interest less than a freehold, will uphold a homestead interest, see *McKee v. Wilcox*, 11 Mich. 358; *Pelan v. De Bevard*, 13 Iowa, 53; *McCabe v. Mazzuchelli*, 13 Wis. 478; *Blue v. Blue*, 38 Ill. 9; *Conklin v. Foster*, 57 Ill. 104.

But it is claimed that Tarrant owns only the undivided half of said lot, and that such an interest in property is insufficient to uphold a homestead claim. We can perceive no good reason why this should be so, under our broad and comprehensive homestead provisions. *Thorn v. Thorn*, 14 Iowa, 49; *McClary v. Bixby*, 36 Vt. 254. The laws, however, of the various states upon this subject differ, and several decisions may be found on the other side of the question. Of course, a tenant in common can obtain no such homestead interest as will interfere with the rights or interests of his co-tenant, or any person rightfully holding under his co-tenant. But this is probably the only limitation upon his acquiring a homestead interest in such property. Third parties cannot say that, because a tenant in common cannot obtain such a homestead interest as will defeat or destroy the interest of his co-tenant, that, therefore, he cannot obtain any homestead interest at all. Neither can his co-tenant question his right to acquire a homestead interest in the property, so long as such co-tenant is allowed to enjoy all his rights and privileges in and to said property as a co-tenant. There is a vast difference between holding property as tenants in common and holding it as coparceners. Each co-tenant has a known, absolute, fixed, and determinate individual interest in the property. No coparcener has any such interest. In

estates in coparcenery the whole of the property belongs to the coparceners jointly, as an aggregate and individual entity. It is like the property of a copartnership, no member of which has any specific interest in any article of property belonging to the copartnership. His interest is merely to share in the profit, or profit and loss, and receive dividends made from time to time, and at the final closing up of the copartnership; *and he really has no interest as an individual in any specific article of the property belonging to the copartnership.

The order of the court below will be reversed, and cause remanded for further proceedings.

(All the justices concurring.)

A. K. MOORE v. DANIEL REAVES and wife.

July Term, 1875.

1. **Homestead: Equitable Owner.** An equitable owner of real estate may occupy and hold the same as his homestead, subject to all the rights, privileges, immunities, and disabilities given and imposed by the homestead exemption laws; following *Tarrant v. Swain, ante, *146*.
2. ———: **Possession is Notice to All.** When an equitable owner of a homestead is in the actual occupancy of the land, all persons must take notice of his homestead interest. [*Davies v. Cole, 28 Kan. 260.*]¹
3. ———: **Conveyance by Husband Alone.** An actual occupant of land, claiming the same as his homestead, cannot transfer his equitable title to the land, even conditionally, while he occupies the same as his homestead, except with the consent of his wife.
4. ———. And where an attempt is made by the husband alone, without the consent of the wife, to transfer such title, so as to secure the payment of a pre-existing debt not previously a lien on the homestead, such debt does not thereby become a lien on the homestead.²
5. ———: **Trust: Lien of Transferee.** And where the transferee in such a case afterwards procures the legal title to himself, without the consent of the wife, he holds such legal title in trust for the occupants of the homestead, and is entitled to be reimbursed only for such sums as he has actually and properly paid to disincumber the property from valid liens.

¹ A person in actual possession of real estate under an unrecorded deed is, as against all persons who have actual notice of such deed, the legal and absolute owner of such real estate; and, as against all other persons, he is the equitable owner. All persons are bound to take notice of all equitable interests which any person may have in real estate of which he is in the actual possession. *Tucker v. Vandermark, 21 Kan. 268*. See, also, *Sumner v. McFarlan, post, *600*.

² Contract to convey homestead, made by husband without consent of wife, held void; and note and money given, with full knowledge of the facts and circumstances, held not recoverable. *Thimes v. Stumpff, 38 Kan. 58*; *S. C. 5 Pac. Rep. 481*. See note to *Randal v. Elder, 12 Kan. *276*; *Morris v. Ward, 5 Kan. 141*, and note; *Dollman v. Harris, Id. 263*; *Tarrant v. Swain, ante, *146*.

Error from Brown district court.

Action by Reaves, and Jane, his wife, to quiet their title to certain lands occupied and claimed by them as their homestead. Moore, defendant, claimed to be the owner in fee of said lands. The *151 district court, at the April term, 1873, found *and adjudged that Reaves and wife were the equitable owners, and that Moore had a lien on the lands for certain moneys paid thereon by him, and decreed that Reaves should pay to Moore the amount of his lien, and that Moore should thereupon convey the legal title to them.

J. P. Taylor and Nathan Price, for plaintiff in error.

W. W. Guthrie and Killey & May, for defendant in error.

VALENTINE, J. On July 27, 1867, the Central Branch Union Pacific Railroad Company owned the W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 21, township 3, range 17, in Brown county, and on that day entered into a written contract for the sale of said land to Thomas J. Payne. Payne paid \$10 down, and was to make two other payments at stated periods, up to July 27, 1876, when the railroad company was to convey said land to Payne, or to his heirs or assigns, by a good and sufficient warranty deed. In March, 1868, Payne, in consideration of \$42.50 to him paid, assigned his claim to said land to Alfred S. Jones, by a written assignment indorsed on the back of said contract. In February, 1869, Jones, in consideration of \$500 paid to him, assigned his claim to said land to Daniel Reaves, (plaintiff below, defendant in error,) by a like written assignment indorsed on the back of said contract. Reaves took immediate possession of said land, and with his wife and family has occupied the same as his homestead ever since. On the fifteenth of October, 1869, Reaves, by a like written assignment indorsed on said contract, except that the assignee's name was left blank, assigned his claim to said land to secure the payment of a certain promissory note of \$150 held by Samuel Lappin, and delivered said contract, with the indorsements thereon, to said Lappin. This assignment was made, and the contract and indorsements delivered, without the knowledge or consent of the wife of said Reaves. Reaves and his grantors made the

*152 first five payments on said contract *as they became due.

Reaves continued to occupy said land as his homestead, and made improvements thereon of the value of \$300. Afterwards, A. K. Moore (defendant below, plaintiff in error) obtained said contract and assignments from said Lappin. What he paid for them, or how he got them, is not shown. His name was inserted in said blank assignment from Reaves to Lappin, so as to make the assignment appear to be an assignment from Reaves to Moore; but Moore did not make the insertion, and there is nothing in the record that shows that he knew how or when it was inserted, or in what manner the assignment was made. From anything appearing in the record he may have properly supposed himself to be a *bona fide* purchaser of

the land. On the twenty-first of December, 1871, Moore paid the other five payments on said contract, and procured a deed to be executed from the railroad company to himself for said land. At the time he made said payments there were none of them yet due. Upon these facts the court below rendered judgment that plaintiff Reaves should pay to the defendant, Moore, the amount, with interest, to-wit, \$292.40, which Moore in good faith paid to the railroad company, and that Moore should convey to Reaves, by deed, said land. Moore complains of this judgment. We, however, perceive no error therein prejudicial to Moore. Reaves was the equitable owner of said land. He held the same as his homestead. (And that such may be done, see *Tarrant v. Swain*, just decided, *ante*, *146, *148, and authorities there cited.) And, being in the actual possession thereof, every person was bound to take notice of his homestead interests; and therefore, although Moore may have been a *bona fide* purchaser in fact of said land, yet in law he took it subject to all the homestead interests of the plaintiff. The blank assignment to Lappin, even if it had been valid, would have been nothing more than a conditional alienation of the plaintiff's equitable interest in said land, in the nature of a mortgage to secure the payment of said \$150 note, and would not have been an absolute conveyance to Lappin or Moore of the *153 plaintiff's equitable title. But as the assignment was of *land held by the plaintiff as his homestead, and was made by the plaintiff alone, without the consent of his wife, the assignment itself was and is absolutely void. *McKee v. Wilcox*, 11 Mich. 358; *McCabe v. Mazzuchelli*, 13 Wis. 478.

We think the following is the law of this case: An equitable owner of real estate may occupy and hold the same as his homestead, subject to all the rights, privileges, immunities, and disabilities given and imposed by the homestead exemption laws; following *Tarrant v. Swain*, *supra*; and, being in the actual occupancy of the land, all persons must take notice of his homestead interests. He cannot transfer his equitable title to the land, even conditionally, while he occupies the same as his homestead, except with the consent of his wife; and where an attempt is made by the husband alone, without the consent of his wife, to transfer such title, so as to secure the payment of a pre-existing debt not previously a lien on the homestead, such debt does not thereby become a lien on the homestead. Where the transferee in such a case afterwards procures the legal title to himself, without the consent of the wife, he holds such legal title in trust for the occupants of the homestead, and is entitled to be reimbursed only for such sums as he has actually and properly paid to disincumber the property from valid liens.

The judgment of the court below is affirmed.
(All the justices concurring.)

*154 *MATHIAS OSWALT v. J. R. HALLOWELL, Treasurer, etc.

July Term, 1875.

Taxation: Agricultural College Lands Held under Contracts of Purchase are Taxable. In 1867 the plaintiff purchased from the state, through its proper agents, a quarter section of the ninety thousand acres of Agricultural College lands. The purchase money was to be paid "in eight equal annual installments, with ten per centum interest on each installment, payable annually; the first installment to be paid at the date of purchase," and the last installment to be paid December 6, 1874. Plaintiff paid the first installment at the date of the purchase, and probably paid the other installments as they became due, though this is not shown. When plaintiff purchased said land he received only a bond for a deed, and gave his promissory notes for the balance of the purchase money. Plaintiff has never received a patent from the state for said land. In 1873 said land was assessed for taxation, and taxes were levied upon the same. *Held*, that as section 1 of the tax law provides that "all property in this state, real and personal, not *expressly exempted* therefrom, shall be subject to taxation," and as no provision of the constitution or statutes "expressly" or even impliedly exempts such property from taxation, the same is taxable.¹

Error from Washington district court.

The case is stated in the opinion.

J. D. Brumbaugh, for plaintiff.

VALENTINE, J. This was an application to the judge of the court below, at chambers, for a temporary injunction to restrain the defendant, as treasurer of Washington county, from selling the S. W. $\frac{1}{4}$ of section 20, township 2, range 5, in said county, for taxes assessed upon said land for the year 1873. The plaintiff purchased said land of the state of Kansas; the same being a portion of the ninety thousand acres of land granted by the government of the United

*155 States to the state of Kansas under the act of congress entitled "An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July 2, 1862. 12 U. S. St. at Large, 505. He purchased said land under the provisions of an act of the legislature of Kansas entitled "An act for the sale of lands belonging to the State Agricultural College," approved February 22, 1866. Gen. St. 78. Said land was sold December 6, 1867, and the purchase money was to be paid "in eight equal annual installments, with ten per centum interest on each installment, payable annually; the first installment to be paid at the date of purchase," (Gen. St. 78,

¹ See, also, *Morgan v. County of Clay*, 27 Kan. 229; *Board of Regents v. Hamilton*, 28 Kan. 880. Lands belonging to the Agricultural College, which since the law of 1871 have been sold under a time contract, (part of the purchase money being paid,) are, before any right of forfeiture accrues, subject to taxation. *County of Dickinson v. Baldwin*, 29 Kan. 538.

§ 2,) and the last installment to be paid December 6, 1874. Plaintiff paid the first installment at the date of the purchase; but whether he has paid any of the other installments is not shown. When plaintiff purchased said land, he received only a bond for a deed, and gave his promissory notes for the balance of the purchase money. At the time said land was assessed and taxed in 1873, all of said notes except two were due. Whether any of them, or some of them, or all of them, had been paid at that time is not shown. We shall assume, however, that all of those which had become due up to that time were paid, and those which had not yet become due were not paid. No patent had yet been issued by the state to the plaintiff for said land. The main question, therefore, presented by these facts, and, indeed, we think the only one, is whether said land was taxable for the year 1873. We suppose it will be conceded that the legal title to said land still remained in the state of Kansas when said land was taxed, and that the equitable title thereto had been transferred to the plaintiff. The purchaser of such lands is not required, under the statutes, to do anything more than to pay his eight annual installments of the purchase money, with interest; and there is no provision made by statute or otherwise for any forfeiture of the land back to the state on failure by him to make such payments. Hence the whole

*156 question of the forfeiture of the land in such cases would *rest upon broad equitable principles; and, as equity abhors forfeitures, but few forfeitures would be declared. Therefore, under such circumstances, we think the plaintiff holds the equitable title to said land; and, if so, then we think the land is taxable. Even where the United States holds the legal title, and an individual holds the equitable, the land is taxable. *McMahon v. Welsh*, 11 Kan. 291, and cases there cited.

But do the laws of Kansas make this kind of land, held in this manner, taxable? Now, there can be no question as to the power of the state to tax all land within its borders not belonging to the United States or to Indians, even though the state may own the land itself. The only question is whether the state has attempted to make these lands taxable. The first section of the tax law provides that "all property in this state, real and personal, not *expressly exempted* therefrom, shall be subject to taxation." Gen. St. 1019, § 1. Now, are these lands "*expressly exempted*" from taxation? We think not. The constitution provides that "all property used *exclusively* for state, county, municipal, literary, educational, scientific, religious, benevolent, and charitable purposes, and personal property to the amount of at least two hundred dollars for each family, shall be exempted from taxation." Const. art 11, § 1. This is the only constitutional exemption of any kind of property from taxation. Section 3 of the tax law, among other things, provides that "the property described in this section, to the extent herein limited, shall be exempt from taxation. * * * *Fifth*, all property belonging *exclusively* to this

state, or to the United States." This is the only provision of the statutes that may be supposed to have any application to this question. No one will suppose that the lands are exempt from taxation after being sold, merely because the proceeds of the sales are to be used for educational purposes only, (*Washburn College v. Shawnee Co.*, 8 Kan. *344; *Vail v. Beach*, 10 Kan. *214; *St. Mary's College v. Crowl*, Id. *442, *450;) hence we have not quoted the statutory provisions exempting property used "exclusively" for educational purposes. Now, the land in question *is not "used *exclusively* for state purposes," as required by the constitution in order to make it exempt from taxation; and it does not belong to the state *exclusively*, as required by the statute in order to exempt it from taxation. Indeed, the land is not used for state purposes at all, and the state only holds the legal title, with a lien upon the equitable title, to secure the payment of the unpaid purchase money. The purchaser has the entire *use* of the land, and has the entire equitable title, subject only to a lien upon the same for the unpaid purchase money. With reference to this kind of lien, see *Stevens v. Chadwick*, 10 Kan. *406; *Curtis v. Buckley*, 14 Kan. *449. Under section 1 of the tax law, land must be "expressly exempted," in order to be exempt from taxation. But in this case the land is not exempted even by implication. It will be the duty of the board of regents, and of the legislature; which meets annually, as well as the purchaser of the land, to see that no tax title is obtained against the land.

The order of the judge of the court below refusing the temporary injunction is affirmed.

(All the justices concurring.)

BERNARD SETTER v. C. P. ALVEY.

July Term, 1875.

1. **Contracts: Parties in Pari Delicto.** Where both parties to a contract void as against public policy are equally at fault, the law will leave them where it finds them. If the contract be still executory, it will not enforce it, nor award damages for its breach. If already executed, it will not restore the price paid, nor the property delivered.
2. ———. So, where a town company, the occupants, and all interested in the town-site, made a contract with a county to deed it certain lots on the town-site, providing the county-seat was located at the town, and afterwards the county-seat was so located and the lots deeded, *held*, that neither the town company, the occupants, the parties interested in the town-site, nor one claiming under them, could avoid the deed, or recover the land.
- *158 *3. **Town-Sites: Deed by Trustee of Town-Site: Grantee not an Occupant.** Where a party in whose name a town-site is pre-empted for the benefit of the occupants, thereafter makes a deed for a town lot to

a party who was not an occupant, but who might lawfully receive a deed, and there is nothing to show the purpose or consideration of the deed, or that it was not made with the assent and pursuant to the direction of all the occupants, *held*, that it was error to hold such a deed void and of no effect, as not made in conformity to the duty of the trustee and pre-emptor.¹

4. **Conveyances: Rights under Unrecorded Deed.** A party, to avail himself of section 13, c. 30, Laws 1859, for the purpose of obtaining precedence of a prior unrecorded deed, must be a "subsequent purchaser for a valuable consideration without notice."²

Error from Anderson district court.

Ejectment, brought by Alvey as plaintiff, against Setter as defendant. The case was tried before W. S. as referee, who found, "as matters of law, that said plaintiff has a valid legal and equitable title to the premises in dispute, having derived his title from G. W. Iler, chairman of the board of trustees of the town of Garnett, without any notice, either actual or constructive, to plaintiff's grantor, of the previous deed given by the said Iler to the board of commissioners of Anderson county; that said plaintiff has a right to avail himself of the absence of notice, actual or constructive, to his said grantor; and that the plaintiff is entitled to judgment against the defendant for the recovery of the premises in his petition described, and for his costs." The district court, at the March term, 1874, confirmed this report, and gave judgment thereon in favor of Alvey.

Bergen & Kirk, for plaintiff in error.

W. A. Johnson, for defendant in error.

BREWER, J. This was an action of ejectment for half a town lot in Garnett. The facts are these: In October, 1861, the town-site of Garnett was pre-empted by G. W. Iler, chairman of the board of trustees, for the use and benefit of the occupants, and patent issued June 1, 1863. On April 11, 1862, Iler conveyed the lot in controversy to the commissioners of Anderson county. This deed was not recorded until November 30, 1863. On April 14, 1863, Iler also conveyed the lot to J. M. Alvey, and this deed was recorded February 2, 1864. In 1869, J. M. Alvey conveyed to C. P. Alvey, the plaintiff below, now defendant in error. The same year the county conveyed to one Hedley, who conveyed to Setter, defendant below, now plaintiff in error. J. M. Alvey had no notice, actual or constructive, of the deed to the county at the time of his deed from Iler. It does not appear what he paid, if anything, for the deed, nor whether the deed to him (J. M. Alvey) was made in disregard of the claims of C. P. Alvey, or in pursuance of his request. The lot was drawn, at the regular drawing of lots, by said C. P. Alvey, who was

¹See *Winfield T. Co. v. Maris*, 11 Kan. 105, and note; *McTaggart v. Harrison*, 12 Kan. *60, and note.

²See *Hutchinson v. Hartmann*, *ante*, *183.

an actual occupant of the town-site, and a stockholder in the Garnett Town Company. It was drawn upon share 153. It was also drawn, at the same time, by the county of Anderson, being the fifty-sixth lot drawn. The county became interested in the town-site, under an agreement between it and all parties interested in the town-site of Garnett that, if the county-seat should be located there, 400 lots in Garnett would be given to the county. It does not appear whether plaintiff was or was not ignorant of the deed of the county to this particular lot, though, as an occupant, he was a party to the original contract. Upon these facts the court rendered judgment in favor of the plaintiff, (defendant in error.)

The lot was first drawn by the county; first deeded to the county. Why should this priority be set aside, and one holding under a subsequent drawing and subsequent deed be given the lot? It is insisted that the deed to the county was void because the contract upon which it was based was against public policy. Concede, for the purposes of the argument, that the contract was so, and therefore void, and we do not think it follows that the deed can be avoided. The *160 town of Garnett and the occupants were in fault equally with the county. And the rule is general that the law will not in such cases interfere in favor of either party. If the contract remains executory, the law will neither enforce it nor award damages for its breach; if already executed, nothing paid or delivered can be recovered back. So here, no deed having passed, and the contract being void, as stated, the county could not have compelled the deed; and, on the other hand, the contract having been executed, and the deed passed, neither the town company nor the occupants can set it aside and recover the land. And what they cannot do, no one claiming under them can do.

Again, it is claimed that the deed is void because of the provision in the act of congress of March 2, 1867, which declares that "any act of the trustees not made in conformity to the regulations" alluded to in the section granting the right of entry shall be void. U. S. Rev. St. 440, § 2391. Iler was, under the act, a trustee for the occupants, and the county could not in the nature of things be an occupant. Therefore a deed to the county was to one not an occupant, and not in conformity to the regulations referred to. It may properly be noticed here that, so far as the findings of the referee are concerned, nothing is shown as to the consideration or purpose of the deed. He simply finds that the county drew the lot and received the deed. All the information we have as to the contract is from the answer of the defendant, which alleges the making of the contract, and the execution of the deed in pursuance of it. Of course, then, while the facts alleged in the answer may be used as against the defendant, they must all be taken together, and it is there alleged that the contract was made by the county with the town authorities, who furnished the money to enter the town-site, and with the assent of the occupants, and all other

persons interested in the town-site. With the answer out, we have simply the drawing and the deed; with it in, we have also a contract, assented to by the plaintiff, and all other parties interested. No-
 *161 where does it appear for what purpose this lot was conveyed to the county,—whether for use as a site for a court-house, jail, or other public building, or purely for purposes of speculation. Now, if a county may lawfully take a deed for a town lot from the authorities of a town for any purpose, and if the party in whose name a town-site is pre-empted may, with the assent of all the occupants and parties interested, lawfully deed a lot to the county, then this deed must, as against this objection, be held good; for there is nothing to show the purpose, and it cannot be presumed to have been illegal; and nothing to show a want of assent, and it cannot be presumed that a trustee has violated his trust. Indeed, the plaintiff's title rests upon a deed made to one not an occupant, and without any apparent right to a deed.

Plaintiff in error devotes a considerable portion of his brief to show that section 13 of chapter 30, Laws 1859, does not avail the title of defendant in error. Defendant in error seems in his brief to concede the point; at least, he makes no claim under that section. Nor, indeed, could he make any successful claim, for the only persons entitled to any rights under it are "subsequent purchasers for a valuable consideration without notice;" and there is nothing to show that plaintiff's grantor, J. M. Alvey, ever paid anything for the lot, or that plaintiff was not fully cognizant all the time of the county's claim and deed.

The judgment of the district court must be reversed; and, there being no exception to the referee's findings of fact, the case will be remanded, with instructions to enter judgment for plaintiff in error, defendant below, for his costs.

(All the justices concurring.)

*162 *L. SCOTT, Mayor, etc., v. J. W. PAULEN.

July Term, 1875.

1. Injunction: Restraining Execution of Judgment: County-Seat Contest. Where, after a county-seat election, *mandamus* proceedings are had in the district court, and judgment rendered commanding certain officers who are holding their office at one place to remove them to another, which the court finds to be the legal county-seat; and such judgment is brought to this court on error, and by it affirmed; and while such proceedings are pending a new election is duly held in such county for the relocation of the county-seat, at which election the first above mentioned place receives a majority of the votes, and is duly declared the
 v.15K—9

county-seat: *held* that, upon the application of the defendants in the judgment showing the above facts, an injunction might properly issue restraining any execution of such judgment.

- 2. County Commissioners: Sessions of County Board: Jurisdiction: Special Sessions: Presumption.** Where the record of the proceedings of the board of county commissioners shows that at a regular adjourned meeting, on the twenty-second of November, only one commissioner and the clerk were present, and ordered an adjournment to the sixth of December; that on the sixth of December a meeting was had, at which two of the commissioners, with the clerk, were present and transacted business as a county board, but fails to show whether it was a meeting pursuant to the supposed adjournment, or a special session called by the chairman, and contains no record of a call by the chairman, or a request therefor from two of the members; and where, among other matters, a petition duly signed by three-fifths of the electors is presented, praying for an election for a relocation of the county-seat, and an election ordered; and where, in obedience to such order, public notice having been duly given, two elections are had and generally participated in by the electors, and the final vote canvassed, and the result declared, and no objection thereto made for more than a year: *held*, that there was no error in refusing to hold the election void because of the informalities in the record of the session of the county board at which the election was ordered.¹
- 8. County-Seat Election: Publication of Notice: Time.** Where thirty days' notice of an election is required, a publication in a weekly newspaper is sufficient, provided that the first publication is at least thirty days prior to the election, and it is continued in each successive issue of the paper up to the time of the election.

***163 *Error from Wilson district court.**

In May, 1871, the county-seat of Wilson county was at Fredonia, having previously been duly located there. On the twenty-third of said May an election was held to relocate the county-seat of said county. Judicial proceedings growing out of this election (*Russell v. State*, 11 Kan. 308-323) resulted in the decision that by such election the county-seat was relocated and established at Neodesha. But such final decision was not made until June, 1873, when the mandate of this court was sent to the district court to carry into effect said judgment in favor of Neodesha. While said litigation was pending and undetermined, and on the twenty-eighth of January, 1878, another election was held in said county to relocate said county-seat, which resulted in locating said county-seat at Fredonia, where it had in fact remained pending the litigation mentioned. Upon the receipt of said mandate, defendants Scott, the mayor of Neodesha, and William Nicholson, who as relator had commenced the proceedings to contest and determine the result of the election of May 23, 1871, were proceeding to have said mandate and the judgment therein

¹The county board, before it can act, must be convened in legal session, either regular, adjourned, or special; and a casual meeting of a majority of the commissioners does not create a legal session. *Paola & F. Ry. Co. v. Anderson Co.*, 16 Kan. 302.

mentioned carried into effect by the removal of the county offices and county records to Neodesha; whereupon Paulen, the clerk of the district court, commenced this action to restrain said defendants from further proceedings under said mandate and judgment. Upon notice to the defendants the application for a temporary injunction was heard by the district court at the May term, 1874, and such injunction was granted. From this order the defendants appeal, and bring the case here on error.

P. C. Smith, L. W. Keplinger, and McComas & McKeighan, for plaintiffs in error.

Peffer & Clark and Hudson & Chase, for defendant in error.

*164 *BREWSTER, J. This was an action for an injunction. A temporary injunction was granted by the judge of the district court, to reverse which order this proceeding in error has been brought. Three questions are presented by counsel.

1. It is contended that this was an attempt to stay the execution of a mandate of this court, and that such a stay was beyond the power of the district court. The facts are these: An election had been held for the relocation of the county-seat. The canvass of the commissioners had given it to Fredonia. Application was made for a *mandamus* to compel certain of the county officers to remove their offices from Fredonia to Neodesha, alleging that Neodesha had received a majority of the legal votes, and was therefore entitled to the county-seat. The district court sustained the application, and awarded the *mandamus*. On error to this court the judgment was affirmed. *Russell v. State*, 11 Kan. *308. Paulen (the defendant in error here) was the successor in office of said Russell, and as such successor was made a party to that judgment. Pending the proceedings in that suit another county-seat election was had, and, as declared by the canvass of the commissioners, Fredonia received a majority of the votes, and became the county-seat. Paulen now brings this action to stay execution of the former judgment on the ground that by the subsequent election all rights which Neodesha had at the time of the commencement of that action have been swept away, and that, Fredonia being the legal county-seat, it would be illegal to compel the county officers to remove their offices therefrom. We fail to see any such trespass by the district court on the prerogatives of this court as counsel for plaintiffs in error conceive. There is no attempt to question the validity of the judgment previously rendered, or disregard the adjudication upon the rights in controversy. It is conceded that at the time of the commencement of that action

*165 Neodesha was the county-seat, and entitled to the county offices; but it is claimed that, by subsequent proceedings within the power of the people to make, the county-seat had been located elsewhere, and therefore this last determination of the people should be upheld by the courts. We think this entirely proper, and

no trespass on the power of the court, or disregard of its authority. It would be worse than useless to insist on an actual enforcement of the judgment by a removal of the offices to Neodesha, to be followed by an immediate removal back, in obedience to the declared result of the last election. It would be a judicial farce, equaled only by that suggested by the oft-quoted couplet:

"The King of France, with twenty thousand men,
Marched up the hill, and then marched down again."

2. The second question is one of more difficulty. The petition and order for the county-seat election were presented and made on the seventh of December, 1872. It is contended that there was no legal session of the board upon that day, and that, therefore, all orders attempted to be made were void, and no foundation for any subsequent proceedings or rights. The only evidence offered on the hearing of the application, upon this point, was the record of the county commissioners. This record showed a meeting on the ninth of November, at which two of the commissioners were present, and an adjournment to the twenty-second of November. On the twenty-second of November this entry appears:

"BOARD OF COUNTY COMMISSIONERS, November 22, 1872.

"Present: M. A. Brooks, commissioner; C. C. Chase, county attorney; James C. G. Smith, clerk. Met, but not being sufficient members of the board present, adjourned until December 6, 1872.

"M. A. Brooks, Commissioner.

"Attest: J. C. G. SMITH, County Clerk."

The next entry that appears is of a meeting on December 6th, and commences as follows:

"DECEMBER 6, 1872.

"*State of Kansas, Wilson County—Board of County Commissioners.* Present: Henry Brown; Milton A. Brooks; W. A. Peffer, acting county attorney; James C. G. Smith, county clerk. Commenced by electing Henry Brown chairman."

*166 *Then follows a record of the transaction of sundry business, and an adjournment to the next day. On the next day the petition and order for the election were presented and made. Now, it is contended that, as no quorum was present on the twenty-second of November, there was no power on the part of a single commissioner to order an adjournment, and that, therefore, the regular session, which commenced on the first Monday in October, and had been continued from time to time by adjournment, was then ended. The board could not thereafter meet before the first Monday in January, except in special session, which it is conceded might be had at any time, but only "on the call of the chairman at the request of two members of the board." Gen. St. 256, § 18. The record does not

purport to be the record of a special session; shows no request or call therefor. It is a session on a day to which there was an attempted adjournment. On the other hand, it does not recite a meeting pursuant to adjournment, and there is nothing in the record inconsistent with the fact of a special session. The law nowhere requires any record to be made of the call; does not require even that it should be in writing. The call need not precede the session any definite amount of time, nor is any public notice required. We see no reason to doubt the legality of a session called by the chairman on the request of two members, when the request is verbal, the call verbal, the notice to the members verbal, and the session held at the very hour of the call, provided that all the members receive notice of the session in time to attend, and a quorum is actually present. And a record which shows a session, purporting to be a special session, and at which all the members are present, will unquestionably show a valid session, even though it does not in terms state that the session was called by the chairman at the request of two of the members.

Again, it must be noticed that in the location or relocation of county-seats the important matter is the action of the people, and little if anything is committed to the discretion of the county

*167 board. "Upon the petition of three-fifths *of the legal electors * * * the board of county commissioners *shall* order

an election," is the language of the statute. It is not a matter which they may or may not do, according to their judgment of its wisdom, but the duty is imperative upon the presentation of the petition to order the election. And the result of the subsequent election or elections determines the county-seat, independent of the wishes or judgment of the commissioners. Hence it seems to us that when a quorum of the county board, with the clerk, is present, assuming to act as a county board; and at a time and place at which a legal session is possible; and to such board, in actual session, a proper and legal petition is presented for a county-seat election; and an election ordered; and thereafter full and legal notice given of such election; two elections had, generally participated in by the electors; the result canvassed and declared; and no objection made thereto for more than a year,—it will be too late to question the validity of the election on the ground that the record of the proceedings of the commissioners shows that the chairman was absent, and fails to show a session pursuant to a legal adjournment from a regular session, or that the session was a special session, and duly called by the chairman on the request of two members. This is not a case in which parties are claiming adverse to the county upon the basis of the action of the county board. Where a party insists that a county is bound by the action of its agents, it may well be held that he must show affirmatively, not merely that those agents acted, but that they acted in the manner in which alone they could legally bind the county. But the county here has no adverse interests; and the only duty

of the commissioners is the formal one of submitting the question to the electors for decision.

In a certain sense, all the parties interested—the electors of the county—have accepted the action of the commissioners, and treated it as valid; and while the doctrine of estoppel can have technically no application to a matter like this, yet courts should, if possible,

without too great a disregard of the established rules of procedure, *168 ure, uphold that which has received the general assent of the parties interested and affected thereby. We conclude, though with some hesitation, that the election cannot be set aside upon this ground.

3. The remaining question has little difficulty. The statute requires thirty days' notice of the election. The notice was published in a weekly newspaper, the first publication more than thirty days prior to the election, and in each successive issue to the time of the election. This was sufficient. *McCurdy v. Baker*, 11 Kan. *111; *Whitaker v. Beach*, 12 Kan. *492.

This temporary injunction was granted upon notice, and after hearing both parties. Of course, then, the court was not bound to entertain a motion to vacate, based upon matters existing at the time the suit was commenced, and evidence of which could have been had if desired. Gen. St. 676, § 250. There being no other question, the judgment will be affirmed.

(All the justices concurring.)

HIRAM RIDDEL and another v. SCHOOL-DISTRICT No. 72.¹

July Term, 1875.

Bonds: Official Holding Over: Liability of Sureties. Where one was appointed treasurer of a school-district to fill a vacancy, and upon such appointment gave a bond with sureties, as provided by law, and at the annual election thereafter was elected his own successor, and continued in office, but without giving any new bond, *held*, that the sureties on the bond given upon his appointment were not liable for any default occurring after the commencement of the term to which he was elected.

¹ Case decided upon authority of this case, *Monger v. Harvey Co.*, 22 Kan. 318; cases cited, *Horton v. Watson*, 23 Kan. 234; *Rice Co. v. Lawrence*, Id. 234.

Sureties on bonds are not liable, except where they are unmistakably made liable by the terms of their bonds, *Ryan v. Williams*, 29 Kan. 500; implied delivery of official bond, *Ramsey Co. v. Brisbin*, 17 Minn. 451, (Gil. 429); implied authority to fill blanks in official bond, *State v. Young*, 23 Minn. 551; a note or memorandum preceding the signatures of the makers of a bond, to the effect that certain words were inserted therein before signing, is not a part of the bond itself, *White v. Johns*, 24 Minn. 337; distinction between a bond similarly conditioned to that prescribed by statute, and a statutory bond with an unauthorized condition superadded, *Anderson v. Munch*, 29 Minn. 414; S. C. 18 N. W. Rep. 132; duration of the liability of sureties on the bond of a public officer whose term of

Error from Cherokee district court.

Action by school-district No. 72, Cherokee county, against Hiram Riddel and George W. Riddel, on a school-district treasurer's bond which they executed as sureties for their principal, who was *169 *appointed to fill an unexpired term. The bill of exceptions shows that the whole of the moneys sued for came to the hands of defendants' principal after the term for which he had been appointed, and for which said bond was given, had expired, and during the succeeding term, to which he had been elected, but for which he had not qualified. The district court, at the April term, 1874, held the defendants liable, and gave judgment against them for \$139.79, and costs.

John N. Ritter, for plaintiffs in error.

The liability of sureties is limited to the exact letter of the bond. Nothing can extend this liability. "There is no construction—no equities—against sureties." As the bond was given for the appointive term, which expired on the twenty-seventh of March, 1873, no construction or law could extend the liability of the sureties for acts done beyond that term. *Bank of Steubenville v. Leavitt*, 5 Ohio, 207; *State v. Crooks*, 7 Ohio, 221; *State v. Medary*, 17 Ohio, 554; *McGovney v. State*, 20 Ohio, 98; *Hall v. Williamson's Adm'rs*, 9 Ohio St. 22. The failure of said W. F. Riddel, after his election, to give bond as such treasurer, created a vacancy; and it was the duty of the district board to appoint a successor. This duty was imperative. See *School Laws 1873*, § 62. The defendants, the sureties on the bond for a former term, certainly cannot be held lia-

office is a definite period, "and until a successor is elected and qualified," *Scott Co. v. Ring*, 29 Minn. 398; *S. C. 13 N. W. Rep. 181*; the responsibility of a county treasurer for public moneys in his hands is absolute, so that the fact that, without his fault, the money was stolen from him, does not relieve him—omission of seals to bond no defense, *Redwood Co. v. Tower*, 28 Minn. 45; *S. C. 8 N. W. Rep. 907*; the sureties of a county treasurer are insurers as to the safe-keeping, in the proper place, of all moneys intrusted to their principal as treasurer, until his death, and then they cease to be such insurers, *Doolittle v. Atchison, T. & S. F. R. Co.*, 20 Kan. 329; see, also, *Blake v. Johnson Co.*, 18 Kan. 266; all official bonds are joint and several, *Jenks v. School-district*, 18 Kan. 856; unless the official bond of a county treasurer in terms says that it is to have a retroactive effect, it does not cover past delinquencies, *Harvey Co. v. Munger*, 24 Kan. 205; surety is liable only for acts done *virtute officii*, *Ottenstein v. Alpaugh*, 2 N. W. Rep. 219; surety is liable only to his contributory share, *Myers v. Farmer*, 2 N. W. Rep. 572; judgment against principal is admissible in action against surety, *Stevens v. Shafer*, 3 N. W. Rep. 836; sureties not bound by delivery, where altered to their prejudice after signing, *State v. Craig*, 12 N. W. Rep. 301; extent of liability of sureties on a city treasurer's bond determined, *Fond du Lac v. Moore*, 15 N. W. Rep. 782; undertaking of sureties on a county treasurer's bond, what it covers, *Board Sup'rs v. Bristol*, 1 N. E. Rep. 878; legal effect of imposition of subsequent duties, *Board Ed. etc., v. Quick*, 1 N. E. Rep. 538; surety on cashier's bond, *La Rose v. Logansport Nat. Bank*, 1 N. E. Rep. 805; a bond requiring a faithful performance of official duty is as binding upon the principal and his surety as if all the statutory duties of the officer were inserted in the bond, *State v. Nevin*, 7 Pac. Rep. 680; action on city treasurer's bond—second bond—presumption, *Bernhard v. Wyandotte*, 6 Pac. Rep. 617; *S. C. 33 Kan. 465*; tax collector's bond, *Lawrence v. Doolan*, 5 Pac. Rep. 484; liability of sureties on a city assessor's bond determined, *San Jose v. Welch*, 4 Pac. Rep. 207.

ble for the dereliction of duty in this respect on the part of the district board.

Hutchinson & Cowley, for defendant in error.

BREWER, J. On the eighteenth of February, 1873, there being a vacancy in the office of treasurer of the school-district, one W. F. Riddel was duly appointed to fill such vacancy, and qualified as such officer, among other things giving the bond sued on. On the twenty-seventh of March, 1873, at the regular annual election, the said W.

F. Riddel was duly elected treasurer for the ensuing year.

*170 He took no new oath of office, and gave *no new bond, but continued to act as treasurer until his death, November 10, 1873. Were the sureties on the bond responsible for moneys that passed into his hands after the election? The bond does not in terms fix any limits to the time of its running. It does not purport to be given for a year, or a month, or any other period of time. Neither does it specify the length of the term of Riddel's office. Its condition is as follows: "The condition of the above obligation is such that, if the said treasurer shall faithfully discharge his duties as treasurer of said district, as prescribed by law, then this obligation to be void; otherwise to be and remain in full force." Again, the law provides that school-district officers "shall hold their respective offices until the annual meeting next following their election or appointment, and until their successors are elected and qualified." Now, do either or both of these facts render the sureties liable for default occurring subsequent to the term for which the principal was appointed? We think not. The silence of the bond as to its own duration is immaterial. The law fixes the length of the principal's term, and the obligation of the sureties extends only to the term existing, and for which the bond is given. Nor does the failure of the people to elect a successor, or of the successor elected to qualify, extend the term for which the principal was appointed. He may, it is true, be continued in office, as the statute has provided, for preventing a vacancy between the close of the one term and the election and qualification of a successor; but he is simply filling a part of his successor's term.

The authorities generally coincide with the views above expressed. See *Wapello v. Bigham*, 10 Iowa, 39; *Chelmsford Co. v. Demarest*, 7 Gray, 1; *People v. Aikenhead*, 5 Cal. 106; *Mayor, etc., v. Horn*, 2 Del. 190; *Rany v. Governor, etc.*, 4 Blackf. 2. In the first case, the suit was on a county treasurer's bond, who by statute held until his successor was elected and qualified. Elected his own successor, he gave no new bond, and the sureties on the bond given for the first term were held not responsible for default occurring during the

*171 second. The second was the case of a *bond given by the treasurer of a private corporation. He was to be chosen annually, and to hold till another was chosen and qualified. The third

case is like this, in that it was the duty of another officer, on the failure of a party elected to give bond, to treat the office as vacant and appoint some one to hold. The court say the sureties might well rely on the proper discharge by that officer of this duty. Here, if the district treasurer fails to give bond, it is made the duty of the board to appoint one who will. Gen. St. 923, § 37.

The cases of *Kruttschnitt v. Houck*, 6 Nev. 163; *State v. Wells*, 8 Nev. 105; and *Thompson v. State*, 37 Miss. 518,—are partially against the views here expressed. But the first case the court treats as an appointment during pleasure; and in the last there was no fixed time for the commencement and close of a term, or the appointment of a successor, and the case is really not in conflict with the general current of the decisions.

The judgment will be reversed, and the case remanded, with instructions to grant a new trial.

KINGMAN, C. J., concurring.

ADDISON W. JAY v. GRANBY MIN. CO.

July Term, 1875.

1. **Occupying Claimant: Plain and Connected Title.** A quitclaim deed from a mere trespasser, although duly recorded, does not make the "plain and connected title in law or equity" which entitles a party to relief under the first clause of the occupying claimant law.¹
2. **Real Estate: Indefinite Description.** A description of a tract of land as "the N. W. $\frac{1}{4}$ sec. 14, town 33, range 25 east, in the county of Cherokee, Kansas," does not enable the court to say that said tract is within the territory ceded to the Cherokees by the treaty of 1835.

*172 *Error from Cherokee district court.

Action by the Granby Mining & Smelting Co. against Jay and two others, to recover possession of a certain quarter section of land. Plaintiff had judgment for the land at the April term, 1874, of the district court, whereupon defendant Jay claimed the benefit of the occupying claimant act, and asked that the value of his "lasting and valuable improvements" on said lands might be ascertained, etc. The court held, upon the showing made by Jay, that he had no rights under that act, and refused his application.

Hutchinson & Cowley, for plaintiff in error.

John N. Ritter, for defendant in error.

¹See *North v. Moore*, 8 Kan. 108, and note; and *Smith v. Smith*, *post*, *290, and note.

BREWER, J. The only question presented in this case is whether plaintiff in error was entitled to the benefit of the occupying claimant law. The facts are these: On November 7, 1870, a patent issued to the Missouri River, Ft. Scott & Gulf Railroad Company for the land in question. Title passed from the company to defendant in error, first, by bond to convey, and then in September, 1873, by deed. One Glover Pickerell settled on the land in 1869, and built a house thereon the same season. In April, 1872, plaintiff in error purchased from Pickerell, took a quitclaim deed therefor, and had it duly recorded. There is no evidence as to the condition of the title prior to the patent to the railroad company, and nothing to show that Pickerell was other than a naked trespasser. Counsel in the brief say that the fair presumption is that the "title was yet in the United States, unless it yet remained in the Cherokee tribe of Indians, the original owners of the lands known as the 'Cherokee Neutral Lands,' of which said premises was a part." It may be that this is a *173 part of those lands, but the evidence fails to show it. All *we can gather from the evidence is the description, by section, township, and range, and that it lies in Cherokee county. The patent is not recited, so its recitals avail nothing. Ephraim v. Garlick, 10 Kan. *280.

Counsel claim that Jay is within both the first and fifth classes of those entitled, under the amendment of 1873, to the benefit of the occupying claimant law. Laws 1873, p. 203, § 1. The first class includes all who "can show a plain and connected title, in law or equity, derived from the records of some public office." Counsel's claim cannot be sustained under this clause. A quitclaim deed from a trespasser can by no ingenuity of construction be called "a plain and connected title, in law or equity." It means a title connected with the legal and unquestioned title by a succession of conveyances apparently regular and legal, but really passing no title. The case of Krause v. Means, 12 Kan. *335, is a good illustration. Neither does he come within the fifth class. That includes those who have made settlements upon Indian lands, or Indian trust lands. But the testimony, as we have seen, is lacking upon this point.

The ruling of the district court was therefore correct, and the judgment must be affirmed.

(All the justices concurring.)

JAMES CARLIN v. DANIEL F. DONEGAN.

July Term, 1875.

New Trial; Misconduct of Judge: Form of Verdict. Where a new trial is sought on the ground of the alleged misconduct of the judge, and in support thereof it is shown that the action was one for an accounting between partners, in which a principal question was whether a certain writing contained the terms of the partnership, and that the judge, after charging the jury that it was for them to determine what were the terms of the partnership, and instructing them specially to find for what purpose the writing was executed by the parties, without the knowledge of counsel handed to the jury, as they were about to retire, a form of a verdict, to be used in case they found that the writing did contain the

*174 terms of the partnership, which form the jury adopted; and where it is not shown that he did not at the same time submit a form to be used in case the jury found otherwise, or that he made any suggestions or intimations to influence the jury to adopt that form, or that his charge was not in all respects entirely fair and impartial: *held*, that there was no sufficient showing to entitle a party to a new trial.

Error from Saline district court.

At the March term, 1874, Donegan, in an action in which he was plaintiff, and wherein Carlin was defendant, recovered a judgment against Carlin for \$1,077.23, and costs. After the close of said term, Carlin, as plaintiff, commenced this action against Donegan, as defendant, as provided by section 310 of the Civil Code, to vacate and set aside said judgment, and for a new trial of said first-mentioned action, on account of alleged misconduct of the district judge. No answer was filed to this petition, said section 310 of the Code providing that "the facts stated in the petition shall be considered as denied without answer." The transcript shows that afterwards, and at the May term, 1874, of said district court, the following proceedings were had, and entered upon the journal: "This day comes on for hearing the petition of the said James Carlin, plaintiff herein; said plaintiff appearing in person and by his attorney, T. F. Garver, and the defendant, Daniel F. Donegan, appearing by his attorneys, Spivey & Wildman; and thereupon the said petition is read to the court, and the plaintiff offers to introduce witnesses to support the allegations of said petition, which is refused by the court; and the said plaintiff is not allowed to introduce any testimony to maintain the issues herein on his behalf,—to which ruling of the court the said plaintiff excepts; and judgment is thereupon rendered against said plaintiff for costs of this suit." Carlin brings the case here on error for review.

T. F. Garver, for plaintiff.

Spivey & Wildman, for defendant.

*175 *BREWSTER, J. This was a petition for a new trial, brought after the term at which judgment was rendered, and on account of the alleged misconduct of the judge before whom the case was tried. As the district court refused to hear any testimony under this peti-

tion, the allegations in it must, for the purposes of this case, be taken as true; and the only question is whether, upon those allegations, there is any ground for relief. A brief statement of the facts as alleged will be necessary. "Before the March term of the Saline district court, the defendant in error, Donegan, commenced an action against the plaintiff in error, Carlin, for an accounting between them as partners, and to recover the amount that might be found due from Carlin to Donegan. Said case was tried, and at the March term, 1874, a judgment was entered therein against Carlin for the sum of \$1,077.23, and costs. One of the issues submitted to a jury for trial was, what were the terms of the partnership agreement? Donegan claimed a certain writing to be the agreement. Carlin denied that it was executed for such purpose, and alleged in his answer that it did not contain, and was not intended to contain, the terms of the agreement. Testimony was introduced by both plaintiff and defendant as to the character and purpose of the writing, and the terms of their agreement. The jury returned a special verdict of the terms of the partnership; said verdict embracing the disputed writing, without change, and saying that the terms of the agreement were as contained in it. This verdict was allowed to stand by the court, and the rights of the defendant therein determined by it. After the term of court at which the trial was had, Carlin discovered and learned for the first time that so much of the special verdict of the jury as was made up of the disputed writing had been inserted in the blank form for the verdict by the judge before the jury retired, and as they were about to retire, to deliberate upon their verdict. The jury added a
 *176 *few unimportant conditions, and brought in as their verdict the form given them by the judge with the writing. The action of the judge was secret, and unknown to the defendant or his attorneys until long afterwards."

We have taken this statement from the brief of counsel for plaintiff in error, as presenting in full the facts upon which he founds his claim for itself. It should also be stated that the petition alleges that the court instructed the jury that it was for them to determine what were the terms of the partnership agreement, and also instructed them "specially to say for what purpose the writing set up in said petition was executed by said parties." The form of the verdict as given is: "We, the jury impaneled and sworn in the above-entitled cause, do, upon our oaths, find that the terms of the partnership between plaintiff and defendant were as shown by the writing set up in plaintiff's petition, which writing is as follows, to-wit," etc., (giving the writing.) It would seem from the petition that the judge prepared and handed to the jury more than the one form, for it alleges that "the judge of said court, on said trial, prepared, or caused to be prepared, forms of verdict for the jury." But the form we have above copied, and which was the one returned by the jury, is the only one recited, or whose character is given in the petition. If the judge simply prepared two forms, one answering to the case as the plaintiff

claimed it, and the other to that as the defendant claimed it, and submitted the two to the jury, with instructions to determine between them, or if, preparing but one form, he instructed them that the insertion of negative words was all that was necessary for the appropriate opposite verdict, it would be difficult to see how either party was wronged. The case, however, might have been one in which it were easy to prepare a form for the verdict if in favor of the one party, and impossible to prepare it if in favor of the other. Thus, if the claim of the one party was that the terms of the partnership were expressed in a certain writing, it would be perfectly easy to prepare a form for the jury if they found that to be the fact; while if the

*177 claim of the adverse party was *that the terms of the partnership were not so expressed, but rested in parol, and the evidence of that parol agreement was not harmonious, but conflicting and indefinite, it would be impossible for a court to determine beforehand what might be the conclusions of the jury upon this conflicting testimony, or prepare a form to express those conclusions. But whether either of these suggestions be true in this case we can only conjecture, for the petition is silent; and surely, before misconduct is imputed to a judge on the trial of a cause, the whole of his conduct in respect thereto should be disclosed.

We might properly stop here. Indeed, this is as far as, under the record, we can legitimately carry a decision. We may be pardoned, however, a few suggestions beyond. Assuming, for the purpose of the argument, that it affirmatively appeared that the judge submitted only the one form, and that under the testimony it were perfectly easy to have submitted a form answering to the claim of the opposite party, and then could this action be maintained? It is not pretended that he directed the jury to return this verdict. On the contrary, it is expressly stated that he charged the jury that it was for them to determine whether the writing contained the partnership agreement. There is no intimation that the charge was other than fair and impartial. That which was handed to the jury was a *mere form*,—was handed to them as such. It is often not merely the privilege, but the duty, of the court to assist the jury in placing the verdict in proper form; especially when, as in this case, a special verdict is asked. It does not appear that anything more was done in this case than simply discharge this duty. All that could possibly be urged against it is that from the simple form the jury might be led to think that the opinion of the court was in favor of such a verdict. Now, while it is the province of the jury to settle all disputed questions of fact, and the duty of the judge in no way to trespass upon their functions, and to be careful not to cast his own judgment upon the facts into the scale to affect their conclusions, yet the simple fact that from some portion of his

*178 conduct an intimation may be derived as to his *own convictions of the testimony is not of itself sufficient to disturb a verdict. We do not mean to say that the conduct of a judge may not

be so partisan, his expressions or intimations of his own views so strong and decided, that, though he in terms charges the jury that they are to determine the facts, and not he, yet in furtherance of justice a reviewing court ought to set the verdict aside. But this is no such case. It does not appear but that the judge was acting in the utmost good faith, with that clear impartiality which distinguishes the learned judge before whom this case was tried, and with a simple desire to assist the jury in the preparation of that most difficult of all verdicts, a special verdict; and in such a case something more than the mere handing of a form of a verdict to the jury must exist before a new trial should be granted.

The judgment will be affirmed.

(All the justices concurring.)

THOMAS H. BUTLER v. BOARD OF COM'RS OF NEOSHO Co.

July Term, 1875.

Counties: Liability on Implied Contract. Where the admitted facts are that the county treasurer occupied for his office a room belonging to plaintiff; that the defendant made no other provision for such office than by suffering him to occupy said room; and that the plaintiff gave notice, pending the occupation, to at least two of the members of the county board that he should expect and demand compensation for its use, and that said occupation was with the knowledge and consent of the defendant: *held*, that the defendant was liable for the value of the use of said room, although there was no express contract between the plaintiff and defendant that he should receive compensation therefor.¹

Error from Neosho district court.

Action by Butler to recover for use of a room occupied as the county treasurer's office from September 20, 1871, to March *179 20, 1873. It was agreed that the rent of said room *was worth \$18 per month, and that, if plaintiff was entitled to recover, the amount due him was \$234. The district court, at the July term, 1874, held that the county was not liable, and gave judgment against Butler for costs.

Stillwell & Baylies, for plaintiff.

C. F. Hutchings, for defendants.

¹ Action on claim against county—failure of county commissioners and clerk to record proceedings in reference to contract, see *Gillett v. County of Lyon*, 18 Kan. 418; where a county attorney goes beyond the limits of his county to do business for his county, at the instance and with the consent of the county board, he may recover reasonable compensation for such services, in addition to his salary, although there is no express contract between the attorney and the board that he shall receive compensation therefor—the law implies a contract. *Huffman v. County of Greenwood*, 28 Kan. 281; legal meeting of county board, see *Scott v. Paulen*, *ante*, *162, and note.

BREWER, J. This was an action to recover for the rent of a room occupied by the county treasurer. No testimony was heard, but the case was tried upon an agreed statement of facts. So much thereof as is material is as follows: "That said county treasurer held his office in said building during the time that plaintiff was the owner thereof, with the knowledge and consent of the plaintiff herein." "There was no express contract between plaintiff and defendant that plaintiff should receive compensation for the use of this building by said county treasurer, but defendant knew that said building was so occupied, and plaintiff informed at least *two members* composing the defendant board that he should expect and demand compensation for the use of his said building." "This information was given to these *two members*, not to the *board of county commissioners*, shortly after September 20, 1871, and frequently after said date, and neither of the members of the defendant board made any objection when said information was so conveyed." "The defendant herein, during said period, had not provided the county treasurer of said Neosho county with any place to hold his office, further than their suffering said treasurer to occupy the building of plaintiff would constitute such provision."

Was the county liable? There would be no question if the
 *180 defendant were an individual or a private corporation. *The law would imply a contract, and a promise to pay the reasonable value of the use of the room. And we think the same result must follow from the agreed facts, though the defendant is but what is sometimes called an involuntary *quasi* corporation. To provide suitable rooms for county officers is a duty expressly cast upon the defendant. Gen. St. c. 25, §§ 4, 16, 172. The only provision made was in the occupation of plaintiff's room. The only way, therefore, in which this duty was discharged, was by an appropriation of the property of plaintiff, and it was so appropriated with the knowledge and consent of the defendant. Here are all the elements of an implied contract. And, to make the matter stronger, the plaintiff, pending the occupation, gave notice to two of the three commissioners that he should expect pay for his property. The case of *County of Neosho v. Stoddart*, 13 Kan. *207, is by no means similar. There an attempt was made to bind the county by the contract of the sheriff, or district court, or both, for the furnishing of matting for the courthouse; and the only point decided was that neither the court, nor the sheriff, nor both together, could so bind the county without the consent of the commissioners. The very thing which was wanting there is present here, to-wit, the consent of the commissioners; for the consent of the defendant means the consent of those officers, or that agent of defendant charged with the duty of consenting or dissenting. Where there is an express contract, that will control, and the rights of the parties must be settled by it, (*Perry v. Bailey*, 12 Kan. *539;) but, when there is no express contract, the law may imply one, when

a party knowingly receives and appropriates to his own use the property of another.

The judgment of the district court will be reversed, and the case remanded, with instructions to enter judgment in favor of plaintiff for agreed value of the rent.

(All the justices concurring.)

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*JOHN A. LEWIS v. MARY ANN LEWIS.¹

July Term, 1875.

1. **Divorce: Constructive Service.** The mailing of a copy of the petition and publication notice, required by section 641 of the Civil Code, is a part of the service required, in cases of divorce, upon non-resident defendants.
2. ———: **Opening Decree.** Where a decree of divorce was duly and legally entered, after service by publication, and the mailing of a copy of the petition and publication notice, as required by section 641 of the Code, *held*, that the defendant could not come in under section 77 of the Code, and upon the showing of want of actual notice have the decree set aside and be let in to defend.
3. ———: **Barring Defendant's Interest in Property.** Where the decree of divorce contained no other order concerning property than one barring defendant of all right and interest in the property of plaintiff, *held*, that this order must stand with the decree, and, the decree being undisturbed, the order could not be set aside.

Error from Wabaunsee district court.

Lewis filed his petition for a divorce, alleging his intermarriage with defendant at Edinburgh, Scotland, in May, 1859; that he had resided in Kansas more than a year, and was now a resident of Wabaunsee county; that he had at all times been a faithful and obedient husband; that defendant, disregarding her duties as a wife, had been willfully absent from plaintiff for more than one year last past, without any cause or justification therefor. He prayed for a divorce from defendant, and for the custody of a minor son, the issue of said marriage, and for a decree that defendant be debarred from any interest

¹ Effect of foreign divorce, see note to *Van Orsdal v. Van Orsdal*, 24 N. W. Rep. 580. A judgment rendered by a probate court of Utah territory, attempting to dissolve the marriage relation existing between a husband and wife who had neither of them ever resided there, or been within the territory, and being rendered without any actual notice to the wife, is void absolutely and entirely. *Litowich v. Litowich*, 19 Kan. 451.

or dower estate in property of plaintiff. This petition was sworn to "as true," by Lewis, August 5, 1873. The decree was entered September 18, 1873. On the twenty-first of said month Lewis intermarried with Sarah Elizabeth Hafer, to whom was born a daughter June 23, 1874, the issue of said marriage. On the twentieth of June, 1874, notice was served on Lewis, by the attorneys of the divorced wife, *that application would be made to the court, at the next term thereof, to have said decree of divorce opened, and letting the said Mary Ann Lewis in to defend said action. Said motion was made, accompanied by an answer, verified by said Mary Ann at Edinburgh, Scotland, March 17, 1874. In this answer, among other matters, said Mary Ann alleges that on the fifth of August, 1872, at the township of St. George, Pottawatomie county, Kansas, where she and the said plaintiff then were, and for a long time had been, residing, "the plaintiff freely consented to the defendant leaving said Pottawatomie county and going to Edinburgh, Scotland, for her health," and that she did thereupon so leave "on the representation that he intended to rejoin her there so soon as he could wind up his affairs in said Pottawatomie county." Said motion was brought on for hearing at the September term, 1874, of the district court. On such hearing, said Lewis appeared, and filed an affidavit, alleging that he mailed a copy of his original petition, and a copy of the publication notice to defendant on the ninth of August, 1873, as required by section 641 of the Civil Code; that said petition and notice were received by said Mary Ann, who, on the twenty-fourth day of February, 1874, "commenced a suit against this affiant in the courts of Scotland, to-wit, the court of sessions of Edinburgh, Scotland, for alimony, in which suit this affiant had been duly notified by 'summons of aliment,' and which suit so commenced is now still pending and undetermined;" and he annexed to his affidavit a copy of the "summons of aliment" served on him, as follows:

"Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, queen, defender of the faith, to messengers-at-arms, our sheriffs, in that part conjunctly and severally specially constituted, greeting:

"Whereas, it is humbly meant and shown to us by our lovite, Mrs. Mary Ann Montgomery Jollie Devlan, otherwise Lewis, presently residing in Buccleuch place, Edinburgh, wife of John Augustus Lewis, sometime manufacturer of cut and engraved glass in Edinburgh, now farmer, and residing near Wamego, Pottawatomie county, *183 Kansas, United States of *America, or elsewhere furth of Scotland to the pursuer unknown, pursuer against the said John Augustus Lewis, her husband, defender, against whom arrestments have been used *ad fundandam jurisdictionem*, in terms of the condescendence and note of pleas in law hereunto annexed; therefore the defender ought and should be decreed and ordained by de-

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cree of the lords of our council and session to make payment to the pursuer of the sum of one hundred pounds sterling yearly, for aliment to her, payable at two terms in the year, seventeenth August and seventeenth February, by equal portions, beginning the first term's payment of said aliment as at seventeenth August, 1872, for the half year immediately following, and so forth half yearly thereafter during their joint lives, or until the defender adhere to the pursuer, with the lawful interest on each half year's aliment from the term of payment until payment, but under deduction of the sum of fifty pounds paid by the defender at various times between the said seventeenth day of August, 1872, and the twenty-fourth day of November, 1873; and, further, the said defender ought and should be decerned and ordained by decree foresaid to make payment to the pursuer of the sum of fifty pounds sterling, or such other sum as our said lords shall modify, as the expenses of the process to follow hereon conform to the laws and daily practice of Scotland used and observed in the like cases as is alleged.

"Our will is herefore, and we charge you, that on sight hereof ye pass, and in our name and authority lawfully summon, warn, and charge the said defender, personally or at his dwelling-place, if within Scotland, and if furth thereof, by delivery of a copy hereof at the office of the keeper of the record of edictal citations, in terms of the statute thereanent, to compare before the lords of our council and session, at Edinburgh, or where they may happen to be for the time, the said defender, if within Scotland the seventh day, and if furth of Scotland the fourteenth day, next after the date of your citation, in the hour of cause, with continuation of days, to answer at the instance of the pursuer, in the matter libeled; that is to say, to hear and see the premises verified and proven, and decree and sentence pronounced by our said lords, or else to allege a reasonable cause in the contrary, with certification as effiers: Attour that in the mean time ye lawfully fence and arrest all and sundry the whole readiest

movable goods and gear, debts, and sums of money, and other
 *184 *movable effects belonging or addebted to the said defender, wherever or in whose hands soever the same may be found; all to remain under sure fence and arrestment aye, and until sufficient caution and surety be found acted in the books of council and session, that the same shall be made forthcoming to the pursuer, as accords of law, according to justice, as ye will answer to us thereupon. Which to do we commit to you, conjunctly and severally, full power by these our letters, delivering them, by you duly executed and indorsed, again to the bearer.

"Given under our signet, at Edinburgh, twenty-fourth February, 1874.
 T. E. O. HORNE, W. S."

To this summons was annexed a "condescendence," which answers to a bill in chancery, or a petition under the Code, (in which, as in

the foregoing summons, the plaintiff therein is called "pursuer," and the defendant "defender,") setting up the relation of the parties, and the grounds upon which the decree for alimony (or "aliment") is asked. Among other matters it alleges that Lewis supplied said Mary Ann with the means for her trip from Kansas to Edinburgh, and had continued to write and send her money thereafter until November 24, 1873, (two months subsequent to the decree of divorce.) Said summons also bears the following indorsement:

"COPY OF MESSENGER'S EXECUTION.

"This summons executed by me, Andrew Webster, messenger-at-arms, against John Augustus Lewis, defender, (as being furth of Scotland,) by delivering for him a full double thereof, excepting the will, having a just copy of citation subjoined, at the office of the keeper of the record of edictal citations within the general register-house, at Edinburgh, in presence of Alfred McLellan, residenter in Edinburgh, this twenty-seventh day of February, eighteen hundred and seventy-four years.

A.W. WEBSTER.

"ALFRED McLELLAN, Witness."

The district court, upon the hearing of said motion, made an order vacating said decree, and permitting said Mary Ann to appear
 *185 and defend, *and also made a separate order granting temporary alimony to enable defendant to return from Scotland, and to pay counsel for prosecuting her defense. The first-mentioned order is as follows: "And now comes the said Mary Ann Lewis, defendant, by her attorneys, R. S. Hick and Merritt & Merritt, and also comes the said plaintiff, John A. Lewis, by A. H. Case and D. V. Sprague, his attorneys, and thereupon comes on to be heard the motion, amended motion, answer, and affidavit of the said defendant filed in this action to obtain an order of said court opening the judgment obtained by said plaintiff against said defendant at the September term, 1873, of said court, and allowing said defendant to be let in to defend said action; and, after hearing the evidence in the case, and argument of counsel, it is considered and adjudged by the court now here that the said judgment and decree heretofore, and at the September term, 1873, of this court, rendered in this action, be, and the same is hereby, opened, and the said defendant is let in to defend said action. And it is further ordered that the cause be continued until the next term of this court," etc.

D. V. Sprague and Case & Putnam, for plaintiff.

As to the notice to defendants who were absent from the state. As we understand it, if the notice has been made according to law, or the order of the court, such notice gives the court complete jurisdiction of the case. 2 Bish. Mar. & Div. § 314. The court has found that such notice had been given, and that it had jurisdiction

of the case. But the defendant says, "I had no actual notice until the decree was entered," and in her affidavit says that she had no notice until after the court had adjourned. Section 77 of the Code reads that "a party against whom a judgment or order has been rendered *without other service than by publication in a newspaper may,*" etc. But here there was "other service." A "copy of the petition,

with a copy of the publication notice attached thereto, ad-
 *186 dressed to the defendant at her place of *residence," were served as required by section 641 of the Code. Said section 641 is not directory, but mandatory. It must be strictly complied with, or the affidavit excusing the service made. In *Bloomfield v. Chicago*, 5 Ohio, 318, the court refused to dismiss for want of it, but continued the case *for service*, and held that without this service the court had *no jurisdiction*. So, also, *Freeman v. Freeman*, 1 Mich. 480. Section 77 does not apply to divorce cases. *McJunkin v. McJunkin*, 3 Ind. 30.

2. As to the policy of the law. Where a divorce is granted upon which one of the parties contracts new relations, and a third party acquires rights, it cannot be that a process could be had to reverse a decree, the consequences of which would be a severance of all those new relations. *Brice v. Myers*, 5 Ohio, 126; *Kemper v. Seminary*, 17 Ohio, 318; *Dunn v. Dunn*, 4 Paige, 425; and see *Allen v. Maclellan*, 12 Pa. St. 328. There is no charge of fraud in this case, consequently all decisions based solely upon charges of fraud have no application, and are not referred to. Considerations of policy unite with the dictates of justice in forbidding any interference with the parties after a divorce has once been granted. The first marriage, in all such cases, without regard to the divorce, has ceased for all the purposes for which it was contracted. Its sorrows and disappointments have come, and are without a remedy. The breaking up of the second marriage may be revenge, but it is no reparation for the evils that have been already done. It is only a multiplication of the distresses and misfortunes of innocent women and children. The woman marries the man on the faith of the decree, which assures her that he is an innocent and injured party.

Merritt & Merritt and R. S. Hick, for defendant.

In opening and reversing judgments rendered, the Code makes no distinction between divorce and other cases. Section 72 of the Code enumerates all cases in which constructive service may be made, which includes specifically actions for divorce. Section 77 provides for opening judgments where service has been made as provided by section 72, and when the defendant had no actual notice of
 *187 the pendency of the action *before its determination. Section 568, subd. 2, provides for vacating a judgment for a divorce in the following language: "By a new trial granted in proceedings against defendants constructively summoned, as provided in section 72." In this case there was no other service than by publication.

The copy of the petition, with a copy of the publication notice attached, required by section 641 of the Code to be mailed to the defendant when his or her residence is known, even if received, is not service. If it is not part of the service by publication, it is not "other service,"—is not service at all. What is meant by "other service than by publication in a newspaper" is evidently actual service,—the service of a summons, either within or without the state, the only "other service" known to the Code. See Code, art. 6; Laws 1871, p. 273. But, even if the mailing of such copies to the defendant is service when received, it certainly is not service when not received, by the defendant. It is only an attempt at service, which fails. It is no more service than is merely delivering a summons to an officer. In this case the court found that the defendant did not receive the copy of petition and publication notice mailed to her until after the decree was rendered.

There is no reason of public policy, or of hardship to innocent parties, that can be assigned against the power to open a decree of divorce under section 77 of the Code, which does not apply with equal force against opening such a decree on the ground of fraud in obtaining it, or by proceedings in the supreme court to reverse it within three years after its rendition. The consequences to innocent parties are precisely alike in all of these cases. Yet the reports are full of precedents for opening and setting aside such decrees for fraud, and on proceedings in error, without regard to the consequences which may ensue to those who are not parties. *Talbot v. Calvert*, 12 Pa. St. 328; *Martin v. Veeder*, 20 Wis. 499; *Strahlendorf v. Rosenthal*, 30 Wis. 677; *Adams v. Adams*, 51 N. H. 388; *Vischer v. Vischer*, 12 Barb. 640. In the case of *Warner v. Warner*, 11 Kan. *121, this court says: "The defeated party in a divorce suit can take the case to the supreme court, and, if error be shown, can obtain a reversal, as in *any other action*." To deny the authority of the court to open the decree and let the defendant in to defend, under section 77 of the Code, would be to hold that the law does not mean what it says in plain English; and this, as we understand it, the court is asked to do, because, and only because, to hold otherwise would work wrong and injury to others who are not parties to the suit. But this question of hardship, we think, is one for the legislature, and not for the courts.

In any event, we apprehend there can be no doubt of the power of the court to open the decree and let the defendant in to defend as to alimony; and, if it should be held that the court could do no more, the order opening the decree should only be modified so as to give it that effect.

BREWER, J. The plaintiff, on the fifth of August, 1873, filed his petition for divorce against the defendant, in the district court of Wabaunsee county, and at the September term, 1873, of said court,

obtained a decree of divorce. The service was by publication in the local paper, and by sending a copy of the petition and publication, as provided by section 641 of the Civil Code. Shortly after this decree, the plaintiff married one Miss Hafer, and by this last marriage had a child born to him. His second wife acted in good faith. His second wife and the child are alive, and living with the plaintiff. Such marriage and birth were prior to the proceedings of the first wife to set aside the decree. Before the September term, 1874, of said court, but after the September term, 1873, and the March term, 1874, had adjourned, the defendant filed her affidavit and answer, under section 77 of the Code, to set the decree aside, and to open it, and to let her in to defend, on the ground that she had no *actual notice* of the pendency of the action before the decree was entered, and before the court adjourned at the September term, 1873. Upon the hearing of this application the court found as follows, to-wit:

"(1) That there was due and legal service made by publication *189 in a newspaper, as prescribed by law; *(2) that there was a copy of the petition and publication notice sent by mail, postage paid, as prescribed by section 641 of the Civil Code of 1868, on the ninth day of August, 1873; (3) that said copy of petition was not received by the defendant, who was then at Edinburgh, Scotland, until after the decree of divorce was rendered, and that no other service in the case was had or made than as above stated; (4) that the defendant had no actual notice of the pendency of this suit until after the decree was rendered."

And upon these facts the court made an order opening the decree, and letting the defendant in to defend the action.

Was there error in this order? Section 72 enumerates the cases in which service by publication may be had, and among them expressly enumerates actions for divorce. No question, therefore, can be made as to the legality of the decree of September, 1873. Section 77, upon which this application was based, provides that "a party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may, at any time within three years after the date of the judgment or order, have the same opened, and be let in to defend. Before the judgment or order shall be opened the applicant shall give notice, * * * and make it appear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense; but the title to any property, the subject of the judgment or order sought to be opened, which, by it, or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section, nor shall they affect the title of any property sold before judgment under an attachment." The question of the permanence of a decree of divorce, when attacked either by proceedings in error, by motion to set aside, or by direct proceeding on account of fraud and imposition,

has frequently been before the courts, and the decisions are far from uniform.

In *McJunkin v. McJunkin*, 3 Ind. 30, a decree of divorce was rendered upon constructive service. The court held that a section of the statute similar to our section 77, above quoted, was inapplicable, and partly because no provision was made for a case like the one before us,—a marriage intermediate the decree and the application.

In *Bascom v. Bascom*, 7 Ohio, 125, the court decided that a decree of divorce was not the subject of review in the supreme court. It was conceded that the statute provided that divorce cases should be governed by the rules respecting proceedings in chancery, and that in chancery cases the right of review existed; but there was this difference: in divorce cases the testimony was oral, in chancery by deposition. Upon this difference the court concluded that there was no review of a decree of divorce. Manifestly, a controlling consideration was the danger of intermediate marriage. It used this language in the opinion: "When a divorce is granted, upon which one of the parties contracts new relations, and a third party acquires rights, it cannot be that a process could be had to reverse a decree, the consequences of which would be a severance of all those new relations. Such anomalous mischief cannot be ingrafted on the practice of our courts except by clear and explicit legislative enactment. That, we feel confident, can never take place. All the reasons that render a decision upon facts by a jury conclusive between the parties unite in requiring that the decision of a court upon facts, on the hearing of a petition for a divorce, should be final, and stand beyond reach of judicial revision." The same court subsequently, in *Bingham v. Miller*, 17 Ohio, 445, after deciding that the legislature had no power to grant divorces, yet in view of the fact that that power had been exercised without question for a series of years, and to hold the divorces void would bastardize many children, refused to disturb a divorce so granted. It also, in *Parish v. Parish*, 9 Ohio St. 534, decided that a decree of divorce obtained by fraud could not be set aside on an original bill filed at a subsequent term. The same doctrine was announced in *Green v. Green*, 2 Gray, 361, Chief Justice SHAW delivering the opinion. Yet in the same state, in *Edson v.*

Edson, 108 Mass. 590, the supreme court sustained an application made by the defendant, in the case itself, to open up the decree and be let in to defend, on the ground that the service, which was by publication, though regular on its face and apparently good, had been secured by false and fraudulent representations as to residence of plaintiff, ignorance of defendant's residence, etc., and that, therefore, no legal service had been made so as to give the court jurisdiction; and in the opinion it uses this language: "Reasons of public policy, or a regard to the consequences which

might ensue to innocent parties from the exercise of a power to invalidate a decree of divorce after it had become *res adjudicata*, do not constitute sufficient reasons for a denial of the existence of the power."

In *Dunn v. Dunn*, 4 Paige, 425, service had been made of the subpoena outside of the state. On an application to set aside the decree, the chancellor held the service bad; but inasmuch as there had been a second marriage, while he permitted the question of the grounds for a divorce to be tried, refused to disturb the decree unless upon such trial it should appear that there was no sufficient evidence to sustain it. In other words, the case was to be tried after the decree. On the other hand, in *Adams v. Adams*, 51 N. H. 388, a decree was set aside which had been obtained upon constructive testimony.

In *Weatherbee v. Weatherbee*, 20 Wis. 499, service had been made by delivering a copy of the summons to the defendant outside of the state. A motion was made to set aside the decree on the ground of irregularity in the service, and it was sustained. *Crouch v. Crouch*, 30 Wis. 667, in some respects resembles the case at bar. On an affidavit by the plaintiff of ignorance of defendant's whereabouts, an order was made by a court commissioner for service by publication, publication made, and decree entered. There was a subsequent marriage, and after-begotten children. On motion to set aside the decree, the order for publication was held void because made by one who, though a court commissioner, was attorney of the plaintiff, and because the affidavit of plaintiff was clearly shown to have been false and perjured testimony.

In *Allen v. Maclellan*, 12 Pa. St. 328, Chief Justice Gibson *192 uses the following strong language: "It may seem an arbitrary act to expunge a sentence of divorce with a stroke of the pen, bastardize after-begotten children, involve an innocent third person in legal guilt, and destroy rights acquired in reliance on a judicial act which was operative at the time." Yet the power of the court so to do was sustained.

It may be said in reference to the case before us, as distinguishing it from some that have been noticed, that it contains nothing, as shown by the findings of the court, to impeach the regularity and fairness of the proceedings. Whatever may be the merits of the dispute between the parties, and whatever upon a hearing of both sides might have been the judgment of the court, it is plain that the steps pointed out by the law were fairly and correctly taken. Service was legally, and without any trick, falsehood, or imposition, made, and the decree was, when entered, in all respects legal and valid. It must be apparent, too, from the cases noticed, that oftentimes the hardship of an adverse ruling, if it has not directly led to the decision made, has induced the court to magnify matters of minor importance into circumstances of controlling weight. At the risk of being sub-

jected to a like criticism, we are constrained to hold that section 77 does not apply to proceedings for divorce. "Without other service than by publication in a newspaper" is, by its terms, the test of a right to its provisions. It is true that in section 72 it is said that "service may be made by publication * * * in actions to obtain a divorce, when the defendant resides out of this state," and, if this were the only provision, it would be difficult to deny the applicability of section 77. But in the article concerning divorce and alimony (article 28, Code; Gen. St. p. 757, § 641) it is provided that, "when service by publication is proper, a copy of the petition, with a copy of the publication notice attached thereto, shall, within three days after the first publication is made, be inclosed in an envelope, addressed to the defendant at his or her place of residence, postage paid, and deposited in the nearest post-office, unless the plaintiff shall make and file an affidavit that such residence is unknown to *193 the plaintiff, and cannot be *ascertained by any means within the control of the plaintiff." Now, this is a part of the service. Without it no decree can properly be entered. It is a precaution ordered by the legislature to guard against the danger of decreeing a divorce without the knowledge and presence of both parties. It may be very inadequate, but it is worth something. It is a step in the right direction. But, whether adequate or not, it is the legislative direction, and as such may not be disregarded.

It may be said that, as in this case, the copy of the petition may fail to reach the defendant in time for the trial, and that then there is no other notice than by the publication, and section 77 should be held applicable. True, the mailed petition and notice may give no actual notice; neither may the publication.* But each is an effort towards actual notice, and the two combined are requisite for legal service. Service by copy at the usual place of residence is actual service. The copy may fail to reach the defendant; actual notice may not be received by him. But the service is complete, and a judgment rendered cannot be opened because rendered without notice. Service is not always equivalent to actual notice, and does not always result in actual knowledge. It is not the actual result of any particular step which determines whether it is or is not a part of the service. It is enough that the legislature has constituted it a part. And where the legislature has not in terms declared it a part, if the obvious scope and purpose of the step required is to secure notice of the pendency of the suit, it may fairly be considered a part of the service. Again, it may be said that if an affidavit of ignorance is filed, as provided, no copy is mailed, and then the only notice would be by publication. If the affidavit was false, it would make a case much resembling those cited from 30 Wis. and 108 Mass. But it will be time enough to decide that question when it arises. The conclusion, then, to which we have come, though, as we freely admit, with grave doubts, is that the mailing of the copy of the petition and

notice, as required by said section 641, is a part of the service, and that, therefore, in a case where such mailing has been duly
 *194 made in addition to *the publication of notice in the paper, section 77 does not apply, and that a decree legally entered under those circumstances cannot be set aside upon the mere showing of actual ignorance of the pendency of the suit.

As the decree barring the defendant of any interest in the plaintiff's property follows from the divorce, we cannot open the decree as to the one, while sustaining it as to the other.

The judgment will be reversed, and the case remanded, with instructions to overrule the application to set aside the decree, and let the defendant in to defend.

(All the justices concurring.)

DIVISION OF HOWARD CO.¹

July Term, 1875.

1. **Legislature: Records: Journals and Enrolled Bills.** The legislative journals and the enrolled bills are the only records required by the constitution and laws to be kept for the purpose of showing any of the legislative proceedings; and hence they must import absolute verity, and be conclusive proof as to whether any particular bill has passed the legislature, when it passed, how it passed, and whether it is valid or not. The engrossed bills of the two houses are not required to be made records, nor portions of any record. Therefore, where the legislative journals, and the enrolled bill of a particular act of the legislature, apparently show that the bill was regularly passed by the legislature, signed by the proper officers of each house, signed and approved by the governor, and filed in the office of the secretary of state as an enrolled law, it will be held that such enrolled bill is valid and conclusive evidence of the law as contained in said bill, notwithstanding it may appear from an engrossed bill of the house, (not contained in the journal of either house,) and other extrinsic evidence, that a mistake was made in enrolling said bill, and that the enrolled bill omitted one important section which was contained in the bill as it passed the two houses.
2. **Evidence: Judicial Notice: Published Laws: Enrolled Bills: Journals.** The courts will take judicial notice, without proof, of all the laws of the state; and, in doing so, will take judicial notice of what the books of published laws contain, of what the enrolled bills contain, of what
 *195 *the legislative journals contain, and, indeed, of everything that is allowed to affect the validity or meaning of any law in any respect whatever. [Topeka v. Gillett, 32 Kan. 437; S. C. 4 Pac. Rep. 800.]

¹Passing bills—yeas and nays on concurring in amendments—authentication of bills passed—signatures of presiding officers, see *County of Leavenworth v. Higginbotham*, 17 Kan. 63; *Prohibitory Amendment Cases*, 24 Kan. 711. Enrolled statute and journals as evidence of validity of act, see *State v. Francis*, 26 Kan. 724; *In re Vanderberg*, 28 Kan. 243.

3. **Legislature: Passing Bills: Procedure.** A bill was properly passed by the house. It was then properly passed by the senate, with sundry amendments. The house refused to concur. The senate then, by a vote by yeas and nays properly entered on the journal, receded from its amendments, and the bill was not passed in any other manner. *Held*, that as this manner of passing bills has always been considered sufficient in Kansas, and has always been acted upon, it will be considered that the constitutional provision requiring that "the yeas and nays shall be taken and entered immediately on the journal upon the final passage of every bill or joint resolution," was sufficiently complied with.
4. **Constitutional Law: "Subject" and "Title" of Act.** The "subject" to be contained in a bill, under section 16, art. 2, of the constitution, which provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title," may be as broad and comprehensive as the legislature may choose to make it. It may include innumerable minor subjects, provided all these minor subjects are capable of being so combined as to form only one grand and comprehensive subject; and, if the title to the bill containing this grand and comprehensive subject is also comprehensive enough to include all these minor subjects, as one subject, the bill, and all parts thereof, will be valid. [*Woodruff v. Baldwin*, 23 Kan. 494.]¹
5. **Counties and County Organizations: May be Abolished.** The legislature has the power to abolish counties and county organizations whenever it becomes necessary for them to do so in changing county lines, or in creating new counties.²
6. **County-Seats.** Whenever a county is destroyed, the county-seat must go with it.

Original proceedings in *mandamus*.

The passage and approval of the act dividing Howard county, and creating the counties of Chautauqua and Elk, (chapter 106, Laws 1875,) gave rise to three separate actions of *mandamus*, each being commenced originally in this court. Said act contains, among many others, the following provisions:

"Section 1. All that portion of the county of Howard lying south of the township line separating township thirty-one and township thirty-two south shall constitute the territory of a new county *196 hereby created, to be known as the county *of Chautauqua; and all that territory lying north of said township line is hereby created into a new county by the name of Elk.

"Sec. 2. The county-seat of said county of Chautauqua is hereby located at the village of Sedan, in township thirty-four south, of

¹Effect of restrictive title, see *State v. Bankers' Ass'n*, 23 Kan. 499. See *State v. Barrett*, 27 Kan. 217, stating rules for determining constitutionality of statute in reference to question of title of act.

²As to change of school-district boundaries, see *School-district v. Board Ed.*, etc., 16 Kan. 540. The legislature has the power to abolish or destroy a municipal township; and, when the township is abolished or destroyed, the township officers must go with it. In *re Hinkle*, 31 Kan. 712; S. C. 8 Pac. Rep. 531.

range eleven east; and the county-seat of said county of Elk is hereby located at the village of Howard City, in township thirty south, of range ten east. * * *

"Sec. 3. * * * The county commissioners of said new counties shall meet together at some suitable place, on the third Monday in July, 1875, and proceed to divide the aforesaid property, or the value thereof, as hereinbefore provided. * * * The original records of the county of Howard shall be retained by, and shall remain records of and for, the county of Chautauqua."

"Sec. 10. Chautauqua and Elk counties are hereby attached to the Twenty-fifth senatorial district; and until otherwise provided by law the county of Chautauqua shall constitute the Sixty-sixth representative district.

"Sec. 11. This act * * * shall take effect and be in force from and after the first day of June, 1875."

Said bill, as it finally passed both houses, contained the following section, which in some manner was omitted in the enrollment, to-wit:

"Sec. 3. The county officers in and for Howard county in office at the taking effect of this act shall be and remain such officers respectively for and during the term for which they were respectively elected. Such of them as shall then be legal electors of the county of Elk shall be officers of Elk county; and such of them as shall then be electors of the county of Chautauqua shall be officers of the county of Chautauqua. County offices in the aforesaid new counties, made vacant by the taking effect of this act, shall, within twenty days after the taking effect of this act, be filled as provided by law for filling vacancies in other organized counties."¹

An act supplementary to said chapter 106 was passed and approved March 5, 1875, (Laws 1875, p. 115,) under which the governor appointed a county clerk and two county commissioners for the county of Elk, and one county commissioner for the county of Chautauqua. These officers, with the clerk and commissioners of Howard county, then in office, filled both boards for the two

¹NOTE OF HON. W. C. WEBB, STATE REPORTER.

An examination of the senate journal shows that house bill 54, in the senate, was reported from the committee of the whole, February 26th; said committee "recommending its passage, subject to amendment." Sen. Jour. 481, 482. The bill then went to its third reading, and was taken up and considered Saturday, February 27th. It was amended by adding two new sections, to stand as sections 12 and 13, providing that the question of dividing Howard, and creating the two new counties of Chautauqua and Elk, should be submitted to the people of said Howard county at an election to be held in April, 1875, and that if, upon a canvass of the votes cast at such election, a majority were in favor of such division, the act should thereupon go into effect. With these two amendments the bill passed. Sen. Jour. 489-494. No other amendments are shown by the senate journal. The action of the senate was messaged to the house; the message showing that "the senate has passed house bill No. 54, * * * with amendments thereon noted." (This message seems to have been misplaced by the clerk of the house, as it appears under date of "March 2d." House Jour. 787.) The bill being in the house, with the senate amendments, it was, on Monday, March 1st, made

new counties; and immediately after the first of June they undertook to carry into effect the provisions of said chapter 106. The three actions mentioned were thereupon instituted: *First*, "The State of Kansas, on the relation of S. B. Oberlander, County Attorney of Elk County, v. Thomas Wright" and others, county officers of Elk county, to compel the defendants to remove their respective offices, etc., from Elk Falls (the old county-seat of Howard county) to Howard City; *second*, "The State of Kansas, on the relation of J. D. McBrian, County Attorney of Chautauqua County, v. Eli Titus, Sheriff," and others, county officers of Chautauqua county, to compel the defendants to remove their offices, etc., from Elk Falls to Sedan; and, *third*, "The State of Kansas, on the relation of Isaac A. Powell and Noyes Barber, v. Miles B. Light, County Clerk of How-
 *198 ard County," to compel said defendant to remove his office, etc., from Sedan back to Elk Falls; Light having removed said office from Elk Falls to Sedan, on the first of June, pursuant to the provisions of said chapter 106. In each of said cases an alternative writ of *mandamus* was issued, and in each the defendants appeared and answered. The cases came on to be heard together, and were so heard on the tenth of August. A. L. Williams and Wilson Shannon appeared for defendants Wright and Titus and for relators Powell and Barber. W. C. Webb appeared for relators Oberlander and McBrian, and for defendant Light.

A. L. Williams contended: The question, "Shall this bill pass?" was never taken on house bill 54, in the senate. The journal, and the agreed facts, show that the bill was first amended, then passed as so amended, and afterwards that the senate *receded* from its amendments. That left the bill pending, as it came originally from the house. No further action was taken in the senate. Suppose the house should pass an appropriation bill, say \$50,000, for some purpose. The senate amends by reducing the amount to \$25,000, and passes the bill for such smaller sum. The house non-concurs, and the senate *recedes*. Has the senate agreed to and passed the bill for \$50,000? Clearly not. And yet that is this case, so far as the con-

the special order for 7:30 that evening. House Jour. 771, 772. At the hour named it was taken up, and *all* the "senate amendments were non-concurred in." House Jour. 779, 780. It would seem from the house proceedings that there were *other* amendments, but it nowhere appears what they were, if any. The bill was returned to the senate, with the action of the house, where (on the second of March) "the senate *receded* from its amendments" to said bill. Sen. Jour. 544. An inspection of the "engrossed bill" (assuming, what is nowhere shown, that one of the amendments made by the senate when the bill was first passed by that body was the striking out of this "section 3") shows that the secretary of the senate, instead of attaching a "fly" to the margin of said section, noting thereon, "Sec. 3 struck out by the senate," drew his pen around and through the section itself, actually erasing it from the "engrossed bill."—a proceeding which ought not to have been done at all until the house "concurred" in such amendment. But the house did not concur, and the senate *receded*, thus leaving said section in the bill. But it was in fact erased from the face of the bill, and the enrolling clerk most naturally (but erroneously) omitted it in the enrollment, and the committee most naturally (but erroneously) reported the bill "correctly enrolled."

stitutional question goes. Section 13 of article 2 of the constitution requires that "a majority of all the members elected to *each house*, voting in the *affirmative*, shall be necessary to pass any bill." This has not been done in this case. See *Spangler v. Jacoby*, 14 Ill. 297, and *Austin v. Grant*, 1 Mich. 492.

The bill approved by the governor and printed as chapter 106 is not the bill actually passed, (if it passed the senate at all.) The bill passed has 12 sections. Chapter 106 has but 11 sections. Section 3 of the bill passed was omitted in the enrollment, and without any authority therefor. What is the legal effect of this omission? Clearly, it renders the whole act or bill, or both, void.

The act upon the statute book as chapter 106 legislates out
 *199 *of office persons holding county offices by election for a constitutional term; and this cannot be done.

The bill contains more than one subject. It changes county-seats without submitting the question to a vote of the people. By the tenth section it changes the apportionment of members of the legislature, in violation of section 2 of article 10 of the constitution. And the act, by its very terms, "wipes out" an entire county, and then proceeds to create two new counties out of the material of the old.

W. C. Webb, maintaining the validity of said chapter 106, contended:

The bill was legally and constitutionally passed. The proceedings thereon in the senate in all respects conformed to the requirements of the constitution. True, the senate passed the bill *with amendments*, and not otherwise. But it *passed the bill*,—house bill No. 54. It was the *same bill*, and not another bill. The minds of the two houses met and concurred. Each had passed house bill No. 54. But the senate, at the passing of such bill, submitted certain other or further propositions, upon which it asked the concurrence of the house. The action of the senate, in legal effect, is the same as if it had in words said to the house, "We agree to your bill No. 54, and concur in its passage; but we ask you, not as the condition of our assent, but as a favor, to agree to these propositions, and ingraft them on the bill as amendments thereto. If you so agree, the bill will better express our wishes; but, if you decline to concur, we will withdraw our propositions by receding, and let the bill stand passed as you submitted it to us." The history of legislation everywhere is in accordance with this view, and of the action of the senate in this case. To hold otherwise now would be not only to establish a procedure alike cumbersome and unnecessary, but to nullify a large number of the enactments of every session. In the case of the appropriation bill suggested by counsel on the other side, the real question in that case, and in all cases is, shall an *appropriation* be made? The questions
 *200 of right, policy, propriety, and power, are all *determined by the answer to that question. The house says, "Yes," and suggests the sum of \$50,000. The senate also says, "Yes," thus con-

curing in the passage of the bill making an appropriation, and for the objects and purposes indicated by the house. But it suggests that half the sum named will be adequate to the ends in view, and proposes to the house to reconsider the question of amount. The house considers the proposition and non-concurs. The senate *recedes from its proposed reduction*, thus leaving the amount originally named in the bill, which it has already passed.

The omission of the third section of the bill as passed cannot in anywise affect the validity of the provisions of the bill as approved and published, unless such remaining provisions are, by reason of the omission, incongruous and uncertain; in which case the act might be held void for *uncertainty*, not by reason of the *omission*. But such omitted section in nowise affects or impairs any of the remaining sections. But we contend that the enrolled bill, authenticated by the officers of both houses and approved by the governor, is *conclusive* as a record, and the court cannot go behind it to inquire as to the facts. We agreed that the facts were as claimed by the other side, but not that they were competent evidence to impeach the record, nor that this court had power to receive such evidence for that purpose.

As to the question of power,—the power of the legislature to “wipe out” the county of Howard. It would seem that this question was settled in the case of *State v. Meadows*, 1 Kan. *90, where an act which abolished the county of Madison was held valid, and in which the present chief justice of this court wrote the opinion. [Chief Justice KINGMAN: “An examination of that case, as I recollect it, will show that the question of the power of the legislature to abolish an organized county was not submitted to or considered by the court.”] True, the precise question raised in this case was not raised or decided in that. But the case is wonderfully suggestive, and most pertinent here. While the question actually decided was whether *201 the act of *the territorial legislature approved January 31,

1861, two days after the passage of the act of congress admitting the state of Kansas, was valid, yet the case has an important bearing here, as it discloses the exercise by the legislature, *under the state constitution*, of the same power exercised by the legislature in abolishing Howard county, and that the existence of that power, as a proper legislative power, *was not questioned*. Madison county was created in 1855. Laws 1855, c. 80, § 18. On the north (section 17 of same act) was Breckenridge (now Lyon) county; on the south (section 19) was Greenwood. Each of these counties was 24 miles square. Madison was fully organized at once. By section 35, same act, and by chapter 34, p. 215, same volume, the town of Columbia was made the county-seat; and chapter 41, same volume, provided for the holding of courts in Madison county. From 1855 to 1861 said county was in full operation as an organized county, with its officers, its courts, and its records. The legislature, on the thirty-first of January, 1861, passed an act *abolishing* said Madison county,

and annexing one-half the territory thereof to Breckenridge, and the other half to Greenwood. Terr. Laws 1861, p. 17, c. 13.

This court held (*State v. Meadows, supra*, 94) that the legislature which passed that act was a valid legislature, legally in session, and, under section 3 of the schedule to the constitution, became and was invested with the lawful powers of a legislature *under the constitution*, (which had then just gone into effect by the admission of the state into the Union,) and that said act abolishing Madison county was valid. The report of that case shows that one of the able counsel on the other side of this case (Gov. Shannon) was of counsel there; and in his brief, speaking of the powers of the legislature which passed the act then in question, (if a legal legislature at all after January 29, 1861,) he says, (*State v. Meadows, supra*): "*The powers of the legislature would be those given by the organic act, limited by the restrictions of the constitution.*" When learned counsel and learned courts, gravely trying and judicially determining an action between

parties litigant, are silent upon a question so important there *202 * (as it is so important here) as *whether the legislature has the constitutional power to wholly abolish an organized county, possessing and employing all the offices, officers, records, and courts enjoyed by other organized counties*, that silence ought to be taken as a concession of the existence of the power. The legislative exercise of the power there went a step further than it did in the case here. Madison county was in fact *abolished*; while Howard county is converted into two distinct counties, with its records preserved to one of them.

The act purports to create two *new* counties. If it does this, there can be no doubt but the legislature had power to locate the county-seat of each where it pleased. Section 1 of article 9 of the constitution, so far as it relates to county-seats, applies only to those which have been first located, and it is only such that can be "changed." But if the act in question merely *divides* Howard county, setting off and creating *one* new county by the name of Elk, and changes the name of Howard to Chautauqua, (as may well be claimed from section 3 of the act as published,) then, as to Elk, the power to locate the first county-seat must be conceded; and as, by the division, the old county-seat of Howard is in the detached territory, there was no county-seat in Chautauqua to "change," and it was competent for the legislature to establish one. See *Attorney General v. Fitzpatrick*, 2 Wis. 542, 548.

The bill has but "one subject," the county of Howard, which it proposes to divide and dispose of in such manner as shall conduce to the public weal, (*State v. Merrill*, 1 Chand. 258;) and, as the bill has but "one subject," the "title" is most ample, clearly expressing that subject, and the general purpose of the bill in disposing of its subject.

Wilson Shannon, contending that said chapter 106, Laws 1875, was unconstitutional and void, submitted:

Howard county was a regularly organized county, and had a county-seat established by law at Elk Falls. The county of Howard is attempted to be divided by said chapter 106. This act divides the *208 county of Howard into two parts,—calls one part the *county of Chautauqua, the other part the county of Elk. Elk Falls, the county-seat of Howard county, is contained in the division called Elk. The act fixes the county-seat for the so-called Elk county at Howard City, and is silent as to Elk Falls. The other division is called Chautauqua county, and the act fixes the county-seat of the so-called county at a place called Sedan. We claim that this law violates several provisions of the constitution, and is void, and that in a legal point of view Howard county remains as though this law had never been passed.

But, first, we contend that this act was not passed according to the provisions of the constitution. "The yeas and nays shall be taken on the final passage of every bill." Article 2, § 10. "A majority of all the members elected to each house, voting in the affirmative, shall be necessary to pass any bill." Article 2, § 13. "Every bill passed by the house and senate shall be signed by the presiding officers, and presented to the governor," etc. Article 2, § 14. "The reading of the bill by sections on its final passage shall in no case be dispensed with." Article 2, § 15. We claim that the act dividing Howard county was not passed in accordance with the above provisions of the constitution. The senate amended the bill as the house passed it. It was then read and passed. Afterwards the senate receded from its amendments, but it was not again read, nor again passed; and this is shown by the senate journal. The senate never passed the bill which the house had passed, and the house never concurred in the bill which the senate had passed. Upon this point I specially invite the attention of the court to the case of Spangler v. Jacoby, 14 Ill. 298, which seems directly in point, and which sustains our view of this question.

We claim that the following constitutional provisions have been violated by the act known as chapter 106, Laws 1875, to-wit:

- (1) Article 2, § 16. "No bill shall contain more than one subject, which shall be clearly expressed in this title."
- *204 (2) Art. 9, § 1. "The legislature shall provide for organizing new counties, locating county-seats, and changing county lines; and no county-seat shall be changed without the consent of a majority of the electors of the county," etc.
- (3) Art. 9, § 3. "All county officers shall hold their offices for the term of two years, and until their successor shall be qualified."
- (4) Art. 10, § 1. "In the future apportionment of the state, each organized county shall have at least one representative." And the amendment to the constitution adopted in 1873 (Laws 1875, p. xl.) provides that each organized county shall have at least one representative.

The above provision, that a bill shall contain but one subject, which shall be clearly expressed in the title, is violated by the act in question. It is not sufficient that a subject be expressed in the title of the act. The true and actual subject must be thus expressed. *People v. Hills*, 35 N. Y. 453. This bill, instead of containing but one subject, contains many. Among other things, it purports to divide Howard county into two counties. That is one subject. It changes the county-seat of Howard county from *Elk Falls* to *Howard City*. This is the practical result. This is another subject, distinct from the division of the county. And this change of the county-seat of Howard county is without the vote of the people, which is in violation of section 1 of article 9, above quoted. But this subject of changing the county-seat is not expressed in the title, and no one would suspect that the bill changed the county-seat of Howard county from reading the title. This alone makes the act void. It comes within the letter and spirit of the constitution, and is one of the very evils the framers of the constitution attempted to guard against. It cannot be claimed that the location of the county-seat at Howard City was one of the necessary details by which the object of the act is to be accomplished; granting, for the sake of the argument, that the legislature could divide Howard county, and make two counties out of one. That territory which included the county-seat of Howard county had a right,

under the constitution, to retain the county-seat until it was *205 changed by the vote of the people, as the constitution *provides; and the location at Howard City was not necessary to accomplish the object of the law; that is, a division of Howard county. And it is only in those cases where the act is necessary and proper to accomplish the object of the bill, as expressed in the title, that the courts will sustain the bill as constitutional. This question is illustrated in *People v. Commissioners of Taxes*, 47 N. Y. 504, and in *Litchfield v. Vernon*, 41 N. Y. 139, where the court lay down the true rule, and say that it is only necessary that the title express the subject of the act, and not the provisions of the act, or the details by which the object of the act is to be accomplished. The object of the act (the division of Howard county) is in no way promoted by changing the county-seat. The county would have been divided if the county-seat had been left at Elk Falls, just as effectually as it is with the county-seat removed to Howard City. The removal of the county-seat does not affect the division one way or the other. But the main object of this act, and the division of the county, was in fact to secure for two places, Sedan and Howard City, county-seats. This was the bone of contention among the people, or rather the little cliques that had an interest in towns that they desired to give value and importance to, by making them county-seats. They therefore combine together and divide the county into two parts, and select their own villages and enact them into county-seats. Now, it is this very corrupt combination and system of log-rolling that the framers of the

constitution carefully guarded against. But dividing the territory of the county of Howard, and making two new counties out of its territory, and making county-seats in each, neither of which is or ever was the county-seat of Howard county, and requiring the records, etc., to be removed to these new county-seats, is changing the county-seat of Howard county without a vote of the people. If this could not be done directly, it cannot be done indirectly.

But this law contains more than *one* subject, and in this violates the constitution. It changes the county-seat of Howard county
 *206 from Elk Falls to Howard City, which object is *not expressed in the title. It creates the county of Chautauqua out of the territory of Howard county, and locates the county-seat at Sedan. This is one distinct subject, and the creation of Chautauqua county has no necessary connection with the creation of Elk county. Chautauqua county did not interfere with the county-seat of Howard county, and was the proper subject of a distinct bill. It should have been a bill entitled "A bill to create the county of Chautauqua out of part of the territory of Howard county." Such a bill would have stood on its own merits. But no such bill could have passed; hence the combination, and putting the two new counties in the same bill, and fixing new county seats for both counties. By this combination those interested in Sedan and Howard City were able to pass the bill, (that is, if it was legally passed;) and this is the very evil the constitution intended to prevent. The bill abolishes the county of Howard practically, and without saying so. It does not change the name of Howard, but absorbs all its territory by making two new counties, with new names, and new county-seats. This act is unconstitutional because it contains more than one subject, some of which are not expressed in the title: (1) A division of Howard county. (2) The creation of the county of Elk. (3) The creation of the county of Chautauqua. (4) The location of the county-seat for Chautauqua county. (5) The location of county-seat of Elk county, when there was within the territory of that county a county seat already legally located. (6) For division of property and indebtedness. (7) For the taxes and records of the same. The records are given to Chautauqua county, the new county, and not left with the old one, which retains the county-seat. (8) The act, as published, impliedly provides that the officers of Howard county may become officers of whichever county they are electors in at the time the act takes effect, and makes no provision for the old officers giving bonds for the new counties. (9) The supplemental act (Laws 1875, p. 115) provides for filling vacancies in office.

*207 *Can the legislature create a new county out of territory belonging to an old county, and continue the old officers who may reside in the territory of the new county in the same offices? When a new county is created, new officers must be elected or appointed, who must give bonds as required by law. The act in ques-

tion attempts to do what cannot be done under the constitution. The act creates Elk county without representation in the legislature. This cannot be done. Chautauqua county is to be the Sixty-sixth representative district. But Elk county is attached to no district. This is an apportionment of the territory of Howard county, and which was once apportioned as the Sixty-sixth district, which new apportionment is made a year in advance of the time provided by law for making apportionments. The act establishes a district court in and for Elk and Chautauqua counties, and attaches said counties to the Thirteenth judicial district, and provides for holding courts therein. It will thus be seen that the act in question contains more than one subject, and some of which are not expressed in the title. It is therefore unconstitutional and wholly void. *Cooley, Const. Lim. 148.* I will call the attention of the court to the following cases and authorities, all of which throw more or less light on the question now before the court: *Cooley, Const. Lim. 144, 147, 149; State v. Adamson, 14 Ind. 296; Thomasson v. State, 15 Ind. 449; Brandon v. State, 16 Ind. 197; Mewherter v. Price, 11 Ind. 199; Pigg v. State, 9 Ind. 363, 380; Indiana Cent. Ry. Co. v. Potts, 7 Ind. 681; Kuhns v. Krammis, 20 Ind. 490; People v. Mahaney, 18 Mich. 492, 494; Ryerson v. Utley, 16 Mich. 269, 277; Fishkill v. Fishkill, 22 Barb. 642; Spangler v. Jacoby, 14 Ill. 297, 299; Morgan v. King, 35 N. Y. 453; People v. O'Brien, 38 N. Y. 195; Norton v. Rooker, 1 Wis. 204; Attorney General v. Fitzpatrick, 2 Wis. 548.*

The bill as approved and published is not the bill passed, (if it was passed at all by *both* houses.) But it is objected that we cannot go behind the records of the house and senate, and inquire as to the contents of the bill which in fact was passed. This would destroy the legislature as a law-making body, and enable the *officers* of the two houses to make or alter any bill, or substitute one for another; and, if the governor should affix his approval to the false or fraudulent bill, it would become the law, although not assented to or voted for by a single member of the legislature. This doctrine is too dangerous to meet with the unqualified sanction of the court.

VALENTINE, J. The only question involved in these three cases is whether a certain act of the legislature entitled "An act to divide the county of Howard, and to erect the territory thereof into the counties of Chautauqua and Elk, to provide for the due organization of said counties, the filling of vacancies in offices, for the proper division of the property and indebtedness of Howard county, and in regard to the taxes and records thereof," approved March 5, 1875, (Laws 1875, p. 148,) is sufficiently valid to accomplish its object, that is, to create the two new counties of Chautauqua and Elk out of the old county of Howard; or whether said act is wholly and absolutely void. Said act was house bill No. 54. Said bill was passed by the house in a legal

and proper manner. It was then taken to the senate, where it was amended in several particulars, and, as amended, was then passed in a legal and proper manner. It was then returned to the house, but the house refused to concur in any of the several amendments. It was then returned to the senate, and the senate, by a vote by yeas and nays properly entered on the journal, receded from all its amendments. The bill was not passed by the legislature in any other manner than as above specified. The bill was then enrolled; but, by a mistake of the enrolling clerk and the enrolling committee, section 3 of the original bill was left out, and the numbers of sections 4 to 12, inclusive, of the original bill, were changed, and in the enrolled bill numbered respectively from 3 to 11. The bill as enrolled was properly signed by the chief clerk of the house, the secretary of the senate, the presiding officers of the two houses, and was then presented to the governor, who approved and signed the same, and

*209 it was then filed with the secretary of state, where it is now preserved. The published act is an exact copy of the enrolled bill, except that the signatures to the enrolled bill are omitted in the published copy. After the enrolled bill was presented to the governor, the committee on enrolled bills reported to the house that the bill was "correctly enrolled," and that they had presented the same to the governor for his approval. The engrossed bill, as it passed the house, is also on file in the office of the secretary of state, but it is not signed by any person, and there is no record evidence of any kind whatever tending to show that it is in fact such engrossed bill. The only record evidence of any kind whatever showing what said bill No. 54 contained, in any of its stages from the time it was first introduced in the house until it was finally filed as an enrolled bill in the office of the secretary of state, is the enrolled bill itself. The journals of the two houses are entirely silent upon the matter, and the said engrossed bill, as we shall presently see, is not a record, nor a part of any record. An engrossed bill, in this state, is the bill as copied for final passage in either house. It is the bill, as copied before its passage, with the amendments made up to that time, and there may be one or more engrossed bills of each bill introduced; and each of these engrossed bills may be different from any of the others, for each engrossed bill simply represents the bill as the bill is when it is engrossed. The enrolled bill is the bill as copied after its final passage through both houses, and as it has passed both houses, and as presented to the governor for his signature and approval. There can be only one enrolled bill. Our laws with regard to preserving records of the proceedings of the legislature are as follows. The constitution, art. 2, provides:

"Sec. 10. Each house shall keep and publish a journal of its proceedings. The yeas and nays shall be taken, and entered immediately on the journal, upon the final passage of every bill or joint resolution.

"Sec. 11. Any member of either house shall have the right to protest against any bill or resolution; and such protest shall, without delay or alteration, be entered on the journal."

*210 "Sec. 14. Every bill and joint resolution passed by the house of representatives and senate shall, within two days thereafter, be signed by the presiding officers, and presented to the governor. If he approve it, he shall sign it; but, if not, he shall return it to the house of representatives, which shall enter the objections at large upon its journal, and proceed to reconsider the same. If, after such reconsideration, two-thirds of the members elected shall agree to pass the bill or resolution, it shall be sent, with the objections, to the senate, by which it shall likewise be reconsidered; and, if approved by two-thirds of all the members elected, it shall become a law. But in all such cases the vote shall be taken by yeas and nays, and entered upon the journal of each house."

The statutes provide, (Gen. St. 975, § 15, subd. 6:)

"He [the secretary of state] shall be charged with the safe-keeping of all enrolled laws and resolutions, and he shall not permit the same, or any of them, to be taken out of his office or inspected, unless by order of the governor, or by resolution of one or both houses of the legislature, under a penalty of one hundred dollars."

"Sec. 19. It shall be the duty of the secretary of state to cause the original enrolled laws and joint resolutions passed at each session of the legislature, together with an index containing the titles of the same, to be bound in a volume in a substantial manner, and in the order in which they are approved; and no other or further record of the official acts of the legislature, so far as relates to acts and joint resolutions, shall be required of said secretary; and he shall also cause the title thereof, with the session at which the same shall have been passed, to be written or printed on the back of such volume."

The statutes require that the secretary of state shall publish the laws from these enrolled laws filed in his office. Gen. St. 544, § 2. The secretary of state is also required to publish the legislative journals. Gen. St. 544, § 5. It will be noticed that the legislative journals and the enrolled bills are the only records required by law to be kept for the purpose of showing any of the legislative proceedings. There is no provision for preserving the engrossed bills as a record of the legislative proceedings; and, as the legislative jour-

*211 nals and the enrolled bills are, by law, records, and the only records, of legislative proceedings, they must of course import absolute verity, and be conclusive proof as to whether any particular bill has passed the legislature, when it passed, how it passed, and whether it is valid or not. In many of the states, the enrolled bills alone are conclusive evidence upon this subject. *Sherman v. Story*, 30 Cal. 253; *Evans v. Browne*, 30 Ind. 514; *Pangborn v. Young*, 32 N. J. Law, 29; *Green v. Weller*, 32 Miss. 650; *Swan v. Buck*, 40 Miss. 268; *Pacific R. Co. v. Governor*, 23 Mo. 352; *Eld v. Gorham*, 20

Conn. 8; Duncombe v. Prindle, 12 Iowa, 2; Broadnax v. Groom, 64 N. C. 244, 247; Fouke v. Flemming, 13 Md. 392; Mayor v. Harwood, 32 Md. 471. See, also, in this connection, Miller v. State, 3 Ohio St. 475, 479; People v. Supervisors, etc., 8 N. Y. 317; People v. Devlin, 33 N. Y. 269; Supervisors, etc., v. People, 25 Ill. 181, 183; People v. Starne, 35 Ill. 121. In nearly every state from which the foregoing decisions are taken, and perhaps in every one of them, they have constitutional provisions requiring that each branch of the legislature shall keep a journal of its proceedings. This is particularly true in California, Indiana, New Jersey, and Connecticut. And in every one of these states, except Connecticut, Ohio, New York, and Illinois, it is held that the final bill signed by the presiding officers of the two houses, and approved by the governor, usually called the "enrolled bill," is conclusive evidence of the proper passage of such bill, and of its validity. In Connecticut, in accordance with certain statutes in force there, the published laws on file in the office of the secretary of state, properly certified, are conclusive evidence of the passage and validity of such laws, notwithstanding that the constitution requires that legislative journals shall be kept and preserved. Since the decision made in New York, reported in People v. Devlin, 33 N. Y. 269, 279-283, we suppose it will hardly be claimed that the state of New York furnishes any authority for going behind the enrolled bills for the purpose of impeaching the law. In Illinois *212 it is held that, except for certain constitutional provisions in that state, "a bill signed by the speaker of the two houses and approved by the governor would be *conclusive* of its validity, and binding force as a law." People v. Starne, 35 Ill. 121, 135. The principal constitutional provision referred to is as follows: "On the final passage of all bills, the votes shall be by ayes and nays, and shall be entered on the journal; and no bill shall become a law without the consent of a majority of all the members-elect in each house." Const. Ill. 1848, art 3, § 21. But the supreme court of Illinois has never held that the enrolled bills may be impeached by anything except by the legislative journals; and the legislative journals, even where they apparently contradict the enrolled bills, are not always sufficient to invalidate such enrolled bills. In the case of Supervisors, etc., v. People, 25 Ill. 183, the supreme court of that state say: "The constitution does require that every bill shall be read three times in each branch of the general assembly before it shall be passed into a law, but the constitution does not say that these several readings shall be entered on the journals." And therefore said court held in that case that an act of the legislature was valid, although the senate journal did not show that the bill had been read three times.

Now, let us apply the doctrine of the supreme court of Illinois to the case at the bar, and the able and venerable counsel representing the parties claiming that said Howard county division law is void, relied, in his argument upon the question, almost wholly upon an earlier

decision of the supreme court of Illinois, to-wit, *Spangler v. Jacoby*, 14 Ill. 297. We have no constitutional provision requiring that a bill introduced into either house of the legislature shall in any of its stages be spread upon the journal of either house. We have no constitutional provision requiring that any record of any such bill shall be kept or preserved except as it is kept and preserved in what we call the "enrolled bill." The bill in this particular case (and this is true of all other bills) was not in any of its stages entered *213 upon the journal of *either house of the legislature. The journals in this case do not contradict the enrolled bill; they do not in any manner conflict with any presumption in favor of the validity of the enrolled bill; nor do they furnish the slightest evidence that the bill was not legally passed by both branches of the legislature, or that it was not properly enrolled, or properly signed by the presiding officers of the two houses, or that it was not properly approved and signed by the governor, and properly filed away in the office of the secretary of state. Indeed, the report of the enrolling committee entered in the journal of the house does furnish some evidence that the bill was "*correctly* enrolled." We do not think that we can resort to evidence outside of the enrolled bill, and outside of the journals of the legislature, for the purpose of impeaching the enrolled bill as a valid law. Of course, we take judicial notice, without proof, of all the laws of our own state. All the courts of the state are required to do this. And, in doing this, we take judicial notice of what our books of published laws contain, of what the enrolled bills contain, of what the journals of the legislature contain, and indeed of everything that is allowed to affect the validity of any law, or that is allowed to affect or modify its meaning in any respect whatever. But in doing this, if it be merely for the purpose of taking judicial notice of our laws, we cannot take judicial notice of a fact which is not allowed to affect the validity or meaning of a law in any respect whatever; and such fact cannot even be proved to us for any such purpose. For instance, if the mistake in enrolling said bill No. 54 were allowed in any manner to affect the validity or meaning of the law as enrolled and filed in the secretary's office, we would take judicial notice of such mistake; but as such mistake (not being shown by any record) is not allowed to have any such effect upon the validity or meaning of said law, we can neither take judicial notice of the mistake, nor can it be proved to us. Now, as we have before intimated, the enrolled bills and the legislative journals being records provided for by the constitution importing absolute verity, we *214 cannot take judicial notice that they are untrue, nor can we even allow evidence to be introduced for the purpose of proving that they are not true. Therefore, as the enrolled bill of the law dividing Howard county, and the journals of the legislature, would seem to prove that said bill had been legally passed by the legislature, and had been legally approved by the governor in the form as it now appears enrolled in the secretary's office; we

cannot take judicial notice that said bill was not properly so passed and so approved, and we cannot even allow evidence to be introduced showing that it was not so passed and so approved. We must therefore determine that the bill was legally passed and approved, and that it is now a valid law as it appears in the secretary's office.

There were several other objections urged against the validity of said law; but, as we think, none of them are tenable, and all of them must therefore be overruled.

We think that the provision of the constitution requiring that "the yeas and nays shall be taken, and entered immediately on the journal, upon the final passage of every bill or joint resolution," (article 2, § 10,) was sufficiently complied with. It would, of course, have been more formal if the senate, after receding from its own amendments, had again put the bill upon its final passage, and passed the bill without the amendments, as it had done with the amendments. But the manner in which this bill was passed has always been acted upon; and, if we should now hold it insufficient, we should probably invalidate a very large proportion of all the laws that have ever been enacted in Kansas. Upon this question see the case of *People v. Chenango*, 8 N. Y. 318, 327, *et seq.*

The "subject" to be contained in a bill under section 16, art. 2, of the constitution, which provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title," may be as broad and comprehensive as the legislature may choose to make it. It may include innumerable minor subjects, provided all these minor subjects are capable of being so combined as to form only one
 *215 grand and comprehensive subject; and, if the title to the bill containing this grand and comprehensive subject is also comprehensive enough to include all these minor subjects as one subject, the bill, and all parts thereof, will be valid. *Bowman v. Cockrill*, 6 Kan. *234, *235; *Sedg. St. & Const. Law*, (2d Ed.) 517 *et seq.* The title to the bill now under consideration is, as we think, sufficient for the purpose of creating, upon equitable principles as to indebtedness, property, and taxation, two fully-organized new counties, to be named Elk and Chautauqua, out of the old county of Howard; and this is really but one subject, which is the substance of the bill. We would also refer to the following authorities upon this question: *Blood v. Mercelliott*, 58 Pa. St. 391; *Duncombe v. Prindle*, 12 Iowa, 1; *Brandon v. State*, 16 Ind. 197; *Humboldt Co. v. County of Churchill*, 6 Nev. 30. Even if section 10 of the act (Laws 1875, p. 152) should be void, the rest of the act may be valid.

We think the legislature has the power to abolish counties and county organizations whenever it becomes necessary for them to do so in changing county lines, or in creating new counties. Whether they could do so in any other case, it is not necessary for us now to determine. In the case of *Hunt v. Meadows*, 1 Kan. *90, it was held that an act of the territorial legislature (Terr. Laws 1861, p. 17) passed

after the state was admitted into the Union, destroying the county of Madison, was valid. In Iowa, in the case of *Duncombe v. Prindle*, 12 Iowa, 1, it was held that an act destroying the county of Humboldt was valid. And we think such acts are valid. Of course, when a county is destroyed, the county-seat must go with it. The county-seat of an old county need not be made the county-seat of any new county, or, indeed of any county, new or old, into which such county-seat may be placed by a change of county lines, or by the creation of a new county; for, if such county-seat must continue to be the county-seat of the county into which it may be placed by change of county lines, a county might some time, by such change of *216 county lines, have two or three *county-seats. In this connection, see *Blood v. Mercelliott*, *supra*; *Attorney General v. Fitzpatrick*, 2 Wis. 542.

In two of the three cases at bar—that brought by Oberlander, as relator, against Wright and others, and that brought by McBrian, as relator, against Titus and others—judgment will be rendered in favor of the plaintiff, and peremptory writs of *mandamus* will be issued as prayed for. In the third case, brought by Powell and Barber, as relators, against Light, judgment will be rendered in favor of the defendant, and the peremptory writ of *mandamus* prayed for will be refused.

(All the justices concurring.)

CYNTHIA JACKSON and others v. GEORGE F. LATTA.

July Term, 1875.

1. **Sheriff's Deed: Void Deed.** A sheriff's deed will be held to be void if it be shown that such deed is not founded upon or sustained by any judgment entered of record.
2. **Judgment: Entered Nunc pro Tunc.** Where, in an action, a trial was duly had, verdict returned and recorded, judgment actually rendered, but by some oversight or omission such judgment was not entered of record, it would seem that the trial court, at any time afterwards, upon notice to all the parties interested, may direct that such judgment be entered *nunc pro tunc*.

Error from Linn district court.

Ejectment brought by Cynthia Jackson and her three sons, James, John W., and Thomas, the widow and children of Thomas Jackson, deceased. The petition alleged that said deceased died on the twenty-ninth of December, 1861, seized in fee of the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, and

lots Nos. 5 and 6, of section 10, township 21, of range 25 east, in Linn county, and containing together 149.51 acres; that the plaintiffs are the only heirs at law of said deceased; that plaintiffs James, John W., and Thomas are minors, for whom plaintiff Cynthia has been duly appointed guardian, etc.; that, as such heirs, plaintiffs are the lawful owners of said land, having a legal estate therein, and that they are entitled to the possession thereof; and that defendant, Latta, keeps them out of possession, etc. Latta appeared and answered, admitting his possession, and alleging—*First*, that he is the owner in fee of said lands; and, *second*, that he claims title to said lands under a sheriff's deed, duly executed, etc., on the thirteenth day of June, 1859, "and that more than five years have elapsed since the recording of said sheriff's deed." Reply, general denial. Second trial, at the April term, 1872, of the district court, (at which term the judge of the Tenth judicial district presided for and in the absence of the judge of the Sixth district.) The plaintiffs gave in evidence a patent for said land from the government to said Thomas Jackson, deceased, dated August 15, 1862, followed by proof showing that plaintiffs were the widow and children of said deceased, and that said Cynthia had been appointed guardian of the other plaintiffs by the county court of Monroe county, Missouri; and thereupon Latta offered in evidence the sheriff's deed under which he claimed, and being a deed for "the N. E. $\frac{1}{4}$ of section 10, township 21 south, of range 25 east, Linn county, Kansas territory, containing 135 acres more or less," executed by the sheriff of Linn county to Asa Hairgrove, dated June 13, 1859, and purporting to be issued upon a sale made by said sheriff, by virtue of a writ of execution issued to him upon a judgment rendered by the United States district court sitting in Linn county, at the October term, 1858, "in an action wherein Asa Hairgrove was plaintiff, and Charles Hamilton, Algernon Hamilton, Michael Hubbard, Thomas Jackson, Stephen Hightower, James Tate, Frank Powell, Joseph Powell, Levi Henderson, A. Henderson, William Yewlock, G. P. Hamilton, A. B. Brocett, Jasper Brumfield, and N. B. Matlock, were defendants."

This deed was objected to on the ground that no judgment, execution, and sale had been shown, but the court admitted the deed. Latta then showed regular conveyances from said Hairgrove to himself. The plaintiffs, in rebuttal, gave in evidence, to impeach said deed, the record and papers in the action mentioned in the deed. The record shows a petition filed August 13, 1858, in which Hairgrove alleges that the defendants, Hamilton, Jackson, and others, "on the nineteenth of May, 1858, with force and arms, and against the will of plaintiff, did capture and take him from and near his residence, in the county of Linn and territory of Kansas, and afterwards, on the afternoon of the same day, wickedly, maliciously, and without just cause or provocation, with fire-arms, did shoot said plaintiff, thereby greatly injuring and wounding his face, and breaking the bones of plaintiff's hands," and claiming \$5,000 damages; a sum-

mons and service on Matlock; affidavit for publication as to the other defendants; affidavit and undertaking for and order of attachment, with sheriff's return on the attachment, showing a levy on the lands described in the deed, and described as the property of Thomas Jackson; a notice, published in a newspaper, requiring defendants to answer said petition on or before September 11, 1858. A "motion to quash order of attachment," "because an attachment is not proper remedy in *this form* of action," was found among the papers, and is copied in the transcript. It is signed, "MORRHOUSE, Atty. for Defts." This motion does not seem to have been heard or disposed of. The case was tried October 29, 1858, at said October term, 1858, of said district court of the United States; Hon. JOSEPH WILLIAMS, United States district judge, presiding. The journal entry of such trial, as given in the transcript, is as follows:

"The case of Asa Hairgrove, plaintiff, against Charles A. Hamilton *et al.*, defendants, was called for trial, and thereupon the defendants in the above cause was called three times, and they came not, neither by themselves nor attorneys; whereupon judgment was rendered by default against defendants, Charles A. Hamilton *et al.* A jury being desired to assess the damages in the above case, the following persons were impaneled and sworn to try the case according to law
 *219 *and evidence, to-wit, [giving names of jurors.] The evidence being heard in the above case, and jury charged, the case was submitted to them for their consideration. After being absent about twenty minutes, the jury returned a verdict as follows:

"We, the jury, find for the plaintiff, and assess his damages at \$5,000.
 THOS. H. BUTLER, Foreman."

The transcript also shows that, afterwards, on the ninth of November, 1858, said clerk of said court issued an order to sell the lands and tenements, goods and chattels, of said defendants, attached in said action, which said order is in the words and figures, to-wit:

"And now comes Asa Hairgrove, plaintiff, by his attorneys, Mitchell & Ayers, and makes proof that he caused a notice containing a summary statement of the object and prayer of said petition, and notified said defendants, Charles A. Hamilton *et al.*, that they were required to answer the said petition on the eleventh day of September, 1858, to be published six consecutive weeks in the Fort Scott Democrat, a newspaper published in the town of Fort Scott, Bourbon county, Kansas territory, and of general circulation in Linn county, (there being no newspaper published in this county,) the last publication being on the eleventh of August, 1858; and now the said defendants, having failed to appear, and answer or demur to said petition, being three times solemnly called, came not, but made default, and thereupon, by default, judgment is entered against said defendants. On motion of plaintiff's counsel it is therefore ordered that a jury

be impaneled to assess the damages. Thereupon came a jury, to-wit, [giving the names of the jury,] who, being duly impaneled, and sworn the truth to speak, upon the inquiry aforesaid, do on their oaths say and assess the plaintiff's damages at the sum of \$5,000. It is therefore ordered by the court that the plaintiff recover from said defendants the said sum of \$5,000, and his costs herein expended, taxed at \$47.20; and it is further ordered by the court that the said sheriff proceed as upon execution to advertise and sell so much of the personal and real property heretofore attached in this action, now in his hands, as will satisfy the said plaintiff's judgment aforesaid, and all costs herein, taxed at \$47.20. J. WILLIAMS, Judge."

The transcript also shows that said "order of sale" was afterwards returned by the sheriff, showing that he had duly advertised said attached property, and that on the twenty-fifth of December, 1858, by virtue of said "order of sale," he sold said N. E. $\frac{1}{4}$ of sec. 10, T. 21, R. 25, containing 135 acres, to Asa Hairgrove for \$6.70 per acre." Then follows this entry:

"On motion of said plaintiff, by Mitchell & Ayers, his attorneys, and on producing the return of the sheriff of this county of Linn of a sale of real estate made by him on the twenty-fifth day of December to Asa Hairgrove, * * * on an attachment issued in this case, and dated the eighteenth of August, 1858, and in an order of sale made by the district court of Linn county, Kansas territory, at the October term of said court, on the twenty-ninth of October, 1858, and the court, on the examination of said proceedings, being satisfied that said sale had been made in all respects in conformity to law, it is ordered that the said sale and proceedings be, and the same are hereby, confirmed, and the said sheriff is ordered to make to said purchaser a deed for the lands and tenements so sold.

"Made and done this seventeenth day of May, 1859.

"J. WILLIAMS, Judge."

The plaintiffs, Cynthia Jackson and others, having offered said transcript and record in evidence, and the same being received and read, thereupon moved to exclude said sheriff's deed so as aforesaid offered by defendant, Latta. This motion was overruled, and excepted to. The plaintiffs asked the following instruction, which was refused: "That the sheriff's deed read in evidence in this case is void, and that Asa Hairgrove took no title to the land in dispute under and by virtue of the said deed." The defendant asked an instruction that the plaintiffs' action, not being brought within five years from the recording of said sheriff's deed, was barred by statute of limitations, which was refused. But the court gave the following instruction: "The judgment recovered against Thomas Jackson, in the case of Asa Hairgrove v. Thomas Jackson *et al.*, and pursuant to which the sale of said lands in controversy was had, was and is a good and valid judg-

ment, and in full force and effect in law, so far as it affects the land in controversy, sold in pursuance to said judgment."

*221 *The jury found in favor of Latta, defendant. New trial refused, and judgment on the verdict.

McComas & McKeighan and E. M. Hulett, for plaintiffs.

If there was a judgment in form upon or under which the sale was made, such judgment was void for want of jurisdiction. The summons, as to all the defendants except Matlock, is returned "not found." The affidavit for publication is in these words: "Plaintiff, being duly sworn, says that service in the above case cannot be had upon the defendants, except by publication." Upon a publication under this affidavit, the defendants were called three times, and came not, whereupon "judgment was rendered by default." This was not sufficient to give the court jurisdiction to render any judgment. *Shields v. Miller*, 9 Kan. *390. But there is no judgment. A jury was called and assessed the damages against the defendants; but it nowhere appears in the record that any judgment was rendered upon the verdict, or entered upon the default. Immediately following the verdict, the transcript reads: "Afterwards, on the ninth of November, 1858, (the case having been heard on the twenty-ninth day of October, 1858,) said clerk of said court issued an order to sell the lands and tenements, goods and chattels, attached in said action, which said order is in words and figures as follows, to-wit." The "order" is then given, and is signed by the judge, instead of the clerk, and is in form of a judgment upon the verdict of the jury. Such order is not a judgment. It recites no judgment, as none was ever entered. It is only the statement of what the clerk supposed the unwritten judgment was; and being signed by the judge, or his name being affixed by the clerk, does not convert said "order of sale" into a judgment, even in form. No legal sale could be made under the attachment until a judgment was rendered upon a sufficient publication; and the record shows there was no legal publication against the defendants. *Repine v.*

McPherson, 2 Kan. *340.

*222 *Among the files was found a paper purporting to be a motion to discharge the attachment. It was claimed by defendant below that this paper showed an "appearance" by Jackson and the other defendants in the original action. Upon this point, we submit the following observations: This paper was never marked "Filed" by the clerk. It was never called to the attention of the court, nor acted upon. There is nothing to show it was not stuck into the files long after the lands in controversy were sold under such pretended judgment. It is signed, "MOREHOUSE, Atty. for Defts.;" but whether the defendant who was served, or some of the other defendants, it does not say. There is nothing in the proceedings of the court, as shown by the journal entries, to show this man "Morehouse" ever acted, or assumed to act, in the case as attorney for any defendant. On the contrary, the records show the judgment was rendered by "default,"

and not upon appearance. We contend that the pretended motion to quash cannot be regarded as an appearance of Thomas Jackson, and this leaves the case, as to him, without service, either personal or by publication, and of course without jurisdiction to render the pretended judgment under which Latta claims title.

VALENTINE, J. This was an action in the nature of an action of ejectment, brought by Cynthia Jackson and others against George F. Latta. The plaintiffs claim as heirs of the original patentee, Thomas Jackson. The defendant claims under a sheriff's deed executed June 13, 1859, to Asa Hairgrove, on a supposed judgment rendered in favor of said Hairgrove, and against said Thomas Jackson and others. On the trial in the court below, after the plaintiffs had introduced their evidence, and rested their case, the defendant introduced said sheriff's deed in evidence, showing a regular chain of title from Hairgrove to himself. The sheriff's deed was of course sufficient evidence, *prima facie*, to show that the title to the property in controversy had passed from Jackson to Hairgrove. Ogden *v.* Walters, 12 Kan. *292, and cases there cited. The plaintiffs then introduced the record of the proceedings upon which said sheriff's deed is founded. No objection was made to the introduction of this record. No claim was made that it was not the whole of the record, and a true record of each and all of the proceedings had in the case of "Hairgrove against Thomas Jackson and others," which constitutes the foundation for the defendant's sheriff's deed. Hence, if this record should be defective in any essential and material particular, the sheriff's deed founded thereon must be void. Now, said record seems to show that no judgment was ever entered of record in said case of "Hairgrove against Jackson and others;" and, as judgments can be proved only by a record, it would seem to show that no such judgment was ever rendered. There is no record of any such judgment, and hence, for the purpose of the case, we are bound to say that no such judgment was ever rendered. And, there being no judgment, said sheriff's deed of course is void. It cannot exist without having a judgment as a foundation. It is also claimed by the plaintiffs that said sheriff's deed is void for other reasons, but we do not think that the claim is tenable. What answer the defendant would make to the different claims of the plaintiffs we are at a loss to know, for the defendant has filed no brief, nor made any oral argument in this court.

We should think from the record brought to this court that a judgment had in fact been rendered in the said case of "Hairgrove against Jackson and others," but that it had never been entered of record on the journals of the court. We think the evidence furnished by the record itself strongly proves this to be true. And, if we are correct in all this, it would be an easy matter, in a proper proceeding, and with proper notice to all parties interested, to have the judgment that

was actually rendered entered of record *nunc pro tunc*. The verdict of the jury, and the paper signed by the judge, show what the judgment actually rendered, but not entered, was; and, if such *224 judgment was entered *nunc pro tunc*, it would probably uphold said sheriff's deed, not only as against these plaintiffs, who merely claim as heirs of said Thomas Jackson, but as against others also, for the defendant and his grantors have been continuously in possession of the property for many years, their possession commencing before the death of said Thomas Jackson.

The judgment of the court below is reversed, and cause remanded for a new trial.

(All the justices concurring.)

JAMES R. CARTRIGHT v. ARTHUR SMITH.

July Term, 1875.

Supreme Court: Error not Affirmatively Shown: Affirmance of Judgment. In an action of replevin, tried by a justice of the peace, where it is difficult to determine from the record in whose favor the justice found, or intended to find, and where the justice rendered judgment in favor of the defendant for three dollars damages, and rendered judgment in favor of the plaintiff for costs, and did not render any judgment concerning the property in controversy, whereupon the defendant took the case to the district court on petition in error, and the district court reversed the judgment of the justice of the peace, and then rendered judgment in favor of said defendant for his costs both in the district court and the justice's court, *held*, that the judgment of the district court will not be disturbed on the application of said plaintiff.

Error from Miami district court.

Replevin, brought by Cartright as plaintiff, and tried before T. J. T., a justice of the peace. The transcript contains the following, made, given, submitted, and pronounced on the thirty-first of May, 1873, to-wit: "On hearing the evidence, and carefully weighing it, together with the pleadings of their attorneys, the court is in doubt that *225 the inclosure around the field where the wheat *was growing was not a legal fence. Such was the testimony of Mr. Barr. But where he supposed the hog got in, it was according to his measurement. Taking the testimony as a whole, the finding of the court is that the plaintiff pay the defendant the three dollars tendered him; and that the defendant, who, according to the evidence before the court, refused to take a fair compensation for damages, when tendered, and when asked what amount of damages he claimed, refused to fix any amount thus amicably sought, (saying 'they would come to town to learn,') pay the costs of suit, taxed at the sum of \$24.15."

The district court, at the September term, 1873, on petition in error, reversed said judgment.

J. H. C. Royce, for plaintiff.

Roberts & Kingsley, for defendant.

VALENTINE, J. This was an action of replevin, brought by Cartright against Smith, in a justice's court, for the recovery of a certain hog which belonged to Cartright. The hog trespassed upon Smith's premises. Smith took it up. Cartright demanded the hog, and tendered Smith three dollars for damages, cost, and expense. Smith refused to receive the tender, or to give up the hog. Cartright then replevied the hog from Smith, and still has possession of the same. The action was tried by the justice without a jury. It is difficult to determine from the record in whose favor the justice found, or intended to find. But the justice rendered judgment in favor of the defendant for three dollars damages, and rendered judgment in favor of the plaintiff for costs, and did not render any judgment concerning the property in controversy. The defendant then took the case to the district court on petition in error. The district court reversed the judgment of the justice of the peace, and then rendered judgment in favor of said defendant, Smith, for his costs, both in the district court and in the justice's court. Now, whether

*226 *the said Smith wrongfully detained said hog or not we cannot tell from the record. Whether the justice intended to find that Smith wrongfully or rightfully detained said hog we cannot tell from the record. Whether the judgment in the justice's court should have been for the plaintiff, or for the defendant, we cannot tell from the record. And therefore, whether the district court erred in its judgment or not, we cannot tell from the record. Perhaps it is fair, where a plaintiff institutes proceedings, and causes costs to be made, that he should pay such costs, unless he make the record show affirmatively that he should not pay them. The apparent reason given by the justice for imposing the costs upon the defendant is certainly not sufficient.

As it is not shown affirmatively that the court below erred, the judgment must be affirmed.

(All the justices concurring.)

F. T. NASH v. W. J. CAMPBELL, Treasurer, etc.

July Term, 1875.

Supreme Court: Review: Order of Probate Judge. A petition in error will not lie to the supreme court to review an order made by the judge of the probate court, refusing a temporary injunction in a case pending in the district court.

Error from Cloud district court.

Action by Nash against Campbell, as county treasurer, to enjoin the collection of a tax. The case is stated in the opinion.

L. J. Crans, for plaintiff, filed an elaborate brief, arguing that *227 plaintiff was, under the law, entitled to an injunction. *He does not discuss the question whether an appeal would lie from the order of a probate judge in refusing to grant an injunction in an action pending in the district court.

H. A. Hunter, for defendant.

First, the probate judge had no jurisdiction, his powers being limited by section 8 of article 3 of the constitution; *second*, the case could not be removed to the supreme court until heard before the district court, or a judge thereof. Const. art. 3, § 10; Civil Code, §§ 541, 542. The probate judge is not a judge of the district court.

VALENTINE, J. This action was commenced in the district court of Cloud county, for the purpose of perpetually enjoining the collection of a certain tax. The plaintiff then applied to the judge of the probate court, the judge of the district court being absent from the county, for a temporary injunction to restrain the collection of said tax until the case could finally be heard in the district court. The judge of the probate court refused to grant said temporary injunction, and of that refusal the plaintiff now complains. No application was made to the district court, or to the judge thereof, for a temporary injunction in this case, and no attempt has been made to have the district court, or the judge thereof, review the order of the probate judge refusing said temporary injunction.

The first question to be considered in this case, and the only one, if we answer this in the negative, is whether a petition in error will lie to this court from an order of the probate judge refusing a temporary injunction. There is no law that authorizes any such thing. There is a statute that provides that "the supreme court may also reverse, vacate, or modify any of the following orders of the district court, or a judge thereof: *First*, a final order; *second*, an order that grants or refuses a continuance, discharges, vacates, or modifies a provisional remedy, or grants, refuses, vacates, or modifies an *228 *injunction," etc. Civil Code, § 542. This statute provides for and authorizes the supreme court to review an order made by the judge of the *district* court refusing an injunction. But there is

no statute that provides for or authorizes the supreme court to review any order made by the *probate* judge. This petition in error must therefore be dismissed for want of jurisdiction in the supreme court to adjudicate upon matters involved therein.

(All the justices concurring.)

STATE OF KANSAS v. A. L. McLAUGHLIN, Co. Treas., and another.

July Term, 1875.

1. **Taxation: State cannot Enjoin, when.** Where a school-district had issued bonds in excess of its powers, and which were void in the hands of the holders, and thereafter, on the maturity of the bonds, a tax had been levied to pay them off, and proceedings had advanced so far that the tax-roll was in the hands of the county treasurer, and where the tax-payers, without multiplicity of suits, and by a single action, had adequate and complete protection against this illegal tax, *held*, that the state could not maintain an action of injunction to restrain the treasurer from proceeding to collect said tax.¹
- [2. **Effect of Decision.** The decision in this case will not prevent the attorney general from prosecuting an action in the name of the state to prevent a public injustice that could not otherwise be avoided. Per VALENTINE, J.]

Error from Brown district court.

Injunction, brought in the name of the state, upon the relation of A. L. Williams, attorney general, to restrain the collection of certain taxes. The district court, at the January term, 1874, refused a temporary injunction, holding that the state, as "plaintiff, is not a party in interest to the subject-matter in said action, and cannot, in any event, be entitled to any relief therein prayed for." The original petition *was verified by R. E. W., J. F., and J. M. Y., then the director, treasurer, and clerk of the school-district issuing the school-district bonds alleged to be void. The First Congregational Church of Sabetha was joined with the county treasurer as

¹A township cannot maintain an action to enjoin the collection of an illegal tax, levied on the taxable property belonging to the private individuals of such township. *Center Tp. v. Hunt*, 16 Kan. 480. Where a city, without authority of law, caused a tax to be levied and extended upon the tax-roll for the purpose of creating a fund with which to pay certain bonds, theretofore issued and delivered in payment of bridges that had been built therein, and, after the tax-roll had come to the hands of the county treasurer for the collection of the taxes, a number of the tax-payers of the city voluntarily paid the illegal tax thus levied, *held*, that the public has no such interest in the money thus paid as will authorize the state to interfere, and to maintain an action in the name of the state enjoining the treasurer from paying out the money so received by him, and from disbursing it in accordance with the will of those who paid the same. *Atchison City v. State*, 8 Pac. Rep. 367. As to the right of the state to sue, generally, see note to *McElroy v. Swart*, 24 N. W. Rep. 769; *Sipple v. State*, 1 N. E. Rep. 592.

a defendant, and the petition alleged that said church society claimed to own said bonds.

W. D. Webb for plaintiff.

Said Sabetha church society was a party to the issuing of said bonds, and knew all the facts and circumstances connected with the issuing thereof. The trustees of the church, and nearly all the members of the church, lived in the school-district at the time said bonds were issued, and the members of said church and the officers of the same were present at the school-district meetings, and voted in favor of the issuing of said bonds to *their church*. The petition and verification show that the persons who felt particularly interested in preventing the excess of power of the district, that is, the issuing and paying the bonds issued to the church society, were the officers of the school-district. But a newly-elected set of officers now come to this court with a motion to dismiss the action here. The complication arises from a desire of the church defendant, who now has control of the officers of the school-district, to assume control of the case, and to pay off the bonds to their church. This case is commenced on the relation of the attorney general; and the school-district, as a body politic or corporate, has no power in the matter to ask for the dismissal of the case on the ground that the district is willing to pay the bonds. When a school-district or a corporation seeks to pervert its powers, or to exceed them, the state is the proper party to prevent it. We claim that the newly-elected officers of the school-district have no power to assume control of the case. Whenever it comes to the knowledge of the attorney general that a school-district is usurping power, or is proposing to divert the funds of the district, the state has the right to restrain the district from the abuse
 *230 of powers granted, or from exercising those not *granted.

School-districts are a part of the governmental machinery of the state, subordinate departments of the state government, with their allotted functions to perform, possessing the power of controlling and expending large sums of public funds; and when they attempt to improperly dispose of the public moneys, or exercise powers not granted, the state may, through its proper officers, prevent it; and when the state makes the attempt to prevent an unlawful application of the funds of the district, to say that the officers of the district may come in and assume control of the suit, dismiss it, and go on and misapply the funds, we respectfully submit is a dangerous doctrine. *State v. Saline County Court*, 51 Mo. 350; *Kirkpatrick v. State*, 5 Kan. *687; *Bridge Co. v. County of Wyandotte*, 10 Kan. *326.

No school-district has the power to build a school-house to rent for a church, or for any other purpose. Much less have they the right to go to extra expense of putting in pews and pulpit "suitable for church purposes." There is no authority to allow a misapplication of the school-house, any more than there is of the school fund. The petition shows that it was the intention to devote the building to

other purposes than school purposes, viz., "church purposes," and the bonds were voted and issued to enable the district to do so. We cite on this point *Fractional School-district v. Mallary*, 23 Mich. 111; *People v. Hatch*, 60 Barb. 228; *Lilburn v. School-district*, 26 Wis. 585; *School-directors v. Sippy*, 54 Ill. 287; *St. Luke's Church v. Slack*, 7 Cush. 226; *Pickett v. School-district*, 25 Wis. 551.

W. W. Guthrie, for defendants.

The defendants contend that the state, as plaintiff, cannot bring and maintain this action; that the state has no interest in the subject-matter of litigation, and is not entitled to relief; and that no case is made out by petition. If the plaintiff's petition is true, this is a case in which each individual tax-payer is *individually* interested to the extent of his taxable property in the district, and all who desire to sue may do so, separately or jointly, under section 253 of the Code. *Atchison v. Barthallow*, 4 Kan. *124. But plaintiff has no interest or right to prosecute this action, at least within section 26 of

the Code. Nor is the *state* or *county* interested, within section *231 136 of chapter 25, nor section 64 of chapter 102, Gen. *St.;

and an adverse determination of this action would not bar the tax-payers of the district from litigating this matter. This action is but an experiment, without any person responsible for costs, and comes within no principle laid down in *Craft v. Jackson Co.*, 5 Kan. *518.

BREWER, J. This was an action brought by the state, upon the relation of the attorney-general, to restrain the county treasurer of Brown county from further proceedings to collect certain taxes; and the principal question presented is as to the right of the plaintiff to maintain the action. The facts alleged are that a school-district, some years since, made an arrangement with a church society by which, upon condition that the latter advanced a thousand dollars, the former should, in building the public school-house, make arrangements for a room for the church services of the latter; that this arrangement was carried into effect, and to secure this advancement two bonds of the district were executed, delivered to the church, and still remain in its possession; that, the bonds maturing, a levy was duly made to pay them off, and that proceedings had advanced so far that the defendant the county treasurer had possession of the tax-roll, and was proceeding to collect, with other taxes, the tax for this purpose. The church and the county treasurer are the only parties made defendants. It is nowhere alleged that any tax-payer in the district questioned the legality of the tax, or had any objection to paying his proportion of the amount necessary to redeem these bonds. Nor does it appear that there was any want of good faith on the part of the district or the church, or that the contract was not satisfactory to both parties, and fully and fairly executed by both. The case is rested upon the naked proposition that the contract, being *ultra vires* of the

district, the bonds are void, and that the tax-payers of the district, whether willing or not, must not be allowed to pay them. The *232 district judge decided that the action *would not lie in the name of the state on the relation of the attorney-general. The plaintiff brought this ruling here on error. Since it has been pending in this court, the officers of the district have filed a written request and order that the case be dismissed. It is obvious that this interference on the part of the state is unnecessary for the protection of any rights. It is not a case where, but for the intervention of the state, an irremediable wrong will be perpetrated. Conceding the bonds to be void, each and every tax-payer has ample protection by an action of injunction. Nor is a multiplicity of suits necessary. The tax, as a tax, being illegal, all the tax-payers may unite in a single action. *Hudson v. County of Atchison*, 12 Kan. *140. It is apparent, too, that no action of the corporation, the school-district, is sought to be prevented. It is not even a party to the suit. So far as the bonds are concerned, the school-district issued them long ago. So far as any levy of taxes is concerned, that has already been done. All that now remains is the action of the ministerial officer, the treasurer, in collecting the taxes, and the subsequent payment of the bonds. It is clear, too, that there is no express warrant in the constitution or the statutes for such an action on the part of the attorney general. The constitution is silent as to the powers and duties of that officer. Const. art. 1, §§ 1, 14. The statute defining his duties grants no such power,—imposes no such duty. Gen. St. 986, 987. If such power exists, it must be by virtue of the general power of the state to supervise and control the action of all corporations and officers, and the fact that the attorney general is the general law officer of the state. While, in a certain sense, it may be true that the state has a supervision and control over all its corporations and officers, yet to conclude therefrom that it is either the duty or the privilege of the attorney general to interfere in the case of every illegal act of a corporation or officer would be a deduction both novel and startling. Actions of *quo warranto* may be brought by the attorney general against both officers and corporations for ouster and forfeiture.

*233 Laws 1871, *p. 276, §§ 1, 2. In the fourth clause of this first section it is expressly provided that the action may be brought "when any corporation abuses its power, or exercises powers not conferred by law." It may not, however, follow from this that *quo warranto* is the only remedy. It cannot be maintained by one who has no other interest than as a citizen and tax-payer. *Miller v. Town of Palermo*, 12 Kan. *14. If the wrong is of a public nature, affecting the community in general, the state, through its proper officers, can alone maintain the action. *Mandamus* will lie at the instance of the attorney general when the duty sought to be compelled is one of a purely public nature. *Bobbett v. Dresher*, 10 Kan. *9. It will not, under the same circumstances, lie at the instance of a mere citizen

and tax-payer. So, too, we think the process of injunction may be invoked by the state in any proper case. Indeed, we know of no reason why the state may not avail itself of any of the writs and processes of the law available to individuals for the enforcement of rights and the redress of wrongs. So that the form of the action is no objection, if the right exists in the state to interfere.

It is obvious that the state, as a state, has no direct interest in this controversy, any more than in a controversy between individuals. The payment of these bonds may be illegal, but their payment works no greater wrong to the state than the payment by a single individual of an illegal debt. The single individual may, if he chooses, by appealing to the ordinary proceedings of the law, protect himself against such illegal payment. So may the many tax-payers.

The case of *State v. County Court*, 51 Mo. 350, is cited as authority. There, by a divided court, the right of the state was sustained to interfere by injunction to restrain the county court from issuing bonds in pursuance of an illegal subscription, and the officers and collector from levying, assessing, and collecting taxes to pay interest or principal of some of the bonds already issued. In reference to the levy it appeared that the county court had included the tax in the general county taxes, so that it could not be separated, and the tax-
*234 *payer could not tell what part was legal and what illegal.

The general doctrine was laid down that "it is competent for the state, at common law, through its officers, to maintain proceedings by injunction to restrain public corporations from doing acts in violation of the constitution and laws of the state." It would seem from the opinion of the court, given by SHEPLEY, special judge, that the action would not have been sustained if the bonds had already been issued, the tax levied, and so levied that the tax-payers, by a single action, could have protected themselves. Two cases are referred to in the opinion as containing full discussions of the principles involved: one that of *Davis v. City of New York*, 2 Duer, 663, in which Judge DUER reached the conclusion that in an action brought by two tax-payers against the mayor and others to restrain the construction of a street railroad upon Broadway, for the doing and operating of which the municipal authorities of the city had given authority, the attorney general was a necessary party; and the other, that of *Attorney General v. Miner*, 2 Lans. 396, in which Judge MULLEN concludes that the only cases in which "the attorney general was authorized to interfere to restrain corporate action, or was a necessary party to an action for that purpose, were those in which the act complained of would produce a public nuisance, or tend to the breach of a trust for charitable uses." We have referred to these three cases, not as covering the exact question before us, but as containing full discussions of the general question of the right of the state to interfere by injunction to restrain apprehended wrong on the part of public corporations and officers; for in this case, as already noticed, cor-

porate action has ceased, and the interference of the state is sought to restrain a ministerial officer, and that not an officer of the corporation, from discharging the ordinary duties of his office, although those duties are based partially upon the prior illegal corporate action, when the individuals affected thereby have complete and adequate remedy without multiplicity of suits, and by a single action. No authority to which we have been *referred has gone so far as to sustain such an action; and we think the same cannot be maintained. As private citizens, unless specially authorized, may not interfere to compel the performance of a mere public duty, or restrain the doing of a mere public wrong, so the state, having no direct interest, may not interfere to protect individuals from the illegal acts of a public officer, where such individuals have, in the ordinary course of the law, ample and adequate means of protection.

The judgment of the district court will be affirmed.

KINGMAN, C. J., concurring.

VALENTINE, J. I concur, with some doubts, in the decision of this case; for while, under the circumstances of this case, eminent justice has been done by the decision, yet, at first view, I thought there might be cases where such a decision might allow manifest injustice to be done. Thousands of bonds for various purposes have been issued in different portions of this state within the last six or eight years, illegally, fraudulently, flagrantly, perfidiously, and in many cases where all the local officers who would have the power to commence an action to have such bonds declared void are interested in having them held valid, and where the individual tax-payers of the locality have no adequate remedy. But, after a careful consideration of the question, I have come to the conclusion that the decision in this case will not prevent the attorney general from prosecuting an action in the name of the state to prevent a public injustice that could not otherwise be avoided. Judgment affirmed.

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*M. S. GRANT v. JOHN L. PENDERY.

July Term, 1875.

1. **Pleading: Issue: Reply Filed after Jury Sworn.** The district court may allow a plaintiff, who is in default for want of a reply, to file the same, even after the jury has been impaneled and sworn to try the cause; and the court may then proceed with the trial without further delay; and, unless it appear that the district court has abused its discretion in such a case, the supreme court will not reverse its rulings.¹

¹Courts may sometimes commit substantial error by refusing to permit amendments to be made to pleadings during the progress of the trial. *Wright v. Bach-aller*, 16 Kan. 259; *Rice v. Hodge*, 26 Kan. 164.

2. ———. And, in such a case, where the defendant has not made any showing, or even a claim, that he could ever be better prepared for the trial of the cause than at that time, the supreme court cannot say that the district court has abused its discretion.
3. ———. And, in such a case, it is not necessary that the jury should be resworn to try the cause.
4. **Statute of Frauds: Assuming Another's Debt.** Where G. purchases property from C., and agrees with C. to pay the purchase-money to P., a creditor of C., and P. at the time consents to the arrangement, and immediately gives credit for the amount to C., *held*, in an action by P. against G. for said purchase-money, that said agreement of G. to pay said purchase-money to P. is not void as coming within the statute of frauds.¹
5. **Contract: Agreement to Sell and Deliver: Tender.** Where C. sold and agreed to deliver certain fanning-mills to G., and afterwards duly

¹A promise made to a debtor, for a valuable consideration, to pay his debt to a third person, is not a promise to answer for the debt of another person, within the statute of frauds, which applies only to promises made to a creditor. *Morris Center v. McQuesten*, 18 Kan. 476; see, also, *Patton v. Mills*, 21 Kan. 168; sufficiency of written memorandum, *Reid v. Kenworthy*, 25 Kan. 701; see, also, *Kohn v. First Nat. Bank*, *post*, *428; collateral agreement held within statute, *Dufolt v. Gorman*, 1 Minn. 801, (Gil. 234); a verbal agreement to pay rent if the tenant does not, is within the statute, *Walker v. McDonald*, 5 Minn. 456, (Gil. 368); an original promise is not within statute, *Yale v. Edgerton*, 14 Minn. 194, (Gil. 144); *Goetz v. Foos*, 14 Minn. 265, (Gil. 196); *Sullivan v. Murphy*, 23 Minn. 6; *Hodgins v. Heaney*, 15 Minn. 185, (Gil. 142); must be a collateral promise, *Yale v. Edgerton*, 14 Minn. 194, (Gil. 144); promise to answer for debt of another, *Wilson S. M. Co. v. Schnell*, 20 Minn. 40, (Gil. 38); subsequent written promise to pay prior verbal guaranty, *Rogers v. Stephenson*, 16 Minn. 68, (Gil. 56); where the holder of a third person's contract assigns it, on a new consideration moving to himself, his guaranty, made at the time of the assignment, and as part of it, is not a promise to answer for another's debt or default, nor within the statute, *Wilson v. Hentges*, 29 Minn. 102; S. C. 12 N. W. Rep. 151; a promise by A. to B. to pay B.'s debt to C. is not within the statute, *Stariba v. Greenwood*, 28 Minn. 521; S. C. 11 N. W. Rep. 76; an action against the treasurer of a mining company for money advanced for paying the working expenses, according to an arrangement previously made between the parties, cannot be defended on the theory of the provision of the statute of frauds as to "the debt of another," promises to pay which must be in writing, *De Walt v. Hartzell*, 4 Pac. Rep. 1201; consideration for promise to pay debt of another must appear, *Clapp v. Webb*, 9 N. W. Rep. 796; collateral promise to pay is void under the statute, *Rose v. O'Linn*, 6 N. W. Rep. 480; promise to pay debt of another need not be in writing, when, *Clapper v. Poland*, 10 N. W. Rep. 688; an oral agreement to pay for the goods sold to another, to whom they were delivered, is within the statute of frauds, *Langdon v. Richardson*, 12 N. W. Rep. 623; agreement of contractor with merchant to pay orders and time-checks issued by subcontractor to his employees is not within statute, *West v. O'Hara*, 18 N. W. Rep. 894; verbal promise to pay debt of another, when made for personal advantage of promisor, is valid; *Fitzgerald v. Morrissey*, 15 N. W. Rep. 283; certain contract to pay for stove, held not within statute, *Palmer v. Witcherly*, 17 N. W. Rep. 864; see, also, *Hoile v. Bailey*, *Id.* 822; one party cannot be made liable for the payment of the debt of another unless the promise to make such payment is in writing, and signed by the party, or his duly-authorized agent, *Ruppee v. Edwards*, 18 N. W. Rep. 198; where the employe of a contractor neglects to assert a lien upon logs upon which he has worked, on account of a promise by the owner of the logs that he will pay him, the consideration for such promise inures directly to the owner, and the promise is not within the statute of frauds, *Kelley v. Schupp*, 18 N. W. Rep. 725; promise to pay the debt of a third party, in consideration of the release of a lien by the creditor held on the property of the debtor, is void, unless in writing, when no benefit accrues to the promisor by such release, but it is valid if he is benefited thereby, *Weisel v. Spence*, 18 N. W. Rep. 165; sale of goods, to be paid for by one person and delivered to another, is not void, *Larsen v. Jensen*, 19 N. W. Rep. 130; promise by owner of building, to a workman

tendered a portion of them, and G., without any sufficient reason, refused to accept or receive them, or any of the mills sold to him, and then they were all stored in a safe and convenient place for the benefit of G., and subject to his order, and he was duly notified thereof, *held*, that the refusal of G. to accept said mills excused the formal tender and delivery of those not formally tendered.

6. **Trial: Reading Depositions: Striking Out Testimony.** The defendant offered in evidence the deposition of a certain witness. The plaintiff objected. The court overruled the objection. The defendant then read in evidence the examination in chief of said witness, and refused to read the cross-examination. The plaintiff then moved the court to strike out that portion of the deposition which had been read, unless the defendant would offer and read in evidence the balance of the deposition. The defendant still refusing to read the balance of said deposition, the court struck out what had been read, and instructed the jury not to consider the same. *Held*, no error.

7. **Instructions, Inapplicable.** It is not error for the court to refuse instructions not applicable to the facts of the case.

*237 *8. **Evidence: Lost Paper: Secondary.** Where two copies of a paper are made, and one of them is served on one of the parties as a notice, and the other retained, and afterwards the one served as a notice cannot be found, *held*, that the contents of the one served as a notice may be proved by the copy retained.¹

Error from Leavenworth district court.

The case is stated in the opinion.

Clough & Wheat, for plaintiff in error.

Under section 128 of the Code, the new matter in the answer stood for true until leave was given to reply, and we claim that could not lawfully be done after the jury was impaneled. The case should be considered as though no reply had been filed. As the second, if not the third, defense was sufficient, and as Grant would have been entitled to judgment but for such improper filing of the reply, and as the filing of it at the time was a wrong procured by Pendery, he should not now be permitted to have advantage thereof; and Grant's motion for judgment should have been sustained, and should now be sustained by this court. See *Irwin v. Paulett*, 1 Kan. *418.

Injustice, without notice or warning, has been perpetrated on Grant, by the rendition of a judgment on supposed facts not alleged against him. It is not pretended by the verdict that the mills were delivered to him, or that he made any promise for the consideration alleged in

employed by a contractor, that if he did not quit work he would see him paid, provided the contractor did not pay him, is void, *Morrissey v. Kinsey*, 19 N. W. Rep. 455; guaranty of payment, verbally made, for anything a third party should want in equipping a mill, at which he was to make shingles for the promisor, is within the statute, *Studley v. Barth*, 19 N. W. Rep. 568; entry in books of party who sold goods is admissible upon the question as to whom credit was given, *Winslow v. Dakota L. Co.*, 20 N. W. Rep. 145; a promise by a party to pay a debt due from another, made to a creditor, who neither gives up his claim against the original debtor, nor any lien upon his property that he may have, must be in writing to satisfy the statute of frauds, *Vaughn v. Smith*, 23 N. W. Rep. 684.

¹See, also, *Central Branch U. P. R. Co. v. Walters*, 24 Kan. 504.

Pendery's petition; but, if the judgment can be sustained, it is only on a very different state of facts than those in that petition alleged. To defeat the case made by the petition, it was only necessary for Grant to show either non-delivery to him of the mills, or that they were taken away, and that is fully shown in the case; yet the jury find what Pendery now pretends was an executory contract, not performed, because of the declination of Grant to accept the mills,—a matter not in issue; and, further, that the verdict does not show

*238 either a consent on the part of Cooper that Grant should pay Pendery for the mills, or that Grant for a consideration promised to pay him therefor; that it was necessary that the jury should have found such consent, and have stated that Grant, for a consideration named in the verdict, as such, promised Pendery to pay him, etc. 1 Chit. Pl. 293, 297. The verdict, if it showed any liability as against Grant whatever, only shows him *prima facie* liable to Cooper. To make him liable to Pendery the verdict should have shown that Cooper consented that Grant should pay Pendery for the mills, and that in consideration thereof Grant promised so to do. For the want of such showing, Grant was entitled to a judgment on his motion. The petition and verdict both show that if Grant made any promise it was to pay a part of the debt of another person. St. Frauds, § 6.

The court erred in striking out the part of the deposition read by Grant. The evidence stricken out was material and competent, and Grant was no more required to read the cross-examination contained in that deposition than he would have been to have cross-examined the witness for the benefit of Pendery, if the witness had been personally present at the trial.

The court erred in refusing to give the seventeenth instruction. Oral evidence, without a notice to produce, was not competent to prove such a lost paper. A pretended copy retained, does not show what the original was. It is not the case of original duplicates of contracts, signed by the parties to the original, or of a notice, as the paper was not a mere notice. The court should have given the seventh, eighth, and tenth instructions. It was not for either Cooper or Pendery to change the place of delivery, or to recover as for mills delivered under a contract, without a delivery, as thereby required; and we think Grant had a right to have the jury, in substance, told that neither Cooper nor Pendery could himself change the place of delivery.

*239 *J. W. English and L. M. Goddard, for defendant in error.

The filing of reply or answer is a matter in the discretion of the court, (Code, § 106;) for the law gives the court authority to extend the time for filing either. The error claimed, that the contract set out in the petition and proved in evidence is within the statute of frauds, is so untenable that it is needless to hunt authorities to refute it. Under our statutes the real party in interest is authorized to institute suit, and it is a new idea that an arrangement such as is

exhibited in the petition in this case, and shown by the testimony and special verdict, can be termed an agreement to pay the debts of another. *Lawrence v. Fox*, 20 N. Y. 268.

The consent of Cooper to the payment by Grant to Pendery for the mills is explicitly shown by the verdict. The sixth finding establishes a tender of part and refusal to accept, and offer to deliver the remainder, and refusal to accept. This makes the tender complete. *Loomis v. Tillinghast*, 3 Johns. Cas. 477; *Sheldon v. Skinner*, 4 Wend. 525.

The court rightly excluded the deposition offered by plaintiff in error, because he refused to read the whole of said deposition. A party offering a deposition offers it all; and if he refuses to read it all, he should be allowed to read none of it. The cross-examination is as much a part of the deposition as the direct examination.

The instructions refused contain abstract propositions of law not applicable to the case, and for these reasons were properly refused. The seventeenth instruction refused, is in regard to a copy of notice which was in evidence. Two were made out, one given to Grant, the other retained. Grant testified that he could not find his copy, and Pendery produced his. It was a notice, and an original. Even as a copy, under the evidence, it was clearly admissible, the original being lost.

VALENTINE, J. The petition in the court below alleged, in substance, that one W. A. Cooper owed the plaintiff below, *John L. Pendery, on a promissory note, the sum of \$1,140.40; that said Cooper sold and agreed to deliver to the defendant below, M. S. Grant, fifty fanning-mills, for which Grant was to pay said plaintiff the sum of \$750, of which \$400 was to be paid in farming implements, and the other \$350 in cash; that the plaintiff then gave to Cooper a credit of \$750 on said note; that said mills were tendered and delivered to said defendant, and still remain subject to his control; that the defendant has failed and refuses to pay said \$750, or any part thereof, either in farming implements or in cash, and plaintiff demanded judgment for that amount. The defendant filed answer to said petition, which is in substance—*First*, a general denial; *second*, the plaintiff and Cooper "retook, carried away, and themselves disposed of all said mills;" *third*, the defendant "never promised, in writing," to pay the plaintiff anything. Afterwards the case was called for trial; a jury was impaneled and sworn; and the plaintiff then, and for the first time, asked leave of the court to file a reply to the defendant's answer. The court granted such leave. The reply, which was a general denial, was filed. The trial then proceeded, the jury not being resworn. And all this was done over the objections and exceptions of the defendant. When said reply was filed, the "defendant moved the court to postpone the trial of said action, because, he said, he was not ready to proceed then to the trial of the issues made

by said reply; but said court then overruled said motion, to which ruling and decision of said court said defendant excepted. And then said defendant moved said court to continue said action to the next term of said court because of said filing of such reply, but said court then overruled said motion, to which ruling and decision of said court said defendant then excepted." No reason was given for objecting to the filing of said reply, and no other or different reason than those above mentioned was given for asking for a postponement of the trial, or for asking for a continuance. And the motions made for such postponement and continuance were not supported by any oath or *241 affidavit. *It will be noticed that the reply could apply to the second defense stated in defendant's answer only, as the other two defenses did not need a reply. During the trial there were several exceptions taken by the defendant to certain rulings of the court with regard to the introduction of evidence, and with regard to giving or refusing instructions to the jury. The jury found a special verdict, which, as we think, is a substantial finding upon all the issues in the case in favor of the plaintiff and against the defendant, and the jury assessed the plaintiff's damages at \$700. Motions were made by the defendant for a new trial, and for judgment in his favor upon the verdict, both of which motions the court overruled, and then rendered judgment in favor of the plaintiff, and against the defendant, for \$700 and costs. And to reverse this judgment the defendant now prosecutes this petition in error.

Probably the most difficult question in the case is whether the court below abused its discretion by allowing said reply to be filed as it did, and then immediately proceeding with the trial of the cause. The plaintiff was apparently guilty of *gross laches* in not filing his reply sooner. He had then been for more than four months in default for want of a reply; and he did not even then ask to file his reply until after the jury had been impaneled and sworn to try the cause. And the court then allowed him to file the reply without the slightest showing of diligence, without the slightest showing that his reply was true, or that the defense which the reply put in issue was not true, and without the slightest terms of any kind whatever being imposed upon him. Some terms ought evidently to have been imposed upon him as a condition upon which he might file the reply,—a verification by affidavit of the truth of the reply, a postponement of the trial, a continuance of the case, or a payment of the costs of the term, or some portion thereof. But still we cannot say that the court below so abused its discretion that we must reverse the judgment on that account. It is true, the defendant said (not under oath, *242 not by affidavit) that "he was not ready to proceed then to *the trial of the issues made by said reply." But he did not even intimate that he ever would be ready to try such issues. He did not claim that he had the slightest hope of ever being better prepared to try such issues than he was at that very time. Hence it does not

seem that delay would have been of any benefit to him. That the court, exercising a sound judicial discretion, had a right to allow said reply to be filed, and to proceed immediately with the trial, we suppose will not be denied. Civil Code, § 106; *Taylor v. Hosick*, 13 Kan. *518, *526. It was not necessary that the jury should be resworn. They had already been "sworn to well and truly try the matters submitted to them in the case in hearing, and a true verdict give according to the law and the evidence," (Code, § 274,) and that was sufficient. They were not sworn to try the matters that had already been submitted to them, but to try the matters that should afterwards be submitted to them. And the matters to be submitted to them may be changed during the trial.

It seems hardly necessary for us to say that the contract between Grant, Cooper, and Pendery is not void as coming within the statute of frauds. Gen. St. 505, c. 48, § 6. Grant did not merely agree to pay the debt of Cooper, but he agreed to pay *his own debt* to Pendery. But it is claimed that the verdict of the jury does not show any consent on the part of Cooper to the payment by Grant to Pendery. Now, the fifth finding of the jury states, among other things, that "the said defendant, Grant, agreed with said Cooper to take fifty of said mills," etc., "and agreed to pay the proceeds, amounting to the sum of \$750, to the plaintiff Pendery," etc. How could there be an agreement between Grant and Cooper that Grant should pay Pendery \$750 without Cooper consenting to it? The contract was in fact made between Grant, Cooper, and Pendery. All participated in it, and all agreed to it. And Pendery, on the very day that the contract was made, gave Cooper the credit on the note. Grant not only agreed with and promised Cooper to pay Pendery, but he also agreed *243 with *and promised Pendery himself to do so. The arrangement was mutual and reciprocal between the three parties. But in any case Pendery has obtained all of Cooper's interest in said \$750. He is the real party in interest with regard thereto, and therefore he undoubtedly has the right to sue for it. (As to a contract made between two persons for the benefit of a third, see *Anthony v. Herman*, 14 Kan. *494.)

It is claimed that the tender of said mills was not sufficient. A portion of them were duly tendered, and Grant, without any sufficient reason, refused to accept or receive them, or any of the mills sold to him, and then they were all stored in a safe and convenient place for the benefit of Grant, and subject to his order, and he was duly notified thereof. This was sufficient. The refusal of Grant to accept said mills excused the formal tender and delivery of those not formally tendered.

The defendant offered in evidence the deposition of a certain witness. The plaintiff objected. The court overruled the objection. The defendant then read in evidence the examination in chief of said witness, and refused to read the cross-examination. The plaintiff

then moved the court to strike out that portion of the deposition that had been read, unless the defendant would offer and read in evidence the balance of the deposition. The defendant still refusing to read the balance of said deposition, the court struck out what had been read, and instructed the jury not to consider the same. We see no error in this.

The seventh, eighth, and tenth instructions which the defendant asked to have given to the jury, and which the court refused, are not applicable to the facts of this case. *Jaedicke v. Scrafford, ante, *120.*

The seventeenth instruction which the defendant asked to have given to the jury, and which the court refused, was properly refused. It was with regard to a notice served by Cooper upon Grant. The notice was made out in duplicate, and one copy was served on Grant, and the other was retained by Pendery. Pendery's copy was introduced in evidence upon the preliminary (but mistaken) evidence that it was the copy served on Grant. Afterwards it was shown that Grant was served, prior to a former trial of the case, with a notice to produce his copy on that trial. And it was also shown that Grant, on that trial, testified that he could not find his copy of the notice. Grant also testified on the present and last trial of this case, and testified subsequently to the introduction of Pendery's copy of said notice in evidence, and he did not say a word about it. The instruction asked was, in substance, that the jury should not consider said Pendery's copy of the notice at all, even if they should consider it a true copy of the notice served on Grant. We think the instruction was properly refused. Besides, the notice had but very little materiality in the case, and the jury would probably and rightfully have found just as they did if the notice had been stricken out of the evidence.

The judgment of the court below is affirmed.

KINGMAN, C. J., concurring. BREWER, J., not sitting in the case.

FORT SCOTT COAL & MIN. CO. v. JOHN SWEENEY.

July Term, 1875.

1. **Pleading: Answer cannot Vary Terms of Written Agreement.** Allegations in an answer, so far as they attempt to vary or contradict the terms or import of an admitted written contract between the parties, set forth in the petition, are mere nullities; and it is not error for the court to exclude evidence, offered by the defendant, in support of them.
2. **Trial: Instructions to Find for Plaintiff.** Where neither the answer, nor the evidence offered by the defendant, nor both together, make out a sufficient defense to the plaintiff's cause of action, it is not error for the court to instruct the jury to find for the plaintiff.

*245 *Error from Bourbon district court.

The case is stated in the opinion.

McComas & McKeighan, for plaintiff in error.

Harris & Spencer, for defendant in error.

VALENTINE, J. On December 12, 1872, the Fort Scott Coal & Mining Company entered into a written contract with John Sweeney, whereby Sweeney leased unto said company, their successors and assigns, "for the full term of two years, (with the privilege of continuing said lease at its expiration,) the sole and exclusive right and privilege of boring, digging, and otherwise prospecting for coal, petroleum, lead, or other valuable substance on the following described tract of land, to-wit, the S. E. $\frac{1}{4}$ sec. 34, T. 26, R. 25, in Bourbon county, and of taking out and of working the same, together with the right of way and surface use of such land as may be necessary for the economical and efficient working of the same." The only consideration moving from the mining company to Sweeney for this lease, as the same is expressed in the written contract, is as follows: One dollar paid down, one cent royalty on each bushel of coal taken from the leased premises, except that "all coal from the shafts, entries, turn-outs, air-courses, and coal used at the works, is to be free from rental or royalty." "The Fort Scott Coal & Mining Company also agree to pay to said John Sweeney royalty to the amount of \$500 on or before the first day of May, 1873; said money to be considered as royalty in advance if said company have not at that time taken out 50,000 bushels of coal." Said \$500 was not paid when it be-

*246 came due, and on May 8, 1873, Sweeney commenced this action against said company to recover the same. The defendant answered, alleging as a defense to the plaintiff's cause of action "that the consideration moving the defendant to take and enter into said lease and agreement was that the defendant might have the right to go upon the land therein described, and dig and remove therefrom good, merchantable, and marketable coal, which it was be-

lieved and understood at said time by the plaintiff and defendant was to be found therein. Defendant says that there was not, nor is there, any good, marketable, or merchantable coal upon or in said premises; nor was there, nor is there, any coal upon or in said premises, as was supposed at the time of making said lease and agreement; and that Sweeney *agreed and promised*, at the time of making the lease, that the coal to be found and taken from the leased premises was good and merchantable coal." The case was tried before the court and a jury. The defendant offered to introduce evidence showing that the coal taken from said premises was not good, merchantable, marketable coal, and that the defendant did not know, at the time when the defendant entered into said written contract, that said coal was not good merchantable coal. The court excluded the evidence, and afterwards instructed the jury to find for the plaintiff, which the jury did; and judgment was rendered for the plaintiff and against the defendant for said \$500, and interest and costs. The defendant now, as plaintiff in error, seeks to reverse that judgment.

There is no claim that there was no coal on or in said land. It would seem from the evidence offered and introduced that there was plenty of it. There may have been millions of bushels. Indeed, from anything appearing in the record, the defendant may have taken from said land hundreds of thousands of bushels of coal before this suit was commenced. Neither is there anything in the record showing how much "petroleum, lead, or other valuable substance" said land contained. The only claim of the defendant, as a defense, is

that the coal found in said land is not "good, marketable, *247 merchantable coal." Now, *suppose it is not, may not the plaintiff still recover? The plaintiff did not agree or promise that it should be good, marketable, merchantable coal. He did not make any warranty of any kind whatever; and no fraud is imputed. Besides, there is no failure of consideration, as is claimed by the defendant. The lease of the land, with all its incidents, in the aggregate, was the consideration for the defendant's promises; and this consideration seems to be entire, and not divisible. At least, this would seem to be so where both the cause of action and the defense are purely of a legal character, as contradistinguished from an equitable character. With the lease, the defendant gets more than the mere right to take good, merchantable coal from the plaintiff's premises. The defendant actually gets "the sole and exclusive right and privilege of boring, digging, and otherwise prospecting for coal, petroleum, lead, or other valuable substance on" said premises, with the right "of taking out and of working the same,"—that is, of taking out and working the coal, petroleum, lead, etc., whether the same be marketable or not,—"together with the right of way and surface use of such land as may be necessary for the economical and efficient working of the same," and the *free* use of much of the coal taken out; and all this the defendant gets for at least two years, and

longer if the defendant chooses. Now, if the plaintiff is to get pay only for the good, merchantable coal taken from his premises, where will he get pay for the exclusive right of boring, digging, and prospecting on his land for two or more years for coal, petroleum, lead, etc., and for the coal not merchantable, and for the petroleum, lead, etc., taken from the land? And where will he get pay for the right of way and surface use of his land, etc.? It is evident from the contract that it was the intention of the parties that this \$500 should be paid by the defendant to the plaintiff, whatever might be the result of the boring and digging for coal, petroleum, lead, etc. Both the terms of the contract and the reason of the transaction show this to be true. It will be noticed that the defendant does *248 not ask to have the contract *canceled. The defendant does not choose to relinquish any right which it has obtained by virtue of the contract. It still clings to the right to bore and dig on the plaintiff's land for the full two years, or longer. Indeed, the defendant does not wish to dispense with any portion of the contract, except that portion which imposes duties and obligations upon itself, and confers benefits on the plaintiff. But a contract cannot be considered good as to one party, and bad as to the other; and as the defendant does not even ask to have the contract canceled or rescinded, it must be enforced as to both parties, and there can be no question that by its terms the plaintiff is entitled to recover.

So far as the answer of the defendant attempts to vary or modify the terms of the written contract, or to allege that the contract was different from what the written contract itself shows it to be, the answer itself is a nullity. And this is about all the answer contains. The answer in fact states no defense, and the evidence offered and introduced by the defendant was even more defective than the answer. The purport of both was to vary and contradict the terms and import of the written contract entered into between the parties. Taking both together, and they did not make out any sufficient defense to the plaintiff's action. The court, therefore, did not err in excluding said evidence, and in instructing the jury to find for the plaintiff.

The judgment of the court below is affirmed.
(All the justices concurring.)

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*JOEL BREWSTER v. CATHARINE C. MADDEN.¹

July Term, 1875.

1. **Pre-emption: Mortgage, Void.** A mortgage given by a pre-emptor upon the land pre-empted, before the entry, is void, as forbidden by the thirteenth section of the act of congress of September 4, 1841.
2. **Estoppel: Absence of Fraud, Etc.** Where there is no fraud, misrepresentation, or concealment, neither the mortgagor nor his heirs are estopped from setting up the invalidity of the mortgage in an action of foreclosure brought by the mortgagee.

Error from Cherokee district court.

Foreclosure, brought by Brewster against the heirs of Leonard C. Madden, deceased. The mortgage was given by said Leonard C. and Catharine C., his wife, February 17, 1871, and was upon four lots in the city of Baxter Springs, and eighty acres of land then held by said Madden under the pre-emption act. The district court, at the June term, 1873, held said mortgage invalid as to the eighty acres, and gave judgment accordingly.

J. R. Hallowell, for plaintiff.

Judgment for the amount of said note was rendered by the court, and the mortgage foreclosed as to said lots, but the court held the mortgage to be void as to the said land. The execution of said mortgage by Madden and his wife (one of the defendants) being admitted, the only questions are, is the mortgage void as to said eighty acres of land? and, can the defendants in this action raise that question? The land was settled upon by Madden, April 1, 1866, who filed his declaratory statement on the thirteenth of October, 1869. The entry was completed by the said Catharine, as administratrix, for the benefit of the heirs of deceased. A mortgage under the laws of

*250 Kansas is not such a "transfer," "assignment," "grant," or "conveyance" as is contemplated or specially mentioned in the pre-emption law. Sections 12, 13, Pre-emption Act 1841; section 1, c. 68, Gen. St.; *Chick v. Willetts*, 2 Kan. *391; *Watterson v. Kirkwood*, 8 Kan. *465; *McKean v. Crawford*, 6 Kan. *112. The defendants are not in a condition to raise the question of the validity of said mortgage. *Bigelow, Estop.* 369, c. 8; *Shotwell v. Harrison*, 22 Mich. 410; *Maduska v. Thomas*, 6 Kan. *153.

¹Parol contract relating to lands—frauds upon the government, see *Brake v. Ballou*, 19 Kan. 401; sale of improvements and possession on government land, *Bell v. Parks*, 18 Kan. 152; sale of claim on Osage ceded lands, invalid, *Jarvis v. Campbell*, 28 Kan. 370; where a party occupying lands of the United States, with a view to acquiring title thereto under the provisions of the homestead laws, before the expiration of five years from the date of his entry and the ripening of his homestead right, sells an undivided interest therein, receives full payment, and executes a contract to convey such interest by warranty deed after the perfecting of his title, held, that a court of equity will not lend its aid to compel the specific performance of the contract, *Mellison v. Allen*, 80 Kan. 882; S. C. 2 Pac. Rep. 97.

Ritter & Anderson, for defendants.

BREWER, J. Is a mortgage given by a pre-emptor, prior to the entry of the lands, void? and, if so, are his heirs estopped from setting up its invalidity in an action to foreclose the mortgage? These are the only questions presented in this case. The mortgage was on the lands entered, and on four town lots. It was given long before the entry, and to secure simply the purchase price of the four lots. Intermediate the mortgage and the entry, the mortgagor died, and the entry was made by the widow, in the name and for the benefit of the minor heirs. Section 13 of the act of congress of September 4, 1841, (U. S. St. at Large, 456,) provides that, before an entry shall be allowed, the claimant shall make oath that "he has not directly or indirectly made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself;" and it also provides that "any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers for a valuable consideration, shall be null and void." The question is not free from difficulty. On the one hand it may be said that, as viewed in this state, a mortgage is neither a grant nor a conveyance, and therefore not within the letter of the statute; that a statute like this ought not to be extended by any construction beyond its plain letter, nor held to invalidate transactions not specifically and directly forbidden; *251 that often a pre-emptor needs assistance to complete his payment, which assistance he can only obtain by giving the land itself as the security, and that to deny him the use of the land for this purpose is against the spirit of the law. *Watterson v. Kirkwood*, 8 Kan. *465. On the other hand, it may be urged that the terms "grant" and "conveyance" are broad enough to include a mortgage, as much so as the term "alienation," in the constitutional and statutory homestead sections; and that it is so used in this section is evident from the terms of the affidavit required; that a mortgage is certainly an "agreement or contract" by which the title "would inure in part to the benefit" of the mortgagee, and that as the pre-emptor must swear that he has made no such agreement, so the agreement, when made, must be held null and void. *McCue v. Smith*, 9 Minn. 252, (Gil. 237;) *Warren v. Van Brunt*, 19 Wall. 646. We are inclined to favor the latter construction, and to hold that congress intended by this section that, when the title passed by the entry to the pre-emptor, it should pass perfect and unincumbered. This act was passed in 1841. Mortgages, always in form conveyances, were then regarded by the profession generally more as conveyances, and subject to the laws and conditions of conveyances, than at present, perhaps anywhere, and certainly in Kansas; and in the light of the general understanding, then, must this section be considered. It seems

more reasonable that by these terms, "grant and conveyance," was intended all forms of conveyance, whether absolute, as a warranty deed, or upon condition, as a trust deed or mortgage. We see no ground for the application of estoppel. The mortgagee was not ignorant of the facts. No fraud, misrepresentation, or concealment is shown. The mortgagee sold four lots, and, as additional security, took the land.

The judgment will be affirmed.

(All the justices concurring.)

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*JOSEPH F. BABBITT v. JOHN P. JOHNSON.

July Term, 1875.

1. **Acknowledgments:** In 1859, before Deputy-Clerk. In June, 1859, the deputy-clerk of a probate court in the territory of Kansas was authorized to take acknowledgments of deeds.
2. **Conveyances: Delivery: Presumption.** A deed takes effect from the time of its delivery; and this, in the absence of any evidence to the contrary, is presumed to have been on the day of its date.¹
3. ———: **Time of Acknowledgment.** It is no objection to the admissibility of a deed delivered before the commencement of the action that it had been acknowledged subsequent thereto.
4. **Tax Deed, Void.** A tax deed which recites a sale to the county as a competitive bidder is void upon its face.
5. ———: **Action on: Tender of Taxes.** Since the repeal of section 90 of the tax law of 1866, it is no defense to an action against one in possession under a tax deed void upon its face that no tender had been made prior thereto of the taxes, costs, etc.²

Error from Brown district court.

The case is stated in the opinion.

W. D. Webb, for plaintiff in error.

Babbitt, defendant below, claimed title to the land under a tax deed executed and recorded in June, 1864, and claimed that the plaintiff's right of action was barred by the statute. We claim that this action cannot be maintained, as no tender of the amount of the taxes, costs, etc., was made to Babbitt, as provided by section 11 of the tax law of March 6, 1862, and section 90 of the tax law of 1866. *Wakeley v. Nicholas*, 16 Wis. 588; *Smith v. Smith*, 19 Wis. 615, 620; *Sapp v. Morrill*, 8 Kan. *685, *686. The court erred in admitting the

¹But this presumption may be rebutted by testimony. *Cain v. Robinson*, 20 Kan. 460.

²Holder of tax deed is not entitled to a general execution to collect his taxes. *Jeffries v. Clark*, 28 Kan. 448. See, also, *Millbank v. Ostentag*, 24 Kan. 476, *Larkin v. Wilson*, 28 Kan. 516.

deed from Hall to Stewart, dated June 18, 1859, because the same was not acknowledged before any official authorized to take acknowledgments. The court also erred in admitting in evidence the *253 deed from *Stewart to Brown, because the same was not acknowledged before any official authorized to take such acknowledgments, and because the same was insufficient as an acknowledgment. The court erred in admitting in evidence the deed from Brown to Johnson, the plaintiff. This deed, executed in Alabama, and acknowledged there, was improperly admitted. The acknowledgment was made after the suit was commenced. *Porter v. Wells*, 6 Kan. *448. The tax deed offered in evidence by Babbitt was not void on its face, but was a valid deed, and conveyed to the defendant the absolute title to the land in suit, and the statute had barred this action before suit was commenced. *Comp. Laws 1862*, c. 197, § 57; *Id. c. 98*, § 11; *Bowman v. Cockrill*, 6 Kan. *311.

C. W. Johnson, for defendant in error.

No tender of taxes, etc., was necessary. *Sapp v. Morrill*, 8 Kan. *685. There was no error in admitting the deed from Hall to Stewart. By section 28, c. 22, Gen. St. 189, the record of this deed (and it was the record that was offered) was rendered admissible when the original was shown to be lost, notwithstanding any defective acknowledgment. Either the original or copy was admissible, if the original had been recorded. Section 14, c. 80, p. 240, *Laws 1859*, will show that this acknowledgment is good, if the probate court had a seal and a clerk; and sections 34, 38, c. 13, *Laws 1858*, are sufficient answer to that proposition. Again, the case of *Porter v. Wells*, cited by plaintiff in error, says a deed *executed* after suit is inadmissible. In this case the deed was executed before the suit, to-wit, September 6, 1869. The suit was not commenced till 1870. *Porter v. Wells* does not decide that a deed *acknowledged* after suit brought may not be read in evidence. See *Riggs v. Henneberry*, 58 Ill. 135. The tax deed was void on its face. It recites a sale to the county as a competitive bidder. *Norton v. Friend*, 13 Kan. *532.

*254 *Brewer, J. This was an action of ejectment. Defendant in error (plaintiff below) relied on a chain of title from government; plaintiff in error, (defendant below,) upon a tax deed. Four questions are presented.

It is objected that the acknowledgment to a deed in June, 1859, was insufficient, because taken before an officer not authorized to take acknowledgments. The officer was the deputy of the clerk of the probate court. This must be held good. An acknowledgment before the clerk of a court having a seal was sufficient. *Comp. Laws*, p. 355, § 14. The probate court was such a court, and had a clerk. See *Gen. Laws 1858*, p. 202, §§ 34-37; *Laws 1859*, p. 332, § 2; *Laws 1859*, p. 341, §§ 40-43. Such clerk might lawfully appoint a deputy, and such deputy could lawfully perform any ministerial office, unless specially

enjoined upon the clerk. *Laws* 1859, p. 341, § 41; *Whitford v. Lynch*, 10 Kan. *180.

Again, it is objected that an acknowledgment to a deed was taken after the suit commenced. The deed was dated, and irregularly acknowledged, before the commencement of the action, and on the first trial ruled out on account of this defect in the acknowledgment. Intermediate the two trials it had been correctly acknowledged, and now the objection was that this last acknowledgment was subsequent to the commencement of the action. The objection is not good. The acknowledgment is mere matter of proof. The deed is valid without it. It takes effect from the time of its delivery; and this, in the absence of any showing to the contrary, is presumed to have been on the day of its date. *Riggs v. Henneberry*, 58 Ill. 135.

Again, it is insisted that the tax deed was good upon its face. The deed recites that the land was struck off to the county as a competitive bidder, and is similar to the deeds held void in the recent cases of *Norton v. Friend*, 13 Kan. *532; *Magill v. Martin*, 14 Kan. *67.

Finally, it is insisted that this action could not be maintained because no tender of the amount of taxes, costs, etc., had been made to Babbitt as provided by section 11 of the tax law of 1862, (*Comp. Laws*, p. 880,) and section 90 of the tax law of 1866. These sections had been repealed prior to the commencement of this action, and in lieu thereof was enacted section 117 of the tax law of 1868, (*Gen. St.* p. 1057,) by which, before the holder of the tax deed is ousted of possession, the successful claimant is required to pay the taxes, etc. This order was made, and it is all the plaintiff in error was entitled to. *Sapp v. Morrill*, 8 Kan. *685, *686.

The judgment will be affirmed.

(All the justices concurring.)

HENRY CHURCHILL v. W. W. MOORE.

July Term, 1875.

Trespass: Liability of Judgment Creditor and Officer. Where a constable, at the instance of the judgment creditor, but without any express contract of indemnity therefor, levied an execution upon certain property believed to belong to the judgment debtor, but which in fact did not belong to the judgment debtor, but belonged to a third person, and this third person immediately replevied the property, but the constable gave a redelivery bond and retained the property, and afterwards sold the same on said execution to the judgment creditor for the amount of the judgment and costs, and judgment was afterwards rendered in the replevin action in favor of said third person, and against the constable, for a return of the property, or the value thereof in case a return could not be had, and for costs, *held*, that even if the acts of the judgment creditor

were such that an *implied* contract of indemnity may be presumed, still, so long as the claim of said third person remains unsatisfied, the constable has no cause of action against said judgment creditor, and that in no case like this can the constable recover from the judgment creditor more than his actual loss already sustained.¹

***256 *Error from Doniphan district court.**

The case is stated in the opinion.

B. A. Seaver and D. M. Johnston, for plaintiff in error.

Price & Webb, for defendant in error.

VALENTINE, J. The facts of this case are briefly as follows: Henry Churchill, who was the owner of a certain judgment rendered in a justice's court in favor of himself and against Gordon & Jones, caused an execution to be issued thereon and placed in the hands of W. W. Moore, a constable, for service. Moore, by virtue of said execution, levied upon a horse believed to belong to Gordon, but in fact belonging to Mrs. Mauritzius. Mrs. Mauritzius immediately replevied said horse. Moore then gave a redelivery bond, retained the horse, and afterwards sold him on execution to Churchill for the amount of Churchill's judgment, and costs. Churchill acknowledged satisfaction of the execution, and the execution was returned satisfied. All this was done in accordance with the instructions of Churchill, and of Churchill's attorney. Moore, at the instance of Churchill, defended said replevin action; Churchill himself employing the counsel, and through his counsel directing the management of the action. Judgment was finally rendered in the replevin action in favor of Mrs. Mauritzius, and against Moore, for a return of the horse, or, in case a return could not be had, for \$100, the value of the horse, and for costs taxed, as Moore alleges, at \$141.55. Further costs to the amount of \$11, as Moore alleges, afterwards accrued, making a total, as Moore claims, of \$252.55. The jury, however, in this case rendered a judgment in favor of Moore, and against Churchill, for \$250.48, which sum we must presume was the correct amount. No portion of the judgment in favor of Mrs. Mauritzius, and against

***257 Moore, *was paid or satisfied when this action was commenced.**

Indeed, no portion of said judgment was paid or satisfied when this action was tried, or when the jury returned their verdict into court. The court in this case rendered judgment upon the verdict in favor of Moore, and against Churchill, for the said sum of \$250.48. But in rendering the judgment the following proceedings (as shown by the bill of exceptions) were had and done: "Whereupon the court suggested that the execution in this case be stayed until the judgment in the case of *Mauritzius v. Moore* was [shall be] satisfied; whereupon it was shown that said judgment had been paid after the verdict

¹ As to the liability of officers to suit, generally, see note to *McElroy v. Swart*, 24 N. W. Rep. 771.

in this case was rendered; whereupon the court rendered judgment in favor of plaintiff, and against defendant, upon the verdict, and that execution be issued."

This is all there is in the record tending to show that Mrs. Mauritzius' claim, or any part thereof, has ever been satisfied. Churchill is the plaintiff in error in this court, and seeks to reverse the judgment of the court below. Now, when Moore and Churchill took said horse from Mrs. Mauritzius, they were both trespassers, and Mrs. Mauritzius could have sued either of them, and recovered the value of the horse; and, if they had been ordinary trespassers, the one against whom she recovered would have had no action against the other for contribution. But in cases of this kind, where one of the trespassers is an officer, and the property is taken under legal process for the benefit of the other trespasser, who is not an officer, the officer may have an action against the other for his loss actually sustained. Mere liability, however, on the part of the officer, is not sufficient to enable him to maintain the action. He must actually have lost something, and he can recover only to the extent of his actual loss. Both parties become liable to the party injured as soon as they commit the trespass, and that liability continues as against both until the party injured is entirely satisfied for his or her loss. When Moore and Churchill took said horse from Mrs. Mauritzius, (supposing Churchill participated,) both became liable to Mrs. Mauritzius, and both
*258 continued to be liable to her until her claim *was fully satisfied, notwithstanding said judgment rendered in favor of Mrs. Mauritzius against Moore. That judgment did not by any means release Churchill from liability to Mrs. Mauritzius. Nothing but a satisfaction of her claim would release any one of the trespassers; and, if her claim were in any manner released as against any one of the joint trespassers, it would release all. Moore was just as liable to Mrs. Mauritzius on the day that he took the horse as he was after the judgment was rendered against him in her favor, and Churchill was no less liable to her after said judgment was rendered than he was on the day he participated in taking said horse. And yet we suppose no one will claim that Moore had any action against Churchill on the day that they took said horse from Mrs. Mauritzius. After said judgment was rendered against Moore, it was the right and duty of Churchill to satisfy the same; but, if he did not satisfy it, then Moore might have done so if he had so chosen, and after doing so he would then have an action against Churchill for just the amount he necessarily paid in doing so.

The theory upon which a sheriff or constable may recover against a co-trespasser, in a case like the one at bar, is not upon the principle that one trespasser may have an action for contribution against another trespasser, but it is upon the principle of an express or implied contract that the party for whose benefit the trespass is committed will indemnify the officer for all loss that the officer may afterwards sus-

tain by reason of the trespass. And, when the officer sues for indemnity, his action is in the nature of an action on contract, and not in the nature of an action for a tort. Where the contract is not express, there must be sufficient circumstances from which a contract can be implied. The parties must, then, not know that they are making a contract to do an illegal act, but they must suppose that the facts are such that their acts about which they are contracting will be legal. In the present case, no express contract was proved, though the circumstances were such that an implied contract may be presumed. But it cannot be presumed or supposed that Churchill would agree *259 to pay *Moore the amount of their liability to Mrs. Mauritzius, while Churchill himself was still liable to Mrs. Mauritzius, and while such a payment to Moore would not extinguish such liability. The finding of the court below, while rendering judgment in this case, that the judgment in the case of Mauritzius against Moore was paid after the verdict was rendered in this case, is a nullity for various reasons. There was no such question ever presented to the court in any proper manner by the parties. There is nothing to show that the question was ever tried upon any pleadings, motion, or otherwise; and it is not shown who paid said judgment.

The judgment of the court below is reversed, and cause remanded for a new trial.

(All the justices concurring.)

JOHN G. SPENCER v. JOINT SCHOOL-DIST. No. 6, ETC.

July Term, 1875.

1. **Injunction: Parties: Interest of Plaintiff.** A party seeking to restrain an alleged misuse of the school-house belonging to a school-district, who alleges that he is a tax-payer and resident of the district; that the school-house has been built partially out of the taxes that he has paid; that he has children attending school in said school-house; and that, by the misuse complained of, the books of his children are "torn, soiled, carried away, lost, and misplaced, their copy-books written on, or thrown to the floor, their slates and pens broken, their inkstands upset, and their paper wasted and destroyed,"—shows such a personal and private interest as entitles him to prosecute the action.
2. **Schools: Misuse of School-House may be Restrained.** The use of a public school-house for any private purpose, such as the holding of religious or political meetings, social gatherings, and the like, is unauthorized by law, and may be restrained at the instance of any party injured thereby; and this, though a majority of the electors and tax-payers of the district assent to such use, and an adequate rent is paid therefor.

*260 *Error from Nemaha district court.

Injunction, brought by Spencer, as plaintiff, against joint school-district No. 6 of Nemaha and Brown counties, as defendant, to restrain the use of the district school-house for other than school

purposes. The defendant demurred, "for the petition does not state facts sufficient to constitute a cause of action." The district court, at the April term, 1874, sustained said demurrer, dismissed the petition, and gave judgment in favor of the defendant for costs.

Johnson & Fulloon, for plaintiff.

N. Price and J. E. Taylor, for defendant.

BREWER, J. This was an action brought to restrain the defendant from leasing its school-building for other than school purposes. Two questions are raised: *First*, does the plaintiff show such a peculiar and personal interest as will enable him to maintain the action? and, *second*, do the facts alleged disclose grounds for the relief sought?

The plaintiff alleges that "he is a resident of the school-district, and tax-payer therein, and, as such tax-payer, has contributed his proportion of taxes for the building of the said school-house; that his children attend school therein; and that, by the improper uses of the building complained of, the books of his children are torn, soiled, carried away, lost, and misplaced, their copy-books written on, or thrown to the floor, their slates and pens broken, their ink-stands upset, and their paper wasted and destroyed." We think this shows such an interest as entitles him to a hearing upon the question of the alleged misuser of the school-house. When he pays his taxes, he passes over so much money into the public fund, and the disposition of it is a public duty intrusted to certain public agents; and the fact that he has contributed by the payment of taxes to the

*261 creation of this *public fund does not give him a right to challenge the manner of its use. *Craft v. Jackson Co.*, 5 Kan.

*518. He is but one of many contributors to the same fund. He has no personal interest in it. But here he shows that his own private property suffers from the alleged wrong-doings. The school books, etc., which he purchases for his children's use are his individual property. They belong in no sense to the public; and, though they may be but a few dollars in value, he is entitled to have those few dollars protected as fully as though thousands of dollars were in danger.

As misuser, he alleges that the "school-house is, by the order of the directors, leased and let to divers societies, meeting, and gatherings," and that thereby large assemblages of persons, both children and adults, gather there, crowding the seats and desks; that these assemblages consume the fuel purchased with the public funds, tear the desks from their fastenings, and cut, scratch, and deface them; that some of these meetings are in the night-time, and that, at such meetings, kerosene or coal-oil is used, which is in violation of the terms of the insurance policy on the building, the premium of which has been paid out of the public funds; and that to accommodate one of these societies the building has been altered by erecting platforms, rostrums, closets, boxes, etc. In short, he alleges that this building,

erected by public funds for the purpose of a school-house, is, by the order of the directors, used for a variety of purposes and gatherings wholly alien to schools and educational matters. It does not appear that this is done against the wishes or without the consent of a majority of the tax-payers and electors of the district, nor that the building is leased without receiving adequate rent. Indeed, the question as it comes before us may fairly be thus stated: May the majority of the tax-payers and electors in a school-district, for other than school purposes, use or permit the use of the school-house built with funds raised by taxation? The question is one which in view of the times, and the attacks made in so many places, and from so many directions, upon our *public-school system, justifies, as it has received at our hands, most serious consideration. We are fully aware of the fact that all over the state the school-house is, by general consent, or at least without active opposition, used for a variety of purposes other than the holding of public schools. Sabbath schools of separate religious denominations, church assemblies, sometimes political meetings, social gatherings, etc., are held there. Now, none of these can be strictly considered among the purposes for which a public building can be erected, or taxation employed. But it often happens, particularly in our newer settlements, that there is no other public building than the school-house,—no place so convenient as that. The use for these purposes works little damage. It is used by the inhabitants of the district whose money has built it, and used for their profit or pleasure. Shall it be said that this is illegal? Doubtless, if all in the district are content, no question will ever be raised; and, on the other hand, if a majority object, the use for such purposes will cease. It is only when the majority favor, and a minority object, that the courts are appealed to. That minority may be but a single individual,—may be influenced by spite or revenge, or any other unworthy motive; but, whatever the motives which prompt the litigation, the decision must be in harmony with the absolute right of all. It seems to us that upon well-settled principles the question must be answered in the negative. The public school-house cannot be used for any private purposes. The argument is a short one. Taxation is invoked to raise funds to erect the building; but taxation is illegitimate to provide for any private purpose. Taxation will not lie to raise funds to build a place for a religious society, a political society, or a social club. What cannot be done directly cannot be done indirectly. As you may not levy taxes to build a church, no more may you levy taxes to build a school-house and then lease it for a church. Nor is it an answer to say that its use for school purposes is not interfered with, and that the use for the other purposes works little, perhaps no immediately perceptible, injury to the building, and results in the receipt *of immediate pecuniary benefit. The extent of the injury or benefit is something into which courts will not inquire. The character of the use

is the only legitimate question. A municipal bond of five cents in aid of a purely private purpose is as void as one of a thousand dollars; and that, too, though the actual benefit to the municipality far exceeds the amount of the bond. The use of a public school-house for a single religious or political gathering is legally as unauthorized as its constant use therefor. True, a court of equity would not interfere by injunction after a single use, and where there was no likelihood of a repetition of the wrong, for it is only apprehended wrongs that equity will enjoin. Here the unauthorized use is charged as a frequent fact, and one likely to occur hereafter. It is unnecessary to pursue this discussion further, for it would be simply traveling over a road already well worn and dusty. Besides the authorities with which every lawyer is familiar, upon the power to use public funds or property for private purposes, we refer to the following as bearing upon the special phase of the question before us: *Scofield v. Eighth School-dist.*, 27 Conn. 499; *School-district No. 8 v. Arnold*, 21 Wis. 657.

The judgment of the district court will be reversed, and the case remanded for further proceedings in accordance with the views herein expressed.

(All the justices concurring.)

ELAM RICE and others v. SAMUEL POYNTER.

July Term, 1875.

1. **Reforming Deeds: Sheriff's Deed Executed upon an Illegal Sale cannot be Reformed.** In an action to reform a sheriff's deed so as to make it read "section 8" instead of "section 28," where the latter occurs, it was shown as follows: The judgment under which the sheriff's deed was executed, ordered that certain lands in section 8 should be sold; but the recitals in the deed itself show that the order of sale, issued by the clerk in pursuance of said judgment, directed that land in section 28, and not in section 8, should be sold; and *said recitals also show that the sheriff had said land in section 28 appraised, and that he advertised the same for sale, and sold the same, and did not have anything to do with said land in section 8; and it was also shown by other evidence that the notice of the sale, as published in the newspaper, was a notice that land in section 28, and not in section 8, would be sold; and there was no evidence introduced tending to contradict the recitals in the sheriff's deed; and the said sheriff's sale, after it was made, and prior to the execution of said deed, was confirmed by the court upon an *ex parte* motion of the plaintiff in that action. *Held* that, under the circumstances of this case, said sheriff's deed cannot be reformed.¹

¹ To justify the reformation of a contract or deed the facts of a mutual mistake must be shown, as well as that the party seeking the reformation would be prejudiced by a failure to reform; but it is not necessary to show the existence

2. Evidence, Secondary: Lost Records: Competency of Testimony.

Where all the files of the papers in a case have been destroyed by fire, it is not error for the court to permit a party to introduce in evidence the testimony of the publisher of a newspaper, and the paper in which the notice of a sheriff's sale of real estate was published, for the purpose of showing the contents of such notice, and especially so when such evidence does not tend to contradict, but to corroborate, the recitals in the sheriff's deed executed in pursuance of such sale.

3. Judicial Sales: Confirmation, not Conclusive of Regularity. An *ex parte* confirmation of a sheriff's sale, is not conclusive evidence, binding upon all parties that may possibly be affected by it, that the land ordered to be sold by the judgment was sold, and that it was regularly and legally sold.

Error from Doniphan district court.

Action by Poynter to quiet his title to the N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 8, township 3 S., range 20 E., in Doniphan county. Poynter's petition alleges that at the December term, 1862, of the district court, he recovered a judgment against one Alfred L. Rice and Ladorska, his wife, for \$511.25, in an action wherein said Poynter was plaintiff, and said Rice and his wife were defendants; that at the commencement of said action he sued out an order of attachment, which was duly and legally executed by the seizure and appraisalment of the eighty acres of land in controversy then and theretofore belonging to said Rice; that, on rendering final judgment in said action, the court made an order continuing the lien of said attachment, and directing that an order of sale issue to sell said "N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of sec. 8,"

to satisfy said judgment and costs; that such order of sale was *265 duly issued, and said *land duly sold, and bid in by Poynter, and the sale thereof, in March, 1863, duly confirmed; but alleging that the sheriff, in executing the deed, "by mistake described said land as the N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 28, township 3 south, range 20 east." He also alleges that upon receiving said sheriff's deed he took possession of the land described in the judgment, and has occupied it ever since. Said Alfred L. Rice has since deceased, and this action is now brought against Ladorska Rice as the widow, and against Elam Rice and seven others, children and heirs at law of said Alfred L. Poynter prays that said sheriff's deed may be reformed and corrected so as to describe and designate the land mentioned and described in said judgment. The defendants answered, making a special denial of the facts alleged by plaintiff. This action was tried at the March term, 1874, of the district court. The district court gave judgment in favor of Poynter, reforming and correcting the sheriff's deed, and decreeing that "the defendants, and all persons claiming under them, be forever barred and enjoined from setting up any claim to said" N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 8, township

of a prior parol contract, and such part preformance as would, in the absence of a written contract, take the case out of the statute of frauds. *Conaway v. Gore* 24 Kan. 339. See *Miller v. Davis*, 10 Kan. 407, and note; also, *Roberts v. Chamberlain*, 30 Kan. 677; S. O. 2 Pac. Rep. 838.

8 S., range 20 E., "and that plaintiff have and recover of the defendants his costs herein."

Albert Perry, for plaintiffs in error.

Nathan Price, for defendant in error.

The testimony showed that the land originally attached and described in the judgment had been duly sold. By section 449, Code 1859, (Comp. Laws 1862,) it became the duty of the court, when the execution or order of sale was returned, to examine the return and proceedings of the officer, and, if they were found in all respects in strict conformity with law, to order the clerk to make an entry on the journal of that fact, and direct the sheriff to make the purchaser a deed. This was done. Now, this entry is a judgment. It is *266 a final adjudication between the parties, and all *persons claiming under them, that the right land was appraised, advertised, and sold, in strict conformity with law, or, as this court has said, that its process had not been abused.

VALENTINE, J. This was an action to reform a sheriff's deed, so as to make it read "section 8," instead of "section 28," where the latter occurs. Without stopping to consider whether this may be done in any case, we shall immediately pass to the question whether it can be done under the circumstances of this particular case. On the trial of the case in the district court, the plaintiff below, Samuel Poynter, introduced in evidence the sheriff's deed; the judgment upon which the deed was founded, including proceedings had previous to the rendering of the judgment; the confirmation of the sheriff's sale; the testimony of the clerk of the district court that many of the files of his office had been burned, and that the files in this particular case had not been seen since the fire; and the testimony of the plaintiff showing that he had resided on the land in said section 8 ever since the sheriff's sale, and that no one had claimed any adverse title thereto until recently. The defendants below (who are now plaintiffs in error) introduced in evidence the newspaper in which the notice of the sheriff's sale was published, and also the testimony of the publisher of that paper, showing that this was the only notice of such sale published in his paper. No other evidence was introduced for either party. It will be noticed that not one of the following papers was introduced in evidence, to-wit: The execution or order of sale upon which the land was sold; the return by the appraisers of the appraisement of the land; the copy of the notice of the sale of the land published in the newspaper, and filed in the court; the written return of the sheriff, showing his proceedings under the execution. But in lieu thereof we have the sheriff's deed, (which is certainly good evidence, in the absence of better evidence to show the substance of said papers, and of *267 other papers recited therein,) *reciting the substance of the execution, the oath administered to the appraisers, the return by the appraisers of the appraisement, the notice of the sale published in

the newspaper, the sale itself, and the return of the sheriff of his proceedings under the execution; and these papers, and proceedings as recited in the deed, show unequivocally that the sheriff was ordered by the execution to sell "the north half of the north-west quarter of section 28," etc.; that he did appraise, advertise, and sell such land; and not one of these papers or proceedings tends to show that the sheriff ever had anything to do with any land in section 8. Besides, the evidence introduced by the defendants shows beyond all doubt that the sheriff advertised the land in section 28 for sale, and did not advertise the land in section 8 for sale. The sheriff's deed showing that the notice of sale was published in the "White Cloud Kansas Chief," and the publisher of that paper produced on the witness stand a copy of said paper, with a copy of said notice published therein, and testified that no other notice of said sale was ever published in said paper; and that notice shows that the sheriff advertised land in section 28, and not in section 8, for sale. This was certainly competent evidence, for it had already been shown that the original files in the case had been destroyed by fire. Probably no better evidence could have been found, or was then in existence. It corroborated the recitals in the sheriff's deed, and did not contradict them. But it is claimed that it tends to contradict the confirmation of the sheriff's sale, and is therefore incompetent. The confirmation of the sheriff's sale reads as follows:

"On motion of said plaintiff, by Messrs. T. & C., his attorneys, and on producing the return of the sheriff of this county of a sale of real estate made by him on the ninth day of March, 1863, on an order of sale issued in this case, and dated the eighth day of January, 1863, and the court, on an examination of said proceedings, being satisfied that said sale has been made in all respects in conformity to law, it is ordered by the court that said sale and proceeding be, and the same is hereby, confirmed, and the said sheriff is ordered to
*268 *make to the purchaser a deed for the land and tenements so sold."

Now, a confirmation of a sheriff's sale is ordinarily, as in this case, a purely *ex parte* proceeding, and it may always be so. The sale may be confirmed on the motion of the plaintiff, the defendant, the sheriff, or any other person interested therein, or on the court's own motion, and may be done without notice to any person, and in the absence of every person except the officers of the court. And no particular time is required for the confirmation of the sale. It may be done at any time after the sale has been made, when the court is in session, and for an indefinite period of time; and it is usually done merely upon an examination of the return of the officer, (*White Crow v. White Wing*, 8 Kan. *276,) although it would probably be prudent in some cases for the court to look behind the return of the officer, and see whether the writ itself, the execution, or order of sale followed the judgment. The whole difficulty in the present case has probably arisen from the fact that the order of sale does not follow

the judgment. It does not seem, however, to be the special duty of the court, on the confirmation of a sale, to determine whether the clerk has done his duty in issuing the writ, but only whether the sheriff has done his duty in executing the writ. In the present case we think the sheriff undoubtedly followed the writ scrupulously, and did his exact duty under the writ. He undoubtedly advertised and sold land in section 28, and not in section 8, just as the writ directed him to do. The confirmation of the sale in this case does not pretend to show otherwise, but really tends to show that the sheriff did his duty; that is, that he sold the land which he was ordered to sell by the writ, which was land in section 28, and not land in section 8. We suppose that, when counsel for plaintiff below (defendant in error) comes to consider the nature and character of an *ex parte* confirmation of a sheriff's sale made long after judgment, he will no longer consider

*269 that such a confirmation is an adjudication conclusively binding upon all parties that may possibly be affected by it, and conclusively proving that the land ordered to be sold by the judgment was sold, and that it was regularly and legally sold; for such is not the case. *Benz v. Hines*, 3 Kan. *390, *397, *et seq.* The sheriff's deed in the present case cannot be reformed; for the sheriff had no legal power, upon the sale made by him, and recited in the deed, to execute this or any other deed. Under the judgment, no land could be sold except land in section 8. Under the order of sale issued by the clerk, no land could be sold except land in section 28. Hence, as the order of sale in an essential particular did not follow the judgment, the whole of the proceedings had and done after the judgment was rendered, are mere nullities. Therefore, under such circumstances, no court can give the sheriff power to make a good and valid deed, and no court can reform a defective deed already executed by the sheriff so as to make it good and valid.

The judgment of the court below is reversed, and cause remanded for further proceedings.

(All the justices concurring.)

W. B. DICKENSON & BRO. v. CHARLES COWLEY, JR.

July Term, 1875.

1. **Attachment: Third Party Claiming Property.** One who comes in under chapter 164 of the Laws of 1872, and claims property attached or levied on, does not thereby concede the regularity of the proceedings; nor may he, like the defendant, avail himself of errors which are simply sufficient for reversal in direct proceedings therefor. He claims adversely to the proceedings, and can only make such objections as he could if attacking them in an independent collateral action.

2. **Attachment: Affidavit: Fatal Defect.** Where the only grounds for the issue of an attachment in a case before a justice of the peace are thus stated, "that the defendant is a foreign corporation, or a non-resident
*270 of the county," *held*, that the affidavit was fatally defective, and furnished no warrant for the issue of the attachment, and that the defect was one which might be taken advantage of by one claiming the property attached.¹
8. **Debtor and Creditor: Evidence of.** The mere bringing of an action is no evidence, as against a third party, that the plaintiff is a creditor of the defendant.

Error from Brown district court.

In an action in a justice's court, wherein Cowley was plaintiff and one George Parker was defendant, a constable, upon an order of attachment, seized and held 1,000 bushels of corn, and a lot of other property. Dickenson & Bro. served a written notice on Cowley, as authorized by section 1 of chapter 164, Laws 1872, claiming said corn, and that the trial of the right of property would be had before the justice on a certain day. Such trial was had. Parker made no appearance to the action, nor to the attachment proceedings, at any time. As to him the justice continued the action, and Cowley caused notice to be published as provided by section 35 of the justices' act; and upon such notice, at the time therein fixed, the justice rendered judgment in favor of Cowley and against Parker. On the trial of the right of property in said corn, the justice found in favor of Dickenson & Bro., who claimed under an unrecorded chattel mortgage executed to them by Parker. Cowley removed the proceedings to the district court by appeal, where a retrial was had at the April term, 1874. On this trial, Dickenson & Bro. offered in evidence their chattel mortgage, (which had then been recorded,) and proved its execution, and rested. Cowley offered in evidence the attachment and other proceedings, and judgment in his action against Parker before the justice. The bill of exceptions shows that the district court found and held "that the 1,000 bushels of corn in controversy belonged to said Charles Cowley, Jr., and gave judgment accordingly." Dickenson & Bro. bring the case here on error.

James Falloon, for plaintiffs in error.

If Cowley acquired any right by virtue of said proceedings, by
*271 our laches we have lost our right to the property in controversy. Did they acquire any right? To the introduction of the transcript and papers in case of Cowley v. Parker in evidence we raised an objection that the justice had no jurisdiction of the person of Parker, nor of the proceedings *in rem*. Before Cowley could acquire any right to the property in controversy, the court must have jurisdiction of the person, or of the proceedings *in rem*. Without this it could not render a valid judgment. *North v. Moore*, 8 Kan. *143. Did the justice have jurisdiction? Our statute provides that actions

¹ See *Robinson v. Burton*, 5 Kan. 287.

must be commenced in justices' courts by filing a bill of particulars. None was filed in the case. The foundation of the suit was neglected.

Before any court can acquire jurisdiction of property in any proceeding *in rem*, it must have the statutory proof before it, otherwise its act and process would be null and void, the same as if it was not a legally constituted court. *Paine v. Mooreland*, 15 Ohio, 440; *Collins v. Ferris*, 14 Johns. 246; *Bigelow v. Stearns*, 19 Johns. 89; *Ardens v. Brewer*, 3 Cow. 206. See *Repine v. McPherson*, 2 Kan. *340; *Shields v. Miller*, 9 Kan. *390; *Hargis v. Morse*, 7 Kan. *415. The affidavit for attachment in the case of *Cowley v. Parker* stated that the defendant was "a non-resident of Brown County, or a foreign corporation." The laws of 1870 require that the affidavit allege that the defendant is a non-resident of the state. If a man's property may be attached under such an affidavit, a person living just over the line in another county may be divested of his rights to property when the statute does not contemplate it; else why change the law in 1870 from a non-residence of the county to a non-residence of the state? *Drake, Attachm.* § 84. The affidavit must also be in the positive, and not in the disjunctive. *Drake, Attachm.* § 101. The return of the order of attachment must show whose property is attached, and that it is attached in the jurisdiction of the court. *Repine v. McPherson*, 2 Kan. *340. In this case the return of the order of attachment does not show whose property was attached. There was no legal service on *Parker*; no appearance by him; no statutory proof for order of attachment; no return of order of attachment showing whose *272 property was attached; no bill *of particulars filed. Chapter 164, Laws 1872, was not intended as a pit-fall, to debar parties of their rights to property, because they go into court and claim the property in controversy to belong to them. Their appearance in court in no manner gives the court jurisdiction in the original suit if it had none.

C. E. Berry and *W. D. Webb*, for defendant in error.

Plaintiffs in error gave notice to *Cowley* to appear before the justice to contest the right of property. They could not contest the regularity of the attachment proceedings. The property was in the possession of the officer, and *Dickenson & Bro.* could not question his right to hold it, except by a superior title in themselves. They could not champion *Parker's* rights, nor find any fault with the attachment proceedings, unless their title was good as to *Parker's* creditors. By section 3 of chapter 43, and section 9 of chapter 68, Gen. St., *Dickenson & Bro.'s* title was void until taken out of the statute, by evidence. They must recover on the validity of their own title; and, unless it was good as to attaching creditors, they must fail. No evidence was offered to make it good. They could not, on a void title at least, question the affidavit. They could not go back of the attachment, and they cannot require a judgment to be entered. *Parker* is the only person who could question the regularity of the attach-

ment proceedings. Dickenson & Bro. came into court to show their title as against Parker's creditors, or our attachment; and if their title was good, and prior to our levy, they would hold the property; but, if it was void as to Parker's creditors, it gave them no right to object to the attachment.

BREWER, J. The facts in this case are briefly as follows: Defendant in error commenced a suit before a justice of the peace against one George Parker, and caused an attachment to be issued and levied on a certain lot of corn. Plaintiffs in error came in *273 under chapter 164 of the Laws of 1872, and claimed the property. They claimed under a chattel mortgage given by Parker. The proceedings before the justice were commenced before the filing of this mortgage, and it is conceded by counsel for plaintiffs in error that, if Cowley "acquired any right by virtue of said proceedings," the plaintiffs by their laches had lost their right to the property. Could they, coming in as they did, question the regularity of the proceedings? and, if so, were these proceedings so far void as to give no lien to Cowley in the corn? The first question, it seems to us, must be answered in the affirmative, to this extent, and no further: they could question them just as though they were attacking them in an independent collateral action. They did not, by coming in, waive all objections to the proceedings, and concede their regularity; nor did they place themselves in the shoes of the defendant in the action, and acquire his right to object to errors in the proceedings. They could not avail themselves of such irregularities as were simply errors sufficient for reversal, but only of such as were fatal to the process and the jurisdiction. Though coming into the action, they claimed adversely to it. There was a fatal defect in the attachment proceedings. The grounds for the attachment alleged in the affidavit were "that the defendant is a foreign corporation, or a non-resident of Brown county." There are two objections to this: one, that it is in the disjunctive, (Drake, Attachm. § 101;) the other, that non-residence in the county does not warrant an attachment, but only non-residence in the state. Laws 1870, p. 182, § 3. There was therefore no warrant for the issue of the attachment, and the plaintiff in the suit obtained no lien on the goods by the service of the writ. The facts of the case also bring it exactly within the decision in *Repine v. McPherson*, 2 Kan. *340. There was no personal service; the defendant did not appear; nor does it appear from any of the papers that he had any property within the jurisdiction of the court, nor that the property attached was his property.

But it is insisted by defendant in error that the mortgage of *274 plaintiffs in error is void, as against the creditors of the mortgagor, under section 9 of the mortgage statute. Gen. St. 584. It is sufficient reply to this that, as the record stands, there is no evidence, as against plaintiff in error, that defendant in error was a cred-

itor. The mere bringing of a suit is not evidence of that fact against a third party; and, as there was no valid service or appearance, there has as yet been no valid judgment. Further than this we do not care to go. We see that many questions may be raised beyond this, such as these: Was not the mortgage filed within such reasonable time as to bring it within the statute? Will the mere fact that it is shown by parol evidence that the defendant in error was, at the time of the commencement of his action, a creditor of the mortgagor, avoid the mortgage? It will be time enough to dispose of them, if they ever arise, when the facts are fully known.

The judgment will be reversed, and the case remanded for further proceedings in accordance with the views herein expressed.

(All the justices concurring.)

JOHN T. STARKWEATHER and Wife v. EBENEZER MORGAN.

July Term, 1875.

Service: Impeaching Sheriff's Return: Evidence. On a motion by one defendant to set aside a return of service of summons upon her, (the return of the sheriff showing personal service on each of the defendants, they being husband and wife,) the wife, who made the motion, testified that no copy of the summons was ever given to her, and that she had no knowledge of the pendency of the action till the time of filing the motion; the husband, that the sheriff gave him two copies of the summons, one directed to him and one to his wife, and requested him to give the latter to her, but that he did not give it to her as requested. The district court overruled the motion, and sustained the service. *Held*, that the return of the officer being of the highest order of evidence, and of matters *275 within his *personal knowledge, was not so overborne by the testimony of the defendants as to justify this court in reversing the ruling of the district court.¹

Error from Clay district court.

The case is stated in the opinion.

C. M. Kellogg, for plaintiffs in error.

Green & Hessen, for defendant in error.

BREWER, J. On the nineteenth of March, 1874, defendant in error commenced an action in the district court of Clay county against the plaintiffs in error, who are husband and wife, to foreclose a mortgage. The petition set forth a note signed by the husband, and alleged the

¹ A sheriff's return with respect to service of original process may be impeached, so far as it states facts upon which jurisdiction depends, where the facts stated do not come within the personal knowledge of the sheriff, but must be ascertained by him from inquiry. *Chambers v. Bridge Manuf'g Co.*, 16 Kan. 270; *Gapen v. Stephenson*, 17 Kan. 616.

execution of a mortgage by both. On the twenty-first of March a summons was duly issued, and returned on the 28th with an indorsement of personal service by the sheriff upon each of the defendants. Afterwards, and at the May term of court, the husband making no appearance or defense, the wife makes a motion to set aside the return of service upon her, and files in support thereof two affidavits, her own and her husband's. In her affidavit she swears that no copy of the summons was ever served upon her, and that she had no knowledge of the pendency of the action until the time of filing the motion. He swears that the sheriff gave him two copies of the summons, one directed to himself, and one directed to his wife, and requested him to deliver the latter to his wife; but that he did not deliver it. This statement is repeated twice in the affidavit, and with only this difference: The first time he swears that on "the _____ day of March, 1874," the sheriff delivered to him "two copies of a summons in the above action;" the second, that "on the twenty-seventh day of March, 1874," the sheriff delivered to him "two copies of a summons *276 in the *above-entitled action which are copies of the summons upon which the sheriff has returned that he did, on the twenty-seventh of March," etc. The return of the sheriff shows service on the twenty-eighth of March. The district court overruled the motion, and this is the error complained of.

Counsel for plaintiffs in error rely upon the case of *Bond v. Wilson*, 8 Kan. *228, as authority for reversing the ruling of the district court. But we must differ with them for two reasons: In that the matter thrown open to inquiry was one not within the personal knowledge of the sheriff, but depending upon the information he might receive. Here the matter was within his personal knowledge. He either did or did not give a copy of the summons to Mrs. Starkweather, and which he did he knew. In that case, Chief Justice KINGMAN, in the opinion, uses this language: "We know of no statute that makes a sheriff a final and exclusive judge of where a man's residence is, or what is the age of a minor, or who are the officers of a corporation. * * * Of his own acts, his knowledge ought to be absolute, and himself officially responsible. Of such facts as are not in his special knowledge, he must act from information, which will often come from interested parties, and his return, therefore, ought not to be held conclusive." We have made this reference to that case, not for the purpose of deciding that the return of the sheriff is not open to question in matters of his personal knowledge, but to prevent any misunderstanding as to the extent of that decision. A second reason why we think that case not authority for reversing, but rather for affirming, the ruling, is that the question, in whatever cases it may arise, is one of evidence. There the district court found from the evidence against the return, and set it aside. We affirmed its findings upon the evidence. Here it finds in favor of the return, and upon that question of fact we must sustain its findings. Looking at

it in the light of the evidence, and the ruling of the court cannot be disturbed. On the one hand it is the return of the sheriff, a disinterested party and a sworn officer, which, if not conclusive, is *277 the strongest kind of evidence; on the other, the *denial of one witness, Mrs. Starkweather, corroborated to some extent by the testimony of her husband, both interested witnesses. The sheriff might, on the 27th, have given the two copies to Mr. Starkweather, and then, on the 28th, given one to Mrs. S., so that Mr. S.'s testimony only partially corroborates. At any rate, there is not enough testimony adverse to the return of the officer to warrant us in reversing the ruling of the district court, and it must be affirmed. (All the justices concurring.)

ORLANDO DODGE v. WILLIAM COFFIN.¹

July Term, 1875.

1. **Evidence: Judicial Notice: Constitutions of Other States.** This court will take judicial knowledge of the constitution of a sister state, so far as the jurisdiction of its courts is shown. VALENTINE, J., dissenting.
2. **Courts: Jurisdiction: Presumption.** It will be presumed, in the absence of evidence to the contrary, in favor of courts of general jurisdiction of sister states, that they have the authority they assume to exercise, and that the modes of procedure pursued by them, though different from that established by the laws of this state, are authorized by the laws of the state in which they act. [Ward v. Baker, 16 Kan. 32; Comstock v. Adams, 23 Kan. 525.]
3. **Judgments, Foreign: In Vacation.** Thus, though in this state judgments in courts of record can be entered only in term-time, yet, where the duly-authenticated record of a court of general jurisdiction of a sister state shows a judgment entered in vacation, it will be presumed, in the absence of any showing to the contrary, that such a judgment was authorized by the laws of that state.
4. **Constitutional Law: Limitations: Judgments, Foreign.** So much of section 1 of chapter 87, Laws 1870, as reads, "And no action shall be maintained in this state on any judgment or decree rendered in another state or country against a resident of this state, where the cause of action upon which such judgment or decree was rendered could not have been maintained in this state, at the time the action thereon was commenced in such other state or country, by reason of lapse of time," is unconstitutional and void, as conflicting *with section 1 of article 4 of the United States constitution, which ordains that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

Error from Riley district court.

Action by Coffin, as plaintiff, whose petition alleged "that the said plaintiff, on the twenty-ninth of April, 1872, by the consideration and judgment of the circuit court of the state of Illinois, begun and held at

¹ See, also, Haynes v. Cowen, *post*, *687.

the court-house in Geneva, in the county of Kane, on said twenty-ninth of April, recovered against the said Orlando Dodge the sum of \$511.90, his debt, and his costs in and about his suit expended, taxed at \$280, which said judgment, a copy of which is hereto attached, marked 'Exhibit A,' still remains in said court in full force and effect, in nowise reversed or annulled," etc. The judgment itself, said Exhibit A, shows that it was entered on a warrant of attorney, "in vacation, after a regular term of the circuit court of said Kane county, begun and held on Monday, the fifth of February, 1872." Dodge answered, setting up two defenses: *First, nul tiel record; second, the statute of limitations.* Trial at the September term, 1874, of the district court. Verdict and judgment for plaintiff for \$600.20.

H. G. Barner & Son, for plaintiff in error.

The court erred in permitting Coffin to introduce the record from the circuit court of Kane county, Illinois. That record was defective for the reason that it was taken in vacation, and not in accordance with the common law, and does not come within the provisions of the United States constitution, art. 4, § 1, or the laws of congress passed in pursuance thereof. *Galpin v. Page*, 18 Wall. 350. Neither does it come within the provisions of our Code. Gen. St. p. 700, § 371. At common law a judgment rendered by the clerk in vacation is a nullity, and such has been the ruling of this court. *Miffin v. Stalker*, 4 Kan. *283. The judgment roll from Kane county, Illinois, being the roll of a judgment taken in vacation, and entered *279 *without the order of a judge or justice of said court, whether good in Illinois or not, was a nullity here. A judgment by confession should be made in open court, and have all the qualities, incidents, and attributes of other judgments, (*Nichols v. Hewit*, 4 Johns. 423; *Freem. Judgm.* 456, § 547;) and to entitle its record to be read in other states it must be taken according to the established rules of the common law, (*Galpin v. Page*, 18 Wall. 350.)

Again, in the *cognovit* or power of attorney by which this judgment was confessed in Illinois, it is provided that Charles Wheaton, or any other attorney of any court of record, may confess judgment; and the judgment was confessed by one W. J. Brown, who was not only not proved to be an attorney of any court of record, but does not even sign his name as such, but signs himself as attorney in fact for Orlando Dodge. We submit that, where a party is not named in such a power, he must affirmatively show such a character as brings him within its purview.

Again, this Illinois judgment was rendered on two notes, both due December 22, 1859, and the judgment was taken there on the twenty-ninth of April, 1872, more than *twelve* years after their maturity, and no payment or other renewal was made, or pretended to have been made, on them during this time. Our act of 1870, c. 87, § 1, effectually disposes of this case. We are aware that it has been and will again be contended that this statute is unconstitutional. . That a state,

by its limitation laws, may bar a right of action upon a judgment from another state, where the limitation laws of the state to which the judgment is brought are shorter than those of the state from which it came, is too well settled to admit of controversy. *Walker v. Parker*, 13 Pet. 172; *D'Arcy v. Ketchum*, 11 How. 165; *Galpin v. Page*, 18 Wall. 350; *Thompson v. Whitman*, Id. 457. We suppose the only real question about the constitutionality of this statute is whether, having cut off all time for commencement, and barred any action, it has violated the provision of the United States constitution giving full faith, credit, etc. We desire to call attention to the language of the statute of 1870. It protects only persons **280* *who were residents of this state at the time judgment was rendered* in such other state or country. It does not prevent judgments from other states or countries, where the parties are both residents, and both alike subject to the laws of such state or country, from being enforced here. Neither does it deprive a party of his judgment, but leaves him with it in full force in the state where he chose to take it. This is not a retrospective statute. It is prospective, and was approved March 3, 1870, while this judgment was taken April 29, 1872, more than two years afterwards.

Green & Hesse, for defendant in error.

BREWER, J. This was an action on a judgment rendered in the circuit court of Kane county, Illinois. Said judgment was rendered in the spring of 1872, upon two notes executed in March, 1859. Attached to each note was a warrant of attorney authorizing "Charles Wheaton, Esq., or any other attorney of any court of record," to enter appearance, waive process, and confess judgment. Upon these warrants, and without any service of process or other appearance, judgment was entered in vacation. It is insisted that this judgment, having been entered in vacation, was a nullity, and *Mifflin v. Stalker*, 4 Kan. **283*, is cited as authority therefor. But that case simply decides as to the practice in this state, and the authority to enter judgments in our courts at other than the regular terms. And the question here is not whether such judgment would be valid if entered *in this state*, but was it valid *in Illinois*, where it was entered? *French v. Pease*, 10 Kan. **54*. Now, this court will take judicial knowledge of the constitution of the state of Illinois, so far as this question is involved, (*Butcher v. Bank of Brownsville*, 2 Kan. **70*;) and by that constitution we find that the circuit court is one of general original jurisdiction. Being a court of general jurisdiction, the presumption is in favor of the authority which it assumed to exercise. **281* Though the mode of procedure **be* different from that established in this state, yet it will be presumed to be in accordance with that authorized by the statutes of the state in which it was rendered. In 2 Amer. Lead. Cas. (5th Ed.) 647, it is said that "it is obviously essential to the effectual operation of the design of the

constitution that the records of the judgments of other states, duly authenticated under the act of congress, should not merely prove themselves, but give rise to a presumption that the court possessed the authority which it assumed to exercise;" and many authorities from different states are cited in support of the proposition. And, again, it adds: "The presumption, *omnia rite acta*, will accordingly hold good until repelled, and the burden of proof is on him by whom a record, duly authenticated, and which appears to be regular, is impugned." So that, in the absence of any evidence to the contrary, the presumption would be that a judgment entered in vacation was valid, according to the laws of Illinois. But we are not left to a presumption. In *Dunham v. Brown*, 24 Ill. 93, we find such a mode of procedure upheld by the supreme court of that state.

Again, it is urged that the warrant of attorney authorizes "Charles Wheaton, or any other attorney of any court of record," to appear and confess. And the record shows that one W. J. Brown appeared and confessed, and that there is no evidence that he was an attorney of any court, and he signs himself "attorney in fact" for defendant. We suppose the designation was correct, for one authorized by such a warrant of attorney is an attorney in fact; and in the recital of the judgment it reads "that the plaintiff appeared by T. C. Moore, his attorney, and the defendant by W. J. Brown, his attorney." This recital is evidence, *prima facie* at least, that both Moore and Brown were attorneys of the court in which the judgment was entered. But, passing these considerations, it was for the defendant, upon the principles heretofore stated, to overthrow the presumption in favor of this judgment by showing, if he could, that W. J. Brown was not an attorney of a court of record. It is useless to inquire as to the cir-

*282 *cumstances under which the judgment of the court of a sister state can be impeached, for here there was no testimony tending to impeach it. The testimony of Dodge, that he never employed Brown, or authorized him to appear and confess judgment, that he was never served with process, etc., is wholly immaterial. He does not deny the execution of the warrant of attorney, or question its validity; and all further matters, except, perhaps, whether Brown was an attorney of a court of record, are questions of law.

One other question remains. Counsel contends that no action can be maintained on this judgment because of section 1 of chapter 87, Laws 1870, which, among other things, provides: "And no action shall be maintained in this state, or any judgment or decree rendered in another state or country against a resident of this state, where the cause of action upon which such judgment or decree was rendered could not have been maintained in this state, at the time the action thereon was commenced in such other state or country, by reason of lapse of time."

Of the applicability of this statute there can be no question. The notes were more than twelve years past due when the proceedings

were commenced in the circuit court of Kane county; and the only testimony, that of Dodge himself, showed that he had been a resident of this state for the last thirteen years, and had not been back to Illinois since 1859. But a statute in all essential particulars exactly like this has been before the supreme court of the United States, and declared unconstitutional and void, as conflicting with section 1 of article 4 of the federal constitution, which ordains that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." The statute which was before that court was a statute of Mississippi, and in these words: "No action shall be maintained on any judgment or decree rendered by any court without this state, against any person who, at the time of the commencement of the action in which such judgment or decree was or shall be rendered, was or shall be a resident of this state, in any case where the cause of action would have been barred *283 by any act of limitation of this state if such suit had been brought therein." *Christmas v. Russell*, 5 Wall. 290. The similarity of the statutes is obvious, and the decision of that court conclusive upon the question.

There being no other question in the case, the judgment will be affirmed.

KINGMAN, C. J., concurring.

VALENTINE, J., (*dissenting*.) I cannot concur with my brethren in what they say in the first paragraph of the syllabus and the corresponding portion of the opinion. They hold that this court can take judicial notice of the contents of the constitutions of sister states, so far as such constitutions define the jurisdictions of the courts of such states. Now, if this court can do so, of course every other court in the state may do so, and not only may do so, but must do so, for a court that can take judicial notice of a thing is not at liberty to refuse when legally called upon to do so; and, if courts can take judicial notice of the constitutions of other states for the purpose of ascertaining the jurisdiction of their courts, I know of no good reason why they should not also take judicial notice of their statutes for the same purpose. The jurisdictions of many of the courts of other states are not in any manner defined by their constitutions, but are defined by their statutes, or by their statutes and usage; and, if we are to take judicial notice of the jurisdictions of the courts of other states, we must look into their statutes as well as into their constitutions. And, if we can take judicial notice of the constitutions and statutes of other states for one purpose, I know of no good reason why we should not take judicial notice of such constitutions and statutes for all purposes. But the jurisdictions of the courts of other states sometimes rest, partially at least, upon their common law, or upon immemorial usage, or upon judicial decisions. Now, must we

also take judicial notice of the common law, the immemorial usage, and the judicial decisions of such other states? To take judicial notice of the laws of other states *is contrary to a well-settled principle of law. The rule is that courts of one state cannot take judicial notice of the laws of another state, but such laws must be pleaded and proved by the party who relies upon them the same as other facts. *Hunter v. Ferguson*, 13 Kan. *463, *475; *Shed v. Augustine*, 14 Kan. *282; *Sedg. St. & Const. Law*, 363-365; 5 U. S. Dig. (1st Ser.) p. 487, par. 102; *Id.* pp. 745-750, pars. 5307-5432, and the numerous cases there cited. The cases are too numerous to cite in this opinion. In my opinion, this rule includes all laws of sister states, whether such laws are embodied in constitutions or statutes, or their common law, or in judicial decisions, or in immemorial usage.

In the case at bar the court has properly adopted the rule which it has adopted principally because of the great inconvenience of requiring, in every case, the party who attempts to introduce in evidence a judicial record of a court of another state to first prove that such court had, by the laws of its own state, the requisite jurisdiction. This inconvenience would undoubtedly be great, for the opposite party would probably in nearly every case require the evidence; and yet probably in not more than one case in a thousand would it be found that the court of said other state did not possess ample jurisdiction in the premises. But still, as I think, it would be much better, in order to avoid this inconvenience, to resort to natural and reasonable presumptions in favor of the jurisdiction of the courts than to violate a generally and universally recognized rule of law, or to unnecessarily introduce an exception into such general rule of law. In my opinion, the courts of this state may take judicial notice of the existence and political organization of all the states. They may take judicial notice that such states have written constitutions and written statutory laws; that their governments are republican in form, and similar to our own; that they each have an executive department, a legislative department, and a judicial department; and can take judicial notice of all the powers, privileges, and disabilities of such states as established and defined by the constitution and laws of the United States; and, besides this, we can take judicial notice of the kind of jurisdiction usually exercised by courts of record, by courts of general or superior jurisdiction, by probate courts, by justices of the peace, and by police magistrates. But this is about as far as we can go in taking judicial knowledge of the laws and institutions of other states, or of the jurisdiction that their courts may exercise. After this we must resort to presumptions; and one of the first of presumptions is the following: In the absence of anything showing the contrary, we presume that the laws of other states are substantially the same as our own,—*Furrow v. Chapin*, 13 Kan. *107, *113; *Hickman v. Alpaugh*, 21 Cal. 225; *Hill v. Grigsby*, 32 Cal.

55; *Sharp v. Sharp*, 35 Ala. 574, 580; *Cox v. Morrow*, 14 Ark. 603, 604, 609, *et seq.*; *Atkinson v. Atkinson*, 15 La. Ann. 491; *Crane v. Hardy*, 1 Mich. 56; *Cooper v. Reaney*, 4 Minn. 528, (Gil. 413;) *Brimhall v. Van Campen*, 8 Minn. 13, (Gil. 1;) *Robinson v. Douchy*, 3 Barb. 20; *State v. Patterson*, 2 Ired. 346; *Green v. Rugeby*, 23 Tex. 539, 544; *Rape v. Heaton*, 9 Wis. 329; *Walsh v. Dart*, 12 Wis. 635; U. S. Dig. (1st Ser.) 500, 501, pars. 393-417;—and therefore, as a corollary from this presumption, we further presume, in the absence of anything to the contrary, that a judicial record from another state, properly authenticated, and in due form according to the laws of our own state, is valid in said other state, (*French v. Pease*, 10 Kan. *51.)

But the presumption in favor of the regularity and validity of judicial records is sometimes strong enough to make the record of judicial proceedings from another state valid, although, if its regularity and validity were to be determined by the laws of our own state, we would hold the record or some portion thereof void. *Keely v. Garner*, 13 Ind. 399. In such a case the presumption in favor of the regularity and validity of the record is stronger than the presumption that the laws of the other state are like ours; and in such a case it is presumed that the laws of the other state are such as to make the record valid. In Arkansas it has been decided that, "in the absence *286 of evidence to the contrary, the *court will presume in favor of the regularity of the official proceedings of a sister state; as, where the seal of a court is affixed by impression on paper, without wax, or any other tenacious substance, that the sealing was according to the laws of the state." *State v. Lawson*, 14 Ark. 114. In Delaware it has been decided that a record of another state, properly certified to under the seal of a court, is evidence that the court was a court of record. *Smith v. Redden*, 5 Har. 321. In Wisconsin it has been presumed, from the name of the court, and held, that "the circuit court of Kent county, state of Michigan," was a court of general jurisdiction. *Jarvis v. Robinson*, 21 Wis. 524. Also, in this connection, see *Knapp v. Abell*, 10 Allen, 488, 489, and cases there cited. In New York it has been held that "the record of a judgment in a neighboring state is *prima facie* evidence that the court by which it was rendered had jurisdiction." *Shumway v. Stillman*, 4 Cow. 292, 296. In Pennsylvania, in the case of *Wetherell v. Stillman*, 65 Pa. St. 105, the court, speaking of the record of a judgment from New York, say that, "without it were shown that the court which rendered the judgment was a court of special or limited jurisdiction, no averment can be made against the conclusiveness of its record," (page 114;) and "the record of the judgment from New York shows that the plaintiff's costs were included in and formed parcel of the judgment. We are to presume that this is in conformity with the laws of that state," (page 115.) See, also, *Lapham v. Briggs*, 27 Vt. 27, 35; *Shumway v. Stillman*, 6 Wend. 447.

After a careful examination of this subject I have come to the conclusion that, instead of saying that the courts of this state will take judicial knowledge of the laws of other states, so as to determine the jurisdiction of their various courts, we should say that, whenever a record from another state is brought to this state properly authenticated under the act of congress passed for that purpose, (1 U. S. St. at Large, 122,) the courts of this state will presume that such record is just what it purports to be. If it purports to be a record *287 of a court of record, we should *presume it to be such. If it purports to be the record of a court of general or superior jurisdiction, we should presume it to be such. And, as a general rule, where the record seems to be the record of a court, is attested by the clerk with the seal of the court, and the proper certificate of the judge is attached, we should presume that the record is that of a court of record; and, where the subject-matter of such record is also such as usually comes within the jurisdiction of courts of general or superior jurisdiction, we should presume, in the absence of anything to the contrary, that such court was a court of general or superior jurisdiction. Such presumptions would seldom, if ever, mislead a court. The record itself will generally show whether the court is one of general or superior jurisdiction, or one of limited, special, or inferior jurisdiction; and in those rare cases where the record does not show this, let the party who would be prejudiced thereby plead the laws of the sister state, and show by them the nature and character of the jurisdiction possessed by the court from which the record is obtained.

AUGUST JÆDICKE v. MARTIN PATRIE, Sheriff, etc.

July Term, 1875.

Injunction: Restraining Execution Sale. Where, upon one day, a petition in error and transcript are duly filed in this court to reverse a judgment of the district court, on the next a bond to stay proceedings duly filed in the district court clerk's office, and on the third an application made to the district judge for a temporary injunction restraining the sheriff from selling certain personal property, seized upon an execution legally issued and placed in the officer's hands before the filing of the petition in error, and where it does not appear that the sheriff had any actual knowledge, information, or notice of the proceedings in error, *held*, that a ruling of the district judge, refusing the injunction, will not be reversed.¹

*288 *Error from Washington district court.

The case is stated in the opinion.

T. J. Humes and J. W. Rector, for plaintiff.

¹See *Wood v. Millspaugh*, *ante*, *14, and note.

Plaintiff, by due and regular proceedings, as provided by the Code, §§ 551, 554, 555, was entitled to a stay of proceedings upon the execution issued against him on the Scrafford judgment. As the sheriff had received the execution before the stay was effected, we were entitled, upon showing the facts by petition, to the order restraining further proceedings. It was not necessary to give him notice; and if the question of costs is regarded as in the way, the answer is that this is an equity proceeding, and it is in the power of a court of equity to grant us the injunction prayed for, and on final hearing impose the costs on us. Civil Code, § 591.

W. C. Webb and J. G. Lowe, for defendant in error.

The petition for the injunction is not sufficient. It does not show that the requisite steps were taken by plaintiff in error to stay or to supersede the execution issued on the judgment in favor of Scrafford v. Jaedicke. It does not allege that any *præcipe* or order was made or filed in this court, with the petition in error, or otherwise, at any time, for a *summons in error*, nor that a summons in error had been issued or served, nor that the *sheriff* (defendant in error in this case) was in anywise notified or informed that an appeal had been taken, and proceedings stayed on the judgment upon which the execution held by him was issued.

Plaintiff in error had and has an adequate remedy at law for the redress of his supposed injury. Upon giving due notice of his appeal,

and of obtaining a legal stay of proceedings, he could bring *289 trespass against Scrafford and the *sheriff, or he could apply to this court, or to the court below, or district judge, for an order to stay proceedings.

To permit the action of injunction against the sheriff is to impose upon him the costs of an action in a case where he is not only not in fault, but is in the legitimate discharge of a positive duty. This is avoided, and the party complaining is fully protected, by applying to the district court or district judge, in the original case, for an order superseding the execution; and in such case the judgment plaintiff would be, as he ought to be, if he is unjustly pressing his execution, saddled with the costs himself.

BREWER, J. This was an action of injunction. The petition alleges that in August, 1874, one C. G. Scrafford obtained a judgment in the district court of Washington county against the plaintiff for \$200; that on September 24th, then next, the plaintiff filed in the office of the clerk of the supreme court a petition in error, with a transcript of the record, for the purpose of obtaining a reversal of said judgment; that afterwards, and on September 25th, he filed his bond to stay proceedings, duly executed and approved, with the clerk of the district court of Washington county; that, prior to the commencement of the proceedings in error, an execution had been duly issued on the judgment to the defendant, sheriff of said county, who levied

on certain goods and chattels of plaintiff, and, notwithstanding the proceedings in error and the stay, is about to sell them; that such sale will, if permitted, work great and irreparable injury. On the twenty-sixth of September an application was made for a preliminary injunction upon this petition. The application was overruled, and this is the error complained of. We think the ruling must be sustained. The petition was filed on the 24th, the bond on the 25th, and this application made on the 26th. It is nowhere alleged that the sheriff had any actual notice of the filing of either the petition or bond, or any knowledge or information concerning them.

*290 Now, it seems to us that *before the sheriff is subjected to an action, and mulcted in the costs therefor, for executing a process valid on its face, and lawfully issued to him, he should have some actual notice or information of proceedings staying the execution of such process. For all that the petition shows the first intimation the sheriff had that there was any thought of proceedings in error was the notice of this application for an injunction. Doubtless the statute is defective in not making any provision for notice, and unquestionably by the steps taken the execution was legally stayed. But common justice to the officer requires that he should be informed of what had been done before subjected to the vexation and costs of a suit, that he make suitable inquiry, and govern his actions accordingly. We do not mean to be understood as deciding that if, after being informed of the proceedings in error and the stay, the sheriff should still attempt to make a sale, he could not be restrained by injunction; though we think even in such cases the better practice would be to file a motion in the case in which the judgment was rendered for an order on the officer to return the execution.

The judgment will be affirmed.

(All the justices concurring.)

VALENTINE, J. I concur in the decision of this case, but express no opinion upon the matter stated in the latter portion of the opinion delivered by Mr. Justice BREWER.

ALBERT G. SMITH and others v. JOHN T. SMITH and another.

July Term, 1875.

Occupying Claimant: Improvements Made and Taxes Paid. Where a person is in possession of certain real estate, holding the same under a tax deed executed in 1864, upon a tax-sale certificate issued in 1862 to a county, and assigned in 1864 to the holder of the tax deed by the county treasurer, who had no authority at that time to assign the same, and where such person has, while holding said real estate under said tax deed, made lasting *and valuable improvements on said real estate, *291 *held* that, although said tax deed is void upon its face, yet that the holder thereof, when an action is brought against him by the original

owner of said real estate for the recovery of the same, is entitled to the benefit of both the occupying claimant act and section 117 of the tax law.¹

Error from Atchison district court.

Ejectment, brought by Albert G. Smith and two others as plaintiffs, against John T. Smith and another, as defendants, for a lot in the city of Atchison. Plaintiffs' petition alleged title in fee and right of possession in plaintiffs, and wrongful withholding by defendants. One defendant disclaimed, except as a tenant under defendant John T. Smith, who claimed title in himself under a tax deed issued to one "J. T. Morse, his heirs and assigns," June 1, 1864, on a tax sale made in May, 1862. Said tax deed, which was made a part of the answer, contains this recital: "And whereas, the county treasurer of said Atchison county did, on the sixteenth of May, 1864, duly assign the certificate of the sale of the property as aforesaid, and all the right, title, and interest of said Atchison county in and to said property, to J. T. Morse, of the county of Atchison and state of Kansas." Defendant also alleged due and proper conveyances from said Morse to himself, and, for a further defense, said defendant alleged the payment of taxes, etc., from the date of said tax sale, for which he claimed lien on the land, and also that he had made certain lasting and valuable improvements on said lot, for the value of which he claimed the benefit of the occupying claimant act. Plaintiffs demurred. The district court, at the June term, 1874, sustained said demurrer; "holding," says the transcript, "the law of the case to be that said tax-sale certificate and such tax deed were void, but that the defendant or holder thereof was entitled to the benefit of the provisions of section 117, chapter 107, of General Statutes, and that he had a lien thereunder for the amount specified in such tax deed, with costs of deed, and recording, and interest thereon at the rate of twenty per cent. per annum and for other amounts of taxes *292 paid, with interest at the rate of twenty-five per cent. per annum thereon, and that the defendant was entitled to benefit of the occupying claimant act for the lasting and valuable improvements made by him on said lot."

W. W. Guthrie, for plaintiffs in error.

The assignment of the tax certificate was to all intents and purposes no assignment at all. It was void. *Shoat v. Walker*, 6 Kan. *65, *73. Being void, it neither existed as a legal fact, nor as evi-

¹See, also, *Cohen v. St. Louis & S. F. Ry. Co.*, 8 Pac. Rep. 138; *Waterson v. Devoe*, 18 Kan. 281; *Millbank v. Ostertag*, 24 Kan. 471; *Wilder v. Cockshutt*, 25 Kan. 510; *Larkin v. Wilson*, 26 Kan. 516. A party is not entitled to the benefit of the occupying claimant act, or to a recovery for the value of improvements made by him, unless, at the time of such improvements, he has the full and actual possession. *Coonradt v. Myers*, 31 Kan. 30; S. C. 2 Pac. Rep. 858. In all cases of void tax deeds, whatever may be the ground upon which the deeds are held void, the holder of the tax deed, when defeated in an action of ejectment, may recover the taxes which he has paid. *Belz v. Bird*, 31 Kan. 145; S. C. 1 Pac. Rep. 246. See, also, note to *North v. Moore*, 8 Kan. 103; *Jay v. Granby Min. Co.*, *ante*, *171.

dence of the existence of any fact in favor of its possessor. *Hobson v. Dutton*, 9 Kan. *477. To constitute a tax deed that could "be defeated in an action," it must be a deed attacked by evidence not illegal on face. *Shoat v. Walker*, 6 Kan. *74; *Taylor v. Miles*, 5 Kan. *498; *Gordon v. State*, 4 Kan. *500; *Foreman v. Carter*, 9 Kan. *677; *Challiss v. Headley*, Id. *685. The claim of defendants in error for taxes paid both before and after the date of the tax deed stands only as the claim of one who has paid taxes by mistake, viz., the legal taxes paid, and interest at seven per cent.; and the burden of proof is on claimant, as in other cases of money demands. The same principle applies as to the claim for benefit of occupying claimant act. Defendant does not "hold any land under any sale for taxes authorized by the laws of this state." Civil Code, § 601, cl. 4, Gen. St. 749. His claim is illegal, and he cannot complain of his own act. *Lane v. National Bank*, 6 Kan. *74; *Beardale v. Chapman*, 1 Ohio St. 118-122; *Harrison v. Castner*, 11 Ohio St. 339-347. This is not like the case of *Stebbins v. Guthrie*, 4 Kan. *353.

A. H. Horton and B. P. Waggener, for defendants.

The purpose and object of section 117 of the tax law of 1868 was to give the holder of a tax deed, or any one claiming under him by virtue of such tax deed, all the taxes and all the interest therein provided, in case the title under such deed should fail, as an inducement to bid in property sold for taxes. To render the investments in such deeds secure, this section provides that if "the holder of a tax deed *be defeated*," etc., he shall recover the said taxes, interest, and costs therein named. If the court now holds that said section 117 does not apply to defendant John T. Smith in this case, then said section is virtually declared nugatory, and without any effect, as "the experience of other states has shown that most titles held in that way would, upon proper proceedings had, be likewise declared void." *Stebbins v. Guthrie*, 4 Kan. *366. The experience of judicial proceedings in this state, before and since the rendition of the said decision above named, has fully confirmed the experience of other states as to the frequency with which tax deeds are held null and void. See *Guittard Tp. v. Marshall*, 4 Kan. *388; *Brumbaugh v. Magill*, Id. *415; *Shoat v. Walker*, 6 Kan. *65; *Campbell v. Fisher*, 8 Kan. *90; *Sapp v. Morrill*, Id. *677; *Hobson v. Dutton*, 9 Kan. *477; *Park v. Tinkham*, Id. *615; *Hubbard v. Johnson*, Id. *632; *McQuesten v. Swope*, 12 Kan. *82.

Again, the court below held that in the event of the failure of title, that defendant in possession of the premises, and claiming under a tax deed, was entitled to the benefit of the statute and provisions for the relief of occupying claimants of land. This ruling of the court should be sustained. Laws 1873, 203, 204; Gen. St. 750, § 602; *Stebbins v. Guthrie*, 4 Kan. *353. In the last-named case, the claimants, *Stebbins* and *Porter*, were in possession under a tax deed which the court held null and void, and yet this court held that this was

sufficient to authorize the parties to claim the benefit of the occupying claimant law. See, also, *Shaler v. Magin*, 2 Ohio, 236; *Davis v. Powell*, 13 Ohio, 320; *Bemis v. Becker*, 1 Kan. *248.

VALENTINE, J. This was an action for the recovery of certain real property, to-wit, lot 2, in block 2, in the city of Atchison. In this opinion we shall speak of the plaintiffs, and those under whom they claim, as the "plaintiff;" and the defendants, and those under whom they claim, as the "defendant;" and shall not mention particularly each separate person. The plaintiff was the original owner of the lot in controversy. The defendant holds the same under a *294 tax deed. The court below held the tax deed void, but also held that the defendant was entitled to the benefit of the occupying claimant act, (Gen. St. 749, § 601 *et seq.*) and also of section 117 of the tax law, (Gen. St. 1057.) The plaintiff claims that the court below erred, and brings the case to this court for review. The facts of the case are substantially as follows: The plaintiff neglected and failed to pay the taxes on said lot from 1860 up to the commencement of this action. In May, 1862, the lot was sold to the county of Atchison for the taxes of 1861. The taxes for the years 1862 and 1863 were charged up against said lot. In May, 1864, the defendant paid into the county treasury the amount of the taxes, interest, and costs then due on said lot for the years 1861, 1862, and 1863, and obtained a tax-sale certificate for the lot, assigned to himself by the county treasurer of said county. In June, 1864, the defendant obtained a tax deed on this certificate, and had the same immediately recorded in the county register's office, and then took possession of the property, and has had possession of the same ever since. He has also made lasting and valuable improvements on said lot, and has paid all the taxes accruing thereon ever since his supposed purchase of the tax title.

Now, under these circumstances, what are the respective rights of the plaintiff and defendant? Now, while we think the tax deed is void upon its face, and confers no title upon the defendant, yet we think the defendant is entitled to the benefit of the occupying claimant act, and of the provisions of section 117 of the tax law. As to the defendant's right to the benefit of the occupying claimant act, we think the case of *Stebbins v. Guthrie*, 4 Kan. *353, is sufficient authority. Although said tax deed is void upon its face, yet it takes a process of reasoning to make it apparent, and hundreds and perhaps thousands of just such deeds have been executed in the various counties in this state; and until a judicial decision of this court was promulgated, announcing that such deeds were void upon their face, the whole question was considered both by bench and bar as en-
 *295 opened in considerable obscurity and uncertainty. *An occupant of land under such a deed is entitled to the benefit of the occupying claimant act; and for the same reason, and others, we think

the occupant of land under such a deed is entitled to the benefits of section 117 of the tax law. Said section reads as follows:

"Sec. 117. If the holder of a tax deed, or any one claiming under him by virtue of such tax deed, be defeated in an action by or against him for the recovery of the land sold, the successful claimant shall be adjudged to pay to the holder of the tax deed, or the party claiming under him by virtue of such deed, before such claimant shall be let into possession, the full amount of taxes paid on such lands, with all interest and costs as allowed by law, up to the date of said tax deed, including the costs of such deed and the recording of the same, with interest on such amount at the rate of twenty per cent. per annum, and the further amount of taxes paid after the date of such deed, and interest thereon at the rate of twenty-five per cent. per annum."

This statute was enacted in the interest of equity and justice, and its provisions should be so construed as to promote justice. It is wholly unlike that class of statutes which attempts to give the land of one person to another for an inconsiderable sum. The former is liberally construed; the latter is strictly construed. The former was enacted for just such cases as the one at bar. It was enacted for void tax deeds, and not for valid tax deeds. A person holding under a valid tax deed has no need of such a statute. Only persons holding under void tax deeds need such a statute. The laws under whose provisions tax titles are created are usually construed strictly, and therefore we hold that the tax deed in this case is void. But laws enacted for the purpose of forcing, in a fair and reasonable manner, the delinquent members of society to discharge that moral obligation resting upon them, as well as upon others, to bear their proportionate share of the public burdens, are always construed liberally, so as to promote their object, and therefore we hold that, before the plaintiff can recover his property, he must pay to the defendant the taxes which

he ought to have paid a long time ago to the public officers, *296 and which the defendant has *himself paid. As to the duty of a person to pay his taxes, see *Gulf R. Co. v. Morris*, 7 Kan. *230 *et seq.* As to the equitable rule in granting relief to plaintiffs who seek to avoid the payment of their taxes, see *Challias v. Hekelnkaemper*, 14 Kan. *475, *477, and cases there cited.

The judgment of the court below is affirmed.

(All the justices concurring.)

ELISHA S. BABCOCK v. JOHN JONES.

July Term, 1875.

Judgment, Lien of: After-Acquired Property. A judgment in this state is a lien on the lands of the defendant in the county in which the judgment is rendered, acquired subsequently to the judgment, and before it has become dormant.¹

Error from Cowley district court.

On the fourteenth of February, 1872, and for six months next preceding, and until the twentieth of April next following, one B. K. Davidson claimed eighty acres of land situate in Cowley county, and being a portion of the Osage reserve lands, having possession thereof as a pre-emptor under section 12 of the act of congress of July 15, 1870. On said fourteenth of February an abstract of a judgment from the docket of a justice of the peace, in favor of one Richard Cook, and against said Davidson, was filed in the office of the clerk of Cowley district court, and said judgment was duly entered and docketed in said district court. On said April 20, 1872, Davidson sold and conveyed said land, by warranty deed, to Elisha S. Babcock, for \$500 cash in hand. Six days later, Davidson paid the entry money therefor, and acquired title to said land from the United States. On the third of April, 1873, Cook sued out an execution on his said judgment, directed to the sheriff of Cowley county, pursuant to which said *297 sheriff levied upon, *and duly advertised and sold, said land; John Jones becoming the purchaser thereof at such sale. Said sale was confirmed, and a sheriff's deed made to Jones, who thereupon brought ejectment against Babcock, to recover possession of the land. The question was whether the after-acquired title of Davidson was bound by the lien of the Cook judgment, or whether it inured to the benefit of his grantee, Babcock, freed from any lien of said prior judgment.² This question, upon an agreed case, was submitted to the

¹ Priority of judgment and mortgage lien determined, see *Plumb v. Bay*, 18 Kan. 415; a judgment duly recovered and entered is a lien on all the right, title, interest, and equity of the judgment debtor in any lands claimed by him, (other than the homestead,) without regard to where or in whom is the legal title, *Kirkwood v. Koeester*, 11 Kan. *471; the lien of a judgment or an execution levy is only upon the actual interest of the judgment debtor in real estate, and does not, except in cases where the doctrine of estoppel applies, extend to interests which by the record are apparently, but are not in fact, vested in him, *Holden v. Garrett*, 23 Kan. 98; when lien becomes subsequent to other judgment liens, *Lamme v. Schilling*, 25 Kan. 92; there is no foreclosure of a simple judgment lien, *Howe M. Co. v. Miner*, 28 Kan. 441.

² NOTE OF HON. W. C. WEBB, STATE REPORTER. The homestead-exemption question was not raised, nor even suggested, in this case. Whether Davidson was "married," or had a "family," nowhere appears in the record. Nor is the question whether, at the time of his conveyance to *Babcock*, he did or did not reside upon the land, anywhere suggested in the record. One of the agreed facts says that he "had possession" of said land "as a pre-emptor," for upwards of six months previous to said fourteenth of February, 1872, (the day Cook's judgment

district court, at the September term, 1874. The district court held that the judgment lien attached to the land on the instant the title thereto was acquired by Davidson, and that the rights acquired under said judgment were paramount to rights acquired under a deed executed by the judgment debtor subsequently to the entering and docketing of the judgment, and gave judgment in favor of Jones.

Alexander & Saffold, for plaintiff in error.

The only question at issue here is the one of judgment liens on *after-acquired lands* in this state. This question is well settled in the negative in Pennsylvania, under laws relating to liens on real property very similar to our own. *Rundle v. Ettwein*, 2 Yeates, 28; *Colhoun v. Snider*, 6 Bin. 135; *Packer's Appeal*, 6 Pa. St. 277; *Moorehead v. McKinney*, 9 Pa. St. 265; *Waters' Appeal*, 35 Pa. St. 523; *Richter v. Selin*, 8 Serg. & R. 425. The same question has been decided the same way in Iowa and Ohio. *Harrington v. Sharp*, 1 G. Greene, 181; *Woods v. Mains*, Id. 276; *Roads v. Symmes*, 1 Ohio, 281, 315; *Stiles v. Murphy*, 4 Ohio, 92. If our Code relating to judgment liens is the same as the Ohio Code, which we have generally adopted, the decisions of the supreme court of the latter state upon questions arising out of the Code will be considered good authority in Kansas. *We find, by comparing sections 419 and 444 of Kansas Code of 1868 with section 421 of chapter 87 of Revised Statutes of Ohio (Derby's Ed.) of 1854, that they are the same in meaning, though differently worded. In Indiana, where a different doctrine prevails, (*Michaels v. Boyd*, 1 Ind. 259,) the statute creates "a lien upon real estate and chattels real *liable to execution* in the county where the judgment is rendered." Of course, all real estate of the judgment debtor is *liable to execution*, whether acquired *after* or *before* judgment. So in Illinois. The decision in 38 Ill. 193, was made under section 1 of chapter 47, Rev. St. 1845, which provides: "All and singular the goods and chattels, lands, tenements, and real estate of every person against whom any judgment has been, or hereafter shall be obtained," etc., "shall be liable to be sold upon execution." The language of the statute, "*has been obtained*," would seem to be intended to cover lands purchased at any time. In New York it was held (*Stow v. Tift*, 15 Johns. 464) that judgments did not bind after-purchased lands where *seizin* was instantaneous. In the present case *seizin* was instantaneous, having been conveyed to plaintiff even before title acquired by the vendor.

Defendant's counsel seemed to rest their chief argument upon section 4 of chapter 68, Gen. St., relating to mortgages, as if that section was intended to extend judgment liens over after-acquired property. We fail to see any applicability of that section to the case at issue. In many states unpaid "purchase-money" consideration is

was docketed, and two months before the deed to *Babcock*,) and that he "had improvements thereon;" and that said Davidson had no other land in said county, at any time after the rendition of said judgment."

made a lien of itself upon the land purchased. And real estate is often purchased by articles of agreement, on time, and afterwards the vendor conveys and takes a mortgage to secure unpaid purchase money. In such a case, if a judgment had become a lien upon the vendee's equitable title held under the articles of agreement, a mortgage to secure unpaid purchase money, taken upon the land afterwards by the vendor, in the absence of the section referred to, would become subject to the existing judgment lien. This section, relied

upon so strenuously by the defendant, was enacted in order to *299 give a purchase-money consideration preference over demands of a different nature. The defendant's argument seems based upon the supposition that a mortgage to secure purchase money is never given at any other time than at the time of the purchase; confounding always a simple purchase with the actual conveyance. We believe, in all cases where lands become subject to the lien of a judgment, under statutes creating such lien at the date of the judgment entry, or of the first day of a court term at which the judgment is entered, the correct doctrine to be that only the real estate held by the defendant at the time of such judgment entry, or first day of the court term, was intended by the legislature to be affected by the judgment lien. See *Moody v. Harper*, 25 Miss. 484. Why should the lien extend further, in the absence of express provision to that end? No one can be defrauded by it. The credit was not given upon speculation as to what the defendant might possess at some future time. Nor is it possible, in our view, that a judgment, in the absence of express statutory provision to that effect, can bind after-acquired lands of a defendant, without some additional action by the parties; as the levying upon it with execution issued under the judgment, as provided in section 444 of the Code.

Hackney & McDonald, for defendant in error.

The only question in this case is whether, under our laws, the lien of judgment attaches to the after-acquired real estate of the judgment debtor *eo instanti acquisitis*. The district court held in this case that it does; and we submit that there was no error in the finding and judgment of the trial court. The lien of judgment is a remedial provision of statutory law, which, in the absence of express statutory provisions relative thereto, is wholly dependent upon the rules of the common law and judicial interpretation for the determination of the scope and sphere of its application. The lien of judgment was created by statute for the purpose of giving to the judgment creditor a new remedy in aid of the writ of execution,

*300 which by its celerity of action renders it impracticable for the judgment debtor to nullify the judgment by rapid, continuous, or fraudulent transfers of his real property; and, being so entirely remedial in its nature, the statute should receive the most liberal construction. *Smith*, Comm. 628, § 480; *Broom*, Leg. Max. 365. In the following well-considered cases it has been held that

the judgment lien attaches to the after-acquired real estate of the judgment debtor, by virtue of its own inherent force, derived from the evident purpose of its creation, and without intervention by levy of execution: *Ridge v. Prather*, 1 Blackf. 401; *Michaels v. Boyd*, 1 Ind. 259; *Wales v. Bogue*, 31 Ill. 464; *Steele v. Taylor*, 1 Minn. 274, (Gil. 210;) *Banning v. Edes*, 6 Minn. 402, (Gil. 270;) *Handly v. Sydenstricker*, 4 W. Va. 605; *Trustees R. E. Bank v. Watson*, 13 Ark. 74. And this principle has been expressly recognized by the statutes of this state. Our statute relative to judgment liens (Gen. St. 1868, p. 708; Code, § 419) was approved February 28th, and three days after, on the second of March, the "act concerning mortgages" (Gen. St. p. 582) was approved, the fourth section of which is as follows: "A mortgage given by a purchaser to secure the payment of purchase money shall have preference over a prior judgment against such purchaser." Now, if the legislature did not, by this provision, recognize the rule that the judgment lien *does* attach to the after-acquired real estate of the judgment debtor, then we have presented the absurdity of providing a remedy against an evil which did not and could not have an existence.

BREWER, J. The only question in this case is, as stated by counsel in their briefs, and as appears from the record, whether a judgment in this state is a lien on after-acquired lands of the judgment debtor in the county, or binds only those belonging to him at the time the judgment takes effect; that is, either the first day of the term, or the day at which it is entered. The language of the statute is: "Judgments * * * shall be liens on the real estate of the debtor within the county in which the judgment is rendered, from the first day of the term at which the judgment is rendered; but judgments by confession, and judgments rendered at the same term during which the action was commenced, shall bind such lands only from the day on which such judgment was rendered." Civil Code, § 419.

This question has been before the courts of many states, and decided both ways. In Pennsylvania, Ohio, Iowa, and Mississippi it has been decided that a judgment lien does not bind after-acquired lands. *Rundle v. Ettwein*, 2 Yeates, 23; *Colhoun v. Snider*, 6 Bin. 135; *Packer's Appeal*, 6 Pa. St. 277; *Moorehead v. McKinney*, 9 Pa. St. 265; *Richter v. Selin*, 8 Serg. & R. 425; *Waters' Appeal*, 35 Pa. St. 523; *Roads v. Symmes*, 1 Ohio, 281; *Stiles v. Murphy*, 4 Ohio, 92; *Harrington v. Sharp*, 1 G. Greene, 131; *Woods v. Mains*, 1 G. Greene, 276; *Moody v. Harper*, 25 Miss. 484. In the case of *Colhoun v. Snider*, *supra*, in which is the fullest and most exhaustive discussion of the question, Chief Justice TILGHMAN, while assenting to the judgment upon the strength of a prior adjudication, expressed a strong dissent to the soundness of the doctrine,—a dissent repeated by the court in the case of *Richter v. Selin*. On the other hand, the

courts of New York, Virginia, West Virginia, Tennessee, Indiana, Illinois, Minnesota, and Arkansas hold that the judgment does bind after-acquired lands. *Stow v. Tift*, 15 Johns. 464; *Jackson v. Bank of U. S.*, 5 Cranch, C. C. 1; *Handly v. Sydenstricker*, 4 W. Va. 605; *Greenway v. Cannon*, 8 Humph. 177; *Chapron v. Cassady*, Id. 663; *Davis v. Benton*, 2 Sneed, 665; *Relfe v. McComb*, 2 Head, 558; *Ridge v. Prather*, 1 Blackf. 401; *Michaels v. Boyd*, 1 Ind. 259; *Wales v. Bogue*, 31 Ill. 464; *Root v. Curtis*, 38 Ill. 192; *Steele v. Taylor*, 1 Minn. 274, (Gil. 210;) *Banning v. Edes*, 6 Minn. 402, (Gil. 270;) *Trustees R. E. Bank v. Watson*, 13 Ark. 74. See, also, *Freem. Judgm. § 367*. A decision either way, therefore, would be well supported by authority.

Counsel for plaintiff in error contend that our statute resembles the Ohio statute, and that, therefore, adopting it, we adopt the construction *302 given there. Our statute is not a copy of the Ohio statute; and while it resembles it very closely, yet little, if any, more so than it does the statute of some of the other states, as, for instance, Tennessee. See 2 Sneed, *supra*. Nor do we understand the Ohio court, in the case in 1 Ohio, in which the question was first decided, as resting their decision upon the peculiar language of their statute. It should perhaps be stated that the statute now in force in Ohio, and from which it is claimed ours was taken, is not exactly like the one in force at the time of the decisions quoted. *Chase, St. 129*. That is even more unlike ours than the present. The language of the statute is not very clear or decisive upon the question. It would not be doing violence to its terms to construe it either way. We are inclined to favor the views of the last-named courts, and hold that the lien does bind after-acquired lands. A single fact favoring this view may be stated. The fourth section of the mortgage act, passed by the same legislature but a few days after the Code, provides that "a mortgage given by a purchaser to secure the payment of purchase money shall have preference over a prior judgment against such purchaser." This tends to sustain the view that but for this section the prior judgment would be a lien, and a lien preferred to the mortgage. The judgment will be affirmed.

KINGMAN, C. J., concurring.

STATE OF KANSAS v. GEORGE POTTER.

July Term, 1875.

1. **Homicide: Information for: Certainty of Charge: Sufficiency.** An information for murder in the second degree against three parties, which charges that the three, in pursuit of a common purpose, unlawfully, purposely, and maliciously made the assault; that each was armed with a separate weapon, describing it; that one with his weapon, in a cruel and unusual manner, wickedly, purposely, and maliciously inflicted several mortal wounds, describing them, of which the deceased died; *303 that the others, at the same time and place, with their weapons, *wickedly, purposely, and maliciously encouraged, abetted, assisted, and protected him in said acts; and closes with the charge that the three naming them, "in the manner and by the means aforesaid, unlawfully, feloniously, willfully, wickedly, purposely, and maliciously, and with malice aforethought, did kill and murder,"—charges upon all the intent to take life sufficiently for the crime of murder in the second degree.¹
2. **Instructions: Elements of Crime: Different Degrees.** If the court, in its instructions, gives, in general terms, the elements of the crime charged, and it is not asked by defendant to enlarge upon and explain further any particular element or feature thereof, no error has been committed in failing to give fuller and more explicit instructions which will justify a reversal. Especially is this true when the testimony is not preserved, and there is nothing in the record from which it can be inferred that any particular matter called for especial notice and explanation.
3. ———. When the instructions complained of relate to a degree of crime inferior to the principal offense charged in the information, and inferior to that of which the defendant is convicted, they will be deemed not to have prejudiced the defendant, whether erroneous or not.
4. **Verdict: Refusal to Receive: Province of Jury.** Where the jury returned a verdict finding the defendant guilty, and adding a recommendation that he receive the lowest punishment allowed by law, and the court declined to receive it, and handed them a form of verdict answering to the same degree of the crime as the prior verdict, but without the recommendation, which was duly signed and returned, *held*, that no error has been committed affecting the substantial rights of the defendant.
5. **Instructions: To be in Writing: Oral Remarks.** The statute requiring a written charge to the jury in criminal offenses is imperative, and the failure to comply with it is an error compelling a reversal.²

¹ Averments of time and description of offense held sufficiently certain. See *State v. Harp*, 81 Kan. 496; 8 C. 3 Pac. Rep. 433; *State v. Stockhouse*, 24 Kan. 445.

² The statute provides that in civil cases the court shall, when requested by either party, reduce its instructions to writing—this provision is mandatory, and a disregard of it is error, compelling a reversal, *Atchison v. Jansen*, 31 Kan. 580; but see *State v. Schoenewald*, 26 Kan. 291; where a plaintiff makes a request to have the charge of the court given to the jury in writing, and the charge of the court upon the merits of the case is so given, and afterwards the court, in directing the jury as to the manner of answering the special findings submitted, orally explains such findings, and the manner of answering them, and no exception is taken to such oral directions by the plaintiff, the error, if any is committed, is waived by the failure of the plaintiff to object or except to such oral directions, *Map Co. v. Jones*, 27 Kan. 178.

6. ———. Where the bill of exceptions simply states that a part of the charge, or some of the instructions, were given orally, without stating the language used, the statute will be held to apply, and the judgment be reversed.
7. ———. It is immaterial whether the oral portion of the charge is given before the jury retire to consider of their verdict, or after they (having once retired) return to ask further instructions; and whether it is a separate instruction, or a mere explanation of a written instruction, it is an error in either case.
8. ———. The mere fact that an oral communication has passed from the court to the jury is not of itself proof that the statute has been
 *304 *disregarded. But the court may properly make oral statements to the jury in reference to the form of the verdict, the manner in which the trial has been conducted, the behavior of the jury or counsel or parties, or any other oral statement which is not fairly and strictly a direction or instruction upon some question or rule of law involved in or applicable to the trial, or a comment upon the evidence.
9. ———: **Questions by Jurors, and Answers.** Where a juror propounds a question to the court, it may make a direct answer, without reducing the same to writing, provided in so doing it does not make an independent statement of a rule of law. In other words, where the question of the juror is the full statement of the rule, and the answer is no more than an affirmation or denial, such affirmation or denial need not be reduced to writing before it is given.

Appeal from Atchison district court.

Information for murder in the second degree, filed in June, 1874, against defendant, George Potter, and two others. The case of one of his co-defendants, who was convicted on a separate trial, was brought to this court, and is reported in *State v. Potter*, 13 Kan. *414. The defendant here, George Potter, was tried at the November term, 1874, of the district court, and convicted of murder in the second degree, and sentenced to imprisonment in the penitentiary of the state for the period of ten years.

C. F. Cochran and Horton & Waggener, for appellant.

The court should have sustained the motion to quash the information, and should have sustained the objection of the defendant to the introduction of testimony under said information. The information purports to have been drawn under section 7 of the crimes act, which provides that "every murder which shall be committed purposely and maliciously, but without deliberation and premeditation, shall be deemed murder in the second degree." The conviction and judgment were under this section. It contains the word "purposely," as qualifying and characterizing the offense of the murder of a human
 *305 being. We claim that the accused is not charged *in the information at all with having *purposely* murdered or killed Keeley, but only with having purposely aided and abetted Isaac Potter in the infliction of the wounds from which death ensued. It is nowhere charged, or pretended to be charged, in said information, that either of said defendants *purposely* killed or murdered said

Keeley, or that defendant herein aided, abetted, or counseled Isaac Potter in the murder of Keeley. This is fatal to the information, and the court erred in not sustaining this point when presented. *Fouts v. State*, 4 G. Greene, 500; *State v. Thompson*, 31 Iowa, 393; *State v. McCormick*, 27 Iowa, 402; *Kain v. State*, 8 Ohio St. 306, 321; *Loeffner v. State*, 10 Ohio St. 598; *State v. Knouse*, 29 Iowa, 118; *State v. Jones*, 20 Mo. 58; *Bish. St. Crimes*, §§ 471, 472.

The court erred in its instructions to the jury, inasmuch as it failed and neglected to state to them all matters of law which were necessary for their information in giving their verdict. *Crim. Code*, § 236. The offense of murder in the second degree was not in any manner explained to the jury, and they had no information from the instructions of the court from which they could form an intelligent idea of what constituted murder in the second degree. *Whart. Amer. Crim. Law*, (7th Ed.) § 3248; *State v. Dunlop*, 65 N. C. 288; *State v. Wyatt*, 50 Mo. 309. The court in its general charge attempts to tell the jury what constitutes manslaughter in the first degree, and undertook to copy the language of section 12 of crimes act; but, instead of giving the instruction in the words of the section, the court says to the jury, "and which *killing* would be murder at common law." The court undoubtedly misled the jury as to what constituted manslaughter in the first degree under said section, and certainly did not instruct them in what cases killing would be murder at the common law. *Bonfanti v. State*, 2 Minn. 130, (Gil. 99;) *State v. Dunlop*, 65 N. C. 288. The court should have explained to the jury the several definitions of manslaughter in the second degree, as provided in sections 16 and 17 of the crimes act, and it was error not to do so. *Crim. Code*, § 236. The same objection is applicable to the explanation given by the court of manslaughter in the third degree. The court in its general charge to the jury explains to them what constitutes, in its judgment, manslaughter in the fourth degree, in the following words: "Manslaughter in the fourth degree consists of every other kind of killing of a human being, by the act, procurement, or culpable negligence, which would be manslaughter at the common law, and which is not justifiable or excusable, or would not be manslaughter in some other degree, which I have heretofore fully explained to you." Now, we submit that this instruction, standing alone, does not in any manner explain to the jury what constitutes manslaughter in the fourth degree. In order for the jury to have intelligently understood the same, it was necessary for the court to have fully explained to them what would be manslaughter at common law. As this was not done, the jury were left to conjecture in their minds what constituted manslaughter at the common law, which was the exclusive province of the court to explain to them fully and explicitly. *Crim. Code*, § 236; *Reeves v. Wood Co. Treas.*, 8 Ohio St. 835.

After the jury had retired to consider their verdict, they returned into court, and asked of the court "whether a party could be an ac-

cessory, aider, or abettor of another who committed the crime of manslaughter in the second degree." The court thereupon, over the objection of defendant, gave the jury the following instructions: "A person who aids or assists another in the commission of any crime is equally guilty with the person who actually commits the crime, and may be charged, tried, and convicted, the same as the principal, and may be regarded by the jury in every respect as if he were the principal." As an abstract proposition of law, this is not correct. Crim. Code, § 228. But the instruction was not an answer in any manner to the question. It was an evasion in terms of the question of the juror, and the only effect it could have had would be to mislead the minds of the jury in arriving at a proper solution of the question. But, in addition to this written instruction, the court stated *orally* to the jury as follows: "I mean by that, that makes him principal and not accessory. There is no such thing, in my judgment, as *307 accessory, *in this case. *Those acts make him principal, and should be regarded by you as principal, and not accessory.* He is either principal or nothing." This verbal instruction to the jury assumes that the evidence in the case made defendant principal in the crime charged, and that the jury *should* regard him as principal. "*Those acts.*" What acts? It was improper, and greatly prejudicial to the rights of the defendant, for the court to give any instructions *verbally* to the jury. The Criminal Code was undoubtedly enacted for the guidance of courts and juries in the trial of persons accused with the commission of crimes; and so particular was the legislature that the rights of the accused should not be frittered away by any improper act or instruction of the court it wisely provided, in section 236: "The judge must charge the jury in writing, and the charge shall be filed among the papers of the case." This was clearly an instruction or charge of the court, and it was not in writing, and in direct contravention of the provision as laid down in the Criminal Code, and was calculated to mislead the jury, and deprive the defendant of the rights that had been given him by the law. And the court clearly and manifestly deviated from the law, to the prejudice of defendant, in giving this oral instruction. *State v. Huber*, 8 Kan. *447; *Mallison v. State*, 7 Mo. 399; *State v. Cooper*, 45 Mo. 64; *Gile v. People*, 1 Colo. 18, 61; *Jeffersonville R. Co. v. Cox*, 37 Ind. 325; *Dixon v. State*, 13 Fla. 637; *Meredith v. Crawford*, 34 Ind. 399; *Feriter v. State*, 33 Ind. 283; *Turnpike Co. v. Conway*, 7 Ind. 187; *Clark v. State*, 31 Tex. 574. If this provision of the law requiring the charge of the court to be in writing and filed among the papers can be disregarded, as it was in this instance, it is useless for persons accused of crime to insist upon any provision of the law as enacted to protect them in their rights.

The court erred in not receiving the first verdict of the jury. It was clearly proper for the court to have granted the request of the defendant to receive the verdict as presented into court, and it was error for it to refuse such request. The defendant had a *legal* right to have

said verdict read, or to know of its contents, and have the jury polled as the law requires. *Maduska v. Thomas*, 6 Kan. *153; 3 *308 *Wat. New Trials*, 1404. *After the jury had brought in their first verdict, and without the defendant being permitted to see the same, the court, of its own motion, wrote out and handed to the jury a verdict, which they signed and returned. We claim that this was an improper and unauthorized action of the court. He was simply saying to the jury: "In my judgment, the defendant is *guilty* of murder in the second degree, and that the jury should sign the verdict as presented to them and return it into court; but if, upon deliberation, they conclude otherwise, and find the defendant *not guilty*, they should fill up the blank left by the court before the word *guilty* with the word *not*, and through their foreman return the same into court." *State v. Johnson*, 8 Iowa, 525-531. This was drawing a distinction unfavorable to the rights and interests of the defendant. *Horne v. State*, 1 Kan. *74.

Aaron S. Everest, for the State.

There was no error in overruling the motion to quash the information. A similar motion to the same information was passed upon by this court in the appeal of *Isaac Potter*. *State v. Potter*, 13 Kan. *422.

There was no error in the charge. It stated to the jury all matters of law which were necessary for their information, and no substantial rights of the accused were affected, nor was he in any manner prejudiced thereby. It is not necessary nor essential that the court should have delivered a lecture upon criminal law, or to have made its charge a commentary upon the law of homicide. The exception to the charge is too general; being "to each and every part, line, and word thereof." Unless the whole charge is erroneous, or unless the charge in its general scope or meaning is erroneous, such an exception is not available. *Sumner v. Blair*, 9 Kan. *530; *Atchison v. King*, Id. *560; *Eldred v. Oconto Co.*, 33 Wis. 137; *Yates v. Bachley*, Id. 185; *Ferguson v. Graves*, 12 Kan. *43; *Somervail v. Gillies*, 31 Wis. 152; *Bigelow v. West Wis. R. Co.*, 27 Wis. 483.

If the instructions given did not possess sufficient clearness to satisfy the defendant, the attention of the court should have been called, and a more definite charge requested. Although that portion of the charge as to what would constitute manslaughter in the *309 first degree may be open to some verbal criticism, when considered apart and by itself, still, when taken with the rest of the charge, it could not have misled a jury of ordinary intelligence, and did not prejudice the substantial rights of the defendant. And even if the court did not clearly charge what constituted murder at common law, or any other offense less than the one of which a conviction was had, such an omission is not to be presumed injurious to the defendant, who was convicted of murder in the second degree. *State v. Dickson*, 6 Kan. *221; *Walker v. Walker*, 26 Ga. 156.

There was no error in answering the question from the foreman of

the jury. There is no doubt of the correctness of this proposition of law stated by the court. It has been frequently so held under statutes similar to that of our own. *Crim. Code*, § 115; *State v. Cassady*, 12 Kan. *550; *Baxter v. People*, 3 Gilman, 368; *People v. Woody*, 45 Cal. 290; *Ingalls v. Cooke*, 21 Iowa, 561.

The appellant claims that the court below gave an oral instruction to the jury, which we claim is not a fact; the difference being that what was said by the court was only in response to a question asked by the jury after they had been once regularly charged and properly instructed. This was no part of a charge, within the meaning of section 236 of the Criminal Code. And this statute was not intended to include any and every question and answer passing between the court and jury; neither does the statute contemplate any such thing. *Sullivan v. Collins*, 18 Iowa, 231; *Hasbrouck v. City of Milwaukee*, 21 Wis. 217, 225, 238; *City of Milwaukee v. Gross*, Id. 243; *Millard v. Lyons*, 25 Wis. 516; *Grant v. Connecticut Mut. Life Ins. Co.*, 29 Wis. 125; *Hogel v. Lindell*, 10 Mo. 487; *Pate v. Wright*, 30 Ind. 476; 5 Ill. 302-305; *Prater v. Snead*, 12 Kan. *447; *O'Donnell v. Segar*, 25 Mich. 380; *People v. Bonney*, 19 Cal. 426, 446. The province of a trial court is sufficiently hampered without giving this section any unwarranted construction. This did not and could not have prejudiced any rights of defendant.

It was not error for the court to direct the jury to amend their verdict. The first verdict returned was, in the opinion of the court, informal. It found the defendant guilty of murder in the second degree, as charged in the information filed against him, and contained the further words, to-wit, "and recommend his punishment to be the least amount allowed by law." The court had the un-
 *310 *doubted right to direct a verdict which is informal to be corrected; or a verdict which contains unnecessary or improper matter, or matter which is surplusage, to order that part of it to be stricken out, and the verdict corrected. There was no demand to have the jury polled, neither was said verdict received; but the court directed that, the verdict returned being informal, the jury should correct the same. It was not the province of the jury to render any but a general verdict as to the guilt or innocence of the accused.

BREWER, J. Defendant was convicted in the district court of Atchison county of the crime of murder in the second degree, and sentenced to the penitentiary for a term of ten years. From that conviction and sentence he has appealed to this court. The errors complained of may be grouped into four classes: *First*, objection to the sufficiency of the information; *second*, error in the instructions; *third*, the giving of an oral instruction; *fourth*, refusing to receive the verdict as prepared by the jury, and preparing a verdict for them to return. With three of these matters we have had little, but with the other, great, difficulty in coming to a conclusion.

1. It is objected that the information was insufficient. The information was a joint one against Isaac Potter, Walter Boyle, and the appellant. It charged murder in the second degree. It charged the fatal blow upon Isaac Potter, and that Boyle and the appellant were present, aiding and abetting. A severance was had, and the defendants tried separately. Isaac Potter was convicted of murder in the second degree, and appealed therefrom to this court, which reversed the conviction, and remanded the case for a new trial. Subsequent to the conviction of Isaac Potter the appellant was tried. When Isaac Potter's case was brought to this court, (State v. Potter, 13 Kan. *416, *422,) objection was made to the sufficiency of the information, but it was overruled. The specific objection now made was, however, not then presented, so that that decision may not be deemed
 *311 conclusive now. The claim now made by counsel is that "the accused is not charged in the information at all with having *purposely* murdered or killed Jacob B. Keeley, but only with having *purposely* aided and abetted Isaac Potter in the infliction of the wounds from which death ensued." The information, which is perhaps unnecessarily lengthy, charges that the three defendants, in pursuit of a common purpose, "unlawfully, feloniously, willfully, wickedly, *purposely*, and maliciously" made an assault upon the deceased; that each of the defendants (naming him separately) was armed with a certain weapon; that Isaac Potter did, with his weapon, "in a cruel and unusual manner, willfully, wickedly, *purposely*, and maliciously" strike, beat, bruise, and wound the deceased, and thereby gave to him four mortal wounds, (describing them,) of which wounds he died; that this appellant and Walter Boyle, with their weapons, at the same time and place, unlawfully, feloniously, willfully, wickedly, *purposely*, and maliciously encouraged, abetted, assisted, and protected in said acts; and then closes with the charge, "and so the county attorney * * * does say and charge that the said defendants, (naming each of them,) him, the said Jacob B. Keeley, in the manner and by the means aforesaid, unlawfully, feloniously, willfully, wickedly, *purposely*, and maliciously, and with malice aforethought, did kill and murder, contrary," etc. It seems to us, since the decision in the case of Smith v. State, 1 Kan. *365, that there can be little question as to the sufficiency of this information. It charges an assault by all, in pursuit of a common purpose; the killing by Isaac Potter; the presence of the others, aiding and abetting; and, finally, the intent upon all. In the Smith Case, just cited, there was, as here, an omission to charge the intent to take life elsewhere than in the closing clause of the indictment. But the court, disregarding authorities under the old practice, held the indictment good under our Code. It seems to us that
 that decision was correct, and it disposes of this question.
 *312 2. The next objection we shall consider is that to the instructions. The court gave to the jury a general charge, and then, at the instance of the respective parties, several instructions.

The first point made is that it failed and neglected to state to the jury all matters of law which were necessary for their information in giving their verdict, (Crim. Code, § 236,) and upon this counsel say: "The offense of murder in the second degree was not in any manner explained to the jury, and they had no information from the instructions of the court from which they could form an intelligent idea of what constituted murder in the second degree." On examining the charge, we find that the court told the jury that if they found "that the defendant did, in the manner and form, and at the time and place, charged in the information, kill the said deceased," then it was their duty to convict of murder in the second degree; and in the first instruction he charged them that if they found that the defendant, "in connection with Isaac Potter and Walter Boyle, all acting with a common purpose, design, and intent to take the life of the deceased, purposely and maliciously killed the said deceased, without justification therefor, as charged in the information," then they should convict of murder in the second degree; and other instructions, given at the instance of both plaintiff and defendant, enlarged a little upon certain elements of the crime. It does not appear that any instruction asked by the defendant was refused, except one in relation to the presumption of innocence, and one in relation to reasonable doubt, which was refused as tendered, but given with a modification. Now, it may be laid down as a general rule that if the court gives, in general terms, the elements of the crime, and is not asked by defendant to enlarge upon and explain further any particular element thereof, no error has been committed in failing to give fuller and more specific instructions which will justify an appellate court in a reversal. Especially is this true when, as in this case, the testimony is not preserved, and nothing from which it can be inferred that any particular element called for especial notice and explanation. Doubtless it often happens that in view of the testimony certain matters require especial notice, and rules of law applicable thereto should be given with great fullness and detail, and a failure to do so would be sufficient to justify a reversal. But there is no presumption that this is so, and the fact, if it exists, should be made to appear in the record.

Again, it is objected that the court failed to give fully and correctly the law in reference to the several degrees of manslaughter and other inferior crimes. *Craft v. State*, 3 Kan. *485. In reference to these crimes it gave, or attempted to give, simply the statutory definition of them. It made some verbal changes from the language of the statute, but none working any substantial change in the meaning. Thus, in the section defining manslaughter in the first degree, is this phrase, "in cases when such killing would be murder at the common law." Instead of this, the court used this expression, "and which killing would be murder at common law." Then, again, it omitted, in explanation of this section, any definition of "murder at the com-

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mon law." Hence counsel contend that the jury were not fully informed as to what constituted manslaughter in the first degree. Substantially the same criticism is passed upon the instructions in reference to some of the other degrees of manslaughter. In reference to these objections, in addition to what was said concerning the first objection to the instructions, the case of *State v. Dickson*, 6 Kan. *209, may be referred to, in which this court held that "when the instructions complained of relate to a degree of crime inferior to the principal offense charged in the information, and inferior to that of which the defendant is convicted, they will be deemed not to have prejudiced the defendant, whether erroneous or not." This is decisive upon these points.

An instruction asked in reference to reasonable doubt was modified by adding a fair, proper definition of reasonable doubt, and, as modified, given. There was clearly no error in this.

Some other objections are raised to the instructions, but none which we deem well founded.

*314 *3. It is insisted that the court erred in refusing to receive the verdict returned by the jury, and handing to them the form of a verdict. The verdict as returned was one finding the defendant guilty of murder in the second degree, and with it these words, "and recommend his punishment to be the least amount allowed by law." The court declined to receive the verdict in that form, and handed them one without those words, which was duly signed and returned. It may be stated that on the form handed to them a blank space was left before the word "guilty," for the insertion of the word "not," and the jury instructed to insert the word "not" if they found the defendant not guilty. But this was unnecessary. The jury had signified the conclusions to which they had arrived when they returned the first verdict, and all that the court did was to see that the verdict was placed in the proper form. We do not think there would have been any impropriety in receiving the first verdict; but technically and strictly the jury have nothing to do with the question of *punishment*, but only with that of *guilt*; and they go outside the strict boundary of their duties when they attempt to influence the term of the punishment. The court keeps within the letter of the law when it confines the jury to their separate duties, and commits no error in so doing. Indeed, it may be laid down that it is the duty of the court to see that the verdict is in due form; and, if all that it does is to change the form, it is simply discharging an unquestioned duty.

4. This brings us to the last, and by far the most difficult, question in the case. The following are the facts in reference to it: After the jury had retired to consider of their verdict, they returned into court, and through their foreman, Dr. Stringfellow, asked of the court the following question: "I ask whether a party could be an accessory, aider, or abettor of another who committed the crime of manslaughter

in the second degree?" The court thereupon, over the objection of the defendant, gave the jury the following instructions, to-wit:

*315 "A person who aids or assists another in the commission of any crime is equally guilty with the person who actually commits the crime, and may be charged, tried, and convicted the same as the principal, and may be regarded by the jury in every respect as if he were the principal." In addition to this written instruction, the court stated *orally* to the jury as follows: "I mean by that, that makes him principal, and not accessory. There is no such thing, in my judgment, as accessory to this case. *Those acts make him principal, and should be regarded by you as principal, and not accessory. He is either principal or nothing.*"

The statute says: "The judge must charge the jury in writing, and the charge shall be filed among the papers of the cause. Gen. St. p. 858; Crim. Code, § 286. It is error to omit to do so. State v. Huber, 8 Kan.* 447. A glance at some of the decisions in reference to this matter in other courts may not be uninformative.

In Indiana the statute provides that, "when the argument of the cause is concluded, the court shall give general instructions to the jury, which shall be in writing, and be numbered and signed by the judge if required by either party." 2 Rev. St. (G. & H.) p. 198, § 324. Upon this, in *Townsend v. Chapin*, 8 Blackf. 328, it was held error to give written instructions with verbal explanations and illustrations. The same doctrine was affirmed in *Kenworthy v. Williams*, 5 Ind. 375, and in *Laselle v. Wells*, 17 Ind. 83. In *Meredith v. Crawford*, 34 Ind. 399, the court declared that "oral explanations, comments, or modifications" were erroneous. In *Rising Sun & V. T. Co. v. Conway*, 7 Ind. 187, and in *Feriter v. State*, 33 Ind. 283, the decision was that the whole charge must be in writing. In the case of the *Toledo & W. R. Co. v. Daniels*, 21 Ind. 256, the trial judge gave this oral introduction to his written instructions: "This is an action brought against defendant to recover the value of the property alleged by the plaintiff to have been killed on said road. It has been intimated by the defendant's counsel that you may disregard

*316 the instructions of the court as to the law governing the case, but we say to you that you cannot do that. The court may err, but it is not the province of the jury to determine whether the law as delivered to them by the court be correct or incorrect. If wrong, the party feeling aggrieved by it has his remedy by appeal to the supreme court." The giving of this oral statement was adjudged error. In *Pate v. Wright*, 30 Ind. 476, it appeared that the trial judge repeated orally a part of one of the instructions, and, in reading another, remarked that he had not intended to read so far, and then re-read the instruction as intended. This was held no error.

In Colorado it is provided that "the instructions shall be reduced to writing, and may be taken by the jury in their retirement, and returned by them with their verdict." Laws 1861, p. 282, § 28. In

Dorsett v. Chew, 1 Colo. 18, and *Giles v. People*, *Id.* 61, where it appeared from the bills of exception that the court gave oral instructions, and oral explanations of written instructions, both were adjudged error.

In California the statute reads: "In no case shall any charge or instruction be given to the jury otherwise than in writing, unless by the mutual consent of the parties." In *People v. Demit*, 8 Cal. 423, and *People v. Ah Fong*, 12 Cal. 345, the judgments were reversed because of the giving of oral instructions. In *People v. Payne*, 8 Cal. 341, an oral modification of a written instruction was held erroneous. And in *People v. Wappner*, 14 Cal. 437, it was decided that an oral instruction was erroneous, whether given in the first instance, or after the jury had once retired to consider of their verdict and returned with a request for further information. In *People v. Bonney*, 19 Cal. 426, in which was an indictment for murder, the jury returned a verdict of "guilty as charged." The court told the jury verbally that the verdict was not in form, but should specify the degree of murder of which they found the defendant guilty, and directed them to retire and designate the degree. Held no violation of the statute, and no error.

*317 *In *Ray v. Wooters*, 19 Ill. 82, under a statute which declared that the court "shall in no case orally explain or qualify" the written instruction, an oral explanation was held ground for reversal. In *O'Hara v. King*, 52 Ill. 303, where the statute forbade instructions "unless such instructions are reduced to writing," (*Scales, Comp.* 261,) it appeared that during the argument of counsel the court interrupted, and stated orally, in the presence and hearing of the jury, its opinion as to the law of the case; but this was decided to be outside of the statute, and not erroneous.

In Florida the statute requires that the charge shall be wholly in writing; that upon refusing an instruction the court shall write out his own rulings of the law upon the point raised, all of which shall be in writing, and written before the same are delivered; and that all instructions given and refused shall be signed and sealed by the court, and form a part of the record in the cause. In *Dixon v. State*, 13 Fla. 637, it appeared that, after the court had finished its charge, one of the jurors asked whether they must believe all the testimony, or could disbelieve any part of it. The court answered orally that they could reject, etc.; but this was adjudged within the prohibitions of the statute, and an error sufficient for reversal.

In *Clarke v. State*, 31 Tex. 574, it was declared that oral instructions, given without the consent of the defendant, were forbidden by the statute, and sufficient for reversal.

In Missouri it was provided by the act of February, 1839, "that in no criminal case shall the court give to the jury any charge or instruction, on any question of law or fact, except the same be in writing, and filed in the cause;" and that, if any court should violate

that statute, "the party may except, and for such violation the cause or judgment shall be reversed at the instance of the aggrieved party." Under this statute the case of *Mallison v. State*, 6 Mo. 899, was decided. There it appeared that a juror asked if, under the indictment, which was for murder, they could convict of manslaughter, and

*318 the court replied orally that it had not decided *that point; that the court did not know that the supreme court had decided the point; that they (the jury) were judges of the law and the fact; that they might find the verdict as they pleased, and, when rendered, the court would decide on its validity. The judgment was reversed for error in making such oral reply. The statute in force at the time of the decision of *State v. Cooper*, 45 Mo. 64, provided "that the court shall not, on the trial of the issue of any indictment, sum up or comment upon the evidence, or charge the jury as to matter of fact, unless requested so to do by the prosecuting attorney, and the defendant, or his counsel. But the court may instruct the jury on any point of law arising in the case, which instruction shall be in writing." In that case, the court, with the consent of the defendant, charged the jury orally upon the law. This was held erroneous, and the judgment was reversed.

In Michigan the statute reads: "The court shall in no case orally qualify, modify, or in any manner explain the written charge." In *O'Donnell v. Segar*, 25 Mich. 367, it appeared that the court, in explanation of its written instructions, said orally "that the bringing of a suit for exempt property, or claiming it as exempt, was justified by law, and must be so regarded by the jury as well as by the courts." Commenting upon this, the supreme court say "that it was the expression of a mere legal truism, which could not and did not modify the effect of any of the charge given, and consequently cannot be treated as error." But where it was stated in the bill of exceptions that the court "otherwise orally explained," without giving the language used, they decided that the statute applied, and reversed the judgment. In *Swartwout v. Michigan Air-line R. Co.*, 24 Mich. 407, it was held that the reading of a section of the statute as a part of the charge was no violation of the provision which required that the charge should be in writing and filed with the papers of the case.

In *Hasbrouck v. City of Milwaukee*, 21 Wis. 219, the court prefaced the written instructions with some oral statements,

*319 *among which were these: "During the long and fatiguing trial the court may have become impatient at the delay of counsel, and made remarks that may possibly have influenced some juror. I wish it specially understood that nothing I have said was intended to influence unduly the verdict of the jury, and I do not wish any juror to be influenced by it in the least. In submitting this case to you I will not comment at all upon the evidence, leaving you to weigh it all in your own judgment, and bring in your verdict accordingly." This was held no part of the charge, and therefore not in

violation of the statute which required that the charge be in writing. In *Millard v. Lyons*, 25 Wis. 516, a juror, after the charge, asked "whether the plaintiff had the right to use the defendant's divided grain to feed the stock and sheep." The judge answered that he would not have the right by law. This was held no part of the charge; the supreme court saying that the question might have been answered with the simple word "no," and that it would be nonsense to require the court to write that word, and then read it to the jury. In *Grant v. Insurance Co.*, 29 Wis. 125, the court orally stated to the jury that the defendant had offered no proof to sustain the issues he had tendered, and, the plaintiff's proof being conclusive, they must find a verdict for the plaintiff. This was held no violation of the statute.

It will be noticed from this review that our statute is not so specific or minute in its restriction upon the action of the court as those of several other states. The language is general, and simply calls for a written charge, and requires it to be filed among the papers. We think the following propositions may fairly be deduced from the authorities, and are a just construction of the effect to be given to our statute: (1) The statute requiring a written charge in criminal cases is imperative, and a failure to comply with it is an error compelling reversal. (2) Where the bill of exceptions simply states that a part of the charge, or some of the instructions, were given orally, without

stating the language used, the statute will be held to apply, *320 and the judgment be reversed. (3) It is immaterial whether

the oral portion of the charge is given before the jury retire to consider of their verdict, or after they, having once retired, return to ask further instructions; and whether it is a separate instruction, or a mere explanation of a written instruction, it is error in either case. (4) The mere fact that an oral communication has passed from the court to the jury is not of itself proof that the statute has been disregarded; but the court may properly make oral statements to the jury in reference to the form of the verdict, the manner in which the trial has been conducted, the behavior of the jury or counsel or parties, or any other oral statement which is not fairly and strictly a direction or instruction upon some question or rule of law involved in or applicable to the trial, or a comment upon the evidence. (5) Where a juror propounds a question to the court, it may make a direct answer without reducing the same to writing, provided in so doing it does not make an independent statement of a rule of law; in other words, where the question of the juror is the full statement of the rule, and the answer is no more than an affirmation or denial, such affirmation or denial need not be reduced to writing before it is given. It may be remarked in reference to these propositions, and especially the last, that the purpose of this statute is to secure to the defendant the exact rulings of the court, in order that he may avail himself of any error in those rulings; that it was not intended to cast any unnecessary burdens upon the court, or to hamper or restrict communi-

ocations between the court and jury; that it should be so construed as fairly to secure that purpose, and not made a mere weapon of technical error; that in reference to answers to questions, as there is nothing to require the questions to be reduced to writing before they are put, it would seem trifling to compel the answer to be so reduced when the answer is simply responsive, and depends for its meaning upon the unwritten question. It seems to us that, tested by this last

rule, the oral statement in this case must be held not a violation *of the statute, and no ground for reversal. Many words are used, but after all it amounts to no more than a negative reply to the question asked, if a party could be an accessory. The court replies that "there is no such thing as accessory; the party is principal or nothing." So far as the law is concerned, it was, under the provisions of our statute applicable to this case, correctly given in the written statement made in reply to the question.

In the record as it was presented to us at the time of the argument and submission, it did not appear that any exception was taken to the giving of this oral reply to the question of the foreman. Subsequently the appellant filed a motion to have the record corrected by the insertion of an exception, and filed in support thereof an affidavit of one of his counsel who was present during the trial, stating that exceptions were duly taken, and giving an explanation of the omission of a statement to that effect from the record brought here, which is a copy of the original bill signed and filed in the district court, and also a copy of a certificate of the district judge made and filed in the district court since the submission here. It would seem from this testimony that in the bill, as prepared by counsel, was a statement that exceptions were taken, and that this statement was subsequently erased; but whether before or after it was signed, does not seem clear. If the erasure was subsequent to the signing, it is a mere clerical mistake, which can be corrected; but if it was erased before, and the bill was signed without any such statement, it makes this an application to amend the bill, and presents a question of more difficulty. Counsel, appreciating the difficulty, have filed a supplemental brief, contending that, if no exceptions were taken, the defendant was still entitled to the benefit of any error in this action of the district court; and this, too, we find a question of no easy solution. We do not decide either of these questions; our conclusions being adverse to the appellant upon the action of the court supposing it duly excepted to.

The judgment will be affirmed.

(All the justices concurring.)

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*STATE OF KANSAS v. JOHN W. HARPSTER.

July Term, 1875.

Appeal: From Justices' Courts. No appeal can be taken from the judgment of a justice of the peace directly to this court. Const. art. 8, § 10. All appeals from such judgments, where appeal is allowed by law, must be taken to the district court. [Leavenworth v. Weaver, 26 Kan. 394.]

Appeal from a justice's judgment.

Complaint before a justice of the peace of Doniphan county, on oath of one A. C. J., charging defendant with having, in a certain building in the city of White Cloud, on the first day of June, 1875, sold "spirituous, vinous, fermented, and other intoxicating liquors to one G. S., one O. O., and one T. B. without having at the time a license as grocer, dram-shop keeper, or tavern keeper, obtained in accordance with the provisions" of the dram-shop act. A trial was had before the justice and a jury on the eighth of June, 1875. Verdict, "Not guilty." The defendant was discharged; and thereupon, says the transcript, "It is considered and adjudged by the court that the complaining witness, A. C. J., pay all costs in this prosecution, and stand committed until paid. To which judgment for costs the said A. C. J. excepts, and the state also excepts." The costs were taxed at \$62.05. The state prepared a bill of exceptions, which was signed and settled by the justice, and a transcript thereof was brought to this court as upon appeal by the state in criminal actions.

A. L. Brewster and W. D. Webb, for the State.

T. H. Parish and T. M. Keith, for defendant.

BREWER, J. This is an attempted appeal from the judgment of a justice of the peace directly to this court. This cannot be done.

The constitution, art. 8, § 10, explicitly declares that "all appeals from probate courts and justices of the peace shall be to the district courts." Language could not be plainer. It is not in the power of the legislature to provide for an appeal from a justice of the peace directly to this court. And whatever may be the defects of the statute, or failure, if failure there be, to provide any way for appealing a case of this kind—a complaint for selling liquor without a license—to the district court, or whatever express or implied statutory grant of an appeal to this court, the paramount law forbids us to take cognizance of an appeal from a justice of the peace.

The appeal must be dismissed.

(All the justices concurring.)

EPHRAIM BAINTER and another v. ROBERT FULTS.

July Term, 1875.

1. **Supreme Court: Presumptions in Favor of Judgment.** On petition in error to the supreme court, all presumptions must be construed in favor of the correctness of the findings and judgment of the court below. [Lucas v. Sturr, 21 Kan. 482.]
2. **Finding, General: When Sufficient.** In a case tried before the court without a jury, where the court is not asked to make special findings of fact, or to state the facts in detail, the findings will be considered sufficient if all the necessary facts are stated in the findings, although they may be stated in ever so general or comprehensive terms.
3. **Fraud: Contracts and Deeds Procured by, Set Aside.** Where two men contrive and conspire to cheat and defraud a weak old man, mentally so weak as to be wholly incapable of managing his own affairs, and where they do by false and fraudulent representations cheat and defraud this old man, and thereby obtain his property for a grossly inadequate consideration, a court of equity may set aside and cancel all contracts or instruments by which these two men hold the old man's property, and may place the parties in the same situation and condition in which they were before the fraudulent transactions occurred.¹
4. ———: **Liability in Equity Proceedings.** Where F. commences an action against B. and G. to set aside, on the ground of fraud, a certain
 *824 executed contract, and certain deeds connected therewith, and to *place the parties in the same condition in which they were before the fraudulent transactions occurred, and where it was shown that B. only was to receive or did receive any benefit from the contract or deeds, and was the only person who was to receive or did receive any portion of F.'s property, and G. was not a party to any instrument to be set aside or canceled, and where a portion of the property received by B. from F. was \$947 in money, held, that it was error for the court to render a judgment jointly against B. and G. for a return of that money, although G. participated in the fraud. In an action in the nature of an action at law for damages a joint judgment against both would be proper; but in an action in the nature of a suit in equity, like this, and under the facts of this case, such a judgment is not proper. The judgment should be against B. alone.
5. ———: **Property: Money Value.** Where a party fraudulently obtains certain articles of property from another, but receives the property as a definite sum of money, the person defrauded may elect if he chooses to treat such property as such sum of money.
6. **Fraudulent Contracts, Void in Toto.** Where a person commences an action to set aside for fraud a certain contract, and to place the parties in their original condition, and where it was shown that under said con-

¹For cases on the law of fraudulent and voluntary conveyances, etc., see the full notes to Knight v. Kidder, 1 Atl. Rep. 148; State v. Wallace, 24 N. W. Rep. 610; Zoeller v. Riley, 2 N. E. Rep. 898; Lewis v. Hopping, 8 Pac. Rep. 75; Farmers' Bank v. Warner 26 N. W. Rep. 48.

tract the plaintiff, in consideration of certain real estate transferred to him by the defendant, transferred certain other real estate and \$947 in money to the defendant, *held*, that the plaintiff cannot after the trial, and at the time when the judgment is rendered, have the judgment so rendered that he can afterwards, if he chooses, elect to affirm the contract as to the real estate, and treat the judgment as merely a judgment for damages for said sum of \$947. The judgment should be to wholly set aside the contract, and place the parties in their original condition.

Error from Douglas district court.

At the August term, 1873, Fults, as plaintiff, recovered judgment against Bainter and Barnett, defendants. The trial was by the court, without a jury, and the facts and conclusions found were as follows:

"(1) The plaintiff, Robert Fults, on the twentieth of October, 1871, and for a long time prior thereto, was the owner of 160 acres of land in said Douglas county, described as the S. W. $\frac{1}{4}$ of sec. 35, in township 12, of range 17, of the value of \$3,500, and resided on the same with his family. He was then 69 years of age, illiterate, infirm from age and physical injuries, weak in mind, and incapable of managing his own affairs.

*325 "(2) The defendant Ephraim Bainter, on the twentieth of October, 1871, and prior thereto, was the owner of a certain lot in the city of Topeka, in Shawnee county, described as the north half of lot No. 30, and all of lots 32, 34, and 36 on Quincy street north, in Crane's addition, on one of which was a dwelling-house, all of the value of \$2,500, and said Bainter resided with his family on said premises. The defendant Barnett was an auctioneer and real-estate agent, and resided in Topeka.

"(3) Some time prior to October 20, 1871, Fults met the said Barnett in Topeka, and told him he desired to sell his farm and other lands, and his personal property, and put this money out at interest, but that he would not sell unless he could realize at least \$10,000 for all of it, and requested Barnett to undertake the sale of his property at auction. Barnett undertook to do so, to advertise and sell the property, real and personal, for one per cent. on sales, assured Fults that he knew all about the property, and that it was worth more than \$10,000, and would bring more than that sum cash down.

"(4) Afterwards, and before the twentieth of said October, said Bainter went to see Fults at the farm of the latter, and, having inquired if that was the farm advertised by Barnett for sale, and being informed that it was, proposed to plaintiff to trade to him for the farm some property in Topeka. Plaintiff replied that such a trade would not suit him, and Bainter went away. A few days afterwards Fults went to Topeka, and Barnett insisted on showing him Bainter's house and lots. Fults told Barnett it would not suit him to trade for city property, but went to see the house, and again said it would not suit him, and Barnett represented the house and lots as worth \$35,000, and as desirable property.

"(5) On the nineteenth of October, 1871, Bainter and Barnett went to the farm where Fults lived, and contrived and conspired to cheat and defraud the plaintiff, and obtain his property to their own gain and advantage, well knowing that plaintiff at that time was not capable of managing his own affairs, and by means of false and fraudulent representations induced him to agree to exchange the farm in the first paragraph herein described, and to pay to the said Bainter, in addition, as boot-money, \$1,000 in property,—live-stock,—which Bainter was to have the privilege of bidding off at auction while the sale was progressing, and did bid off to the value and amount of \$947.

*326 "(6) Three days afterwards Bainter took possession of the farm, and commenced moving his furniture into the house, and Fults removed with his family into the house in Topeka, where he remained a short time, and afterwards removed to a farm in the neighborhood where he had before lived, where he still resides. Bainter still continues to occupy the land mentioned in the petition.

"(7) On the eleventh of November, 1871, under threats of vexatious litigation, (because of the refusal of plaintiff and his wife to make a deed,) deeds were made and exchanged; and, as there was an outstanding mortgage for \$1,600 on said farm, Fults was required to execute a mortgage to Bainter for \$1,600 on the house and lots to save himself. Fults afterwards paid off the mortgage on the farm, and caused it to be fully satisfied and discharged.

"(8) Some time after the deeds were exchanged, Fults requested Bainter to trade back, and offered him \$400 to do so, which offer Bainter refused; Fults then offered him \$700, which Bainter also refused; and finally Fults offered him \$947, or the amount of the value of the stock bid off by him, and Bainter refused to re-exchange with that difference; but afterwards informed plaintiff that he would "rue," for \$500 cash. Fults immediately went to one J. T. S., and made arrangements for getting \$500, and so informed Bainter, but on learning from Bainter that his offer was for \$500, *in addition to the stock*, Fults abandoned any further effort.

"(9) Fults gave Bainter the farm and \$947 for the town property; but Bainter would not give the farm for the town property, with the privilege of keeping the \$947 worth of stock, unless Fults would pay him \$500 as the difference in value. Had the plaintiff acceded to the demand, the parties would have been restored to their former lands, and Bainter would have received \$1,447 from Fults without giving any consideration therefor in exchange.

"The court therefore finds for the plaintiff, and gives judgment in his favor against the defendants for \$947, with interest at seven per cent. per annum from October 20, 1871, and decrees that the conveyances recited are fraudulent and void, and henceforth held for naught, and that reconveyances be made by the parties, respectively, within ninety days, or, in default of such conveyances on the part of

defendant Bainter, this decree of the court shall be a sufficient conveyance of the farm to plaintiff, Fults; and in default of a reconveyance by plaintiff, Fults, defendant Bainter to have judgment *327 against *him to the effect that defendant Bainter's title to the lands shall be confirmed. [Then follow a formal judgment and decree, in accordance with the conclusions so found by the court.]"

Wilson Shannon, for plaintiffs in error.

Barker & Summerfield, for defendant in error.

Before a decree or judgment will be reversed by this court, plaintiffs in error must have pointed out some fatal error, inconsistent with justice, and injurious to them, on the face of the record. They have not done this. Nor do they deny that they have committed a gross outrage on the defendant, but endeavor to evade justice by technicalities and quibbles, by stating matters in their argument of which there is not even a hint in the record; such, for instance, as the statement that the defendant in error conveyed the property to his daughter, and is therefore unable to reconvey to Bainter, etc. On this statement counsel for plaintiffs in error spins a long argument, and asks the court to reverse the decree. It is not necessary at this time to either deny the premises, or refute the conclusion drawn therefrom, for neither is properly before the court.

It is claimed that, even if the decree is good against Bainter, it is void against Barnett. Why? Is it because he went with Bainter "to the farm where Fults lived, and conspiring and contriving to cheat and defraud Fults, and obtain his property to *their* own gain and advantage, well knowing that plaintiff at that time was not capable of managing his own affairs?" He who assists in the perpetration of a wrong is as much guilty as he who actually does the wrong. 2 Hil. Torts, 295, § 9. We hope that the doctrine enunciated in *Wilbur v. Hubbard*, 35 Barb. 303, "that where two dogs, of different sizes, kill sheep in the dark, the jury have a right to *328 determine, in the absence of direct proof, that the **larger dog* killed the greater number of sheep," is not law; for it is now well known that the race is not always to the swift, nor victory to the strong. We have always been of the opinion that both Bainter and Barnett "killed the sheep," but counsel says Barnett did not get any of the spoils. If this is true, it only illustrates that the good old times are past and gone. Heretofore it has been conceded that there is honor even among thieves. But, if the court shall determine that there ought to be no judgment against Barnett, it will not on that account vacate the decree, but will simply modify it to that extent.

Counsel complains that the court below did not state what the false and fraudulent representations were. If he is so anxious to have this court know the particulars of this transaction, why did he not bring the evidence here? We should have been very grateful to him if he had brought up the evidence so as to let the court see the particulars of this nefarious business. It is not the duty of a trial court in its

findings to state every word that is said by the witness, but simply the conclusion from the whole testimony.

Plaintiffs in error claim that the facts do not justify a decree against Bainter. One can hardly imagine a stronger case of fraud. Here are two men, apparently shrewd and crafty. They come in contact with a man suffering from senile imbecility. By means well known to such characters, they obtain from him a farm worth \$3,500, and personal property of the value of about \$1,000. And what do they give Fults, who has scarcely the intelligence of a child, and with whom they should have dealt as fairly as with an infant, for all this? Property of the value of \$2,500. The inadequacy of the consideration, so gross as it is in this case, is alone ground for canceling the transaction. Kerr, *Frauds & M.* 188, 189. But when we add to this the physical and mental condition of defendant in error, is there any room for doubt left as to what a court of equity should do when such facts are brought before it?

*329 *VALENTINE, J. This was an action brought by Robert Fults against Ephraim Bainter and George Barnett, for the purpose of rescinding, setting aside, and canceling, on the ground of fraud, a certain executed contract, with certain deeds of conveyance, and other matters incidental thereto, whereby Fults exchanged some real estate and personal property belonging to him for some real estate belonging to Bainter. The principal questions discussed by plaintiffs in error are so obscurely and insufficiently presented by the record brought to this court that we think we can hardly consider them at all. The court below finds that the plaintiff below was, at the time the alleged fraudulent transaction occurred, "sixty-nine years of age, illiterate, infirm from age and physical injuries, weak in mind, and incapable of managing his own affairs." Now, how weak in mind was the plaintiff? Was he weak to idiocy, or only slightly weak? We cannot tell from the record. He was "incapable of managing his own affairs;" but whether from age, illiteracy, physical infirmity, or mental imbecility, or all, we cannot tell. None of the evidence has been brought to this court, and nothing else shows it. Hence we are left to conjectures and presumptions only. Now, as all presumptions must be construed in favor of the correctness of the findings and judgment of the court below, we must presume, in support of such judgment, that the plaintiff was extremely weak in intellect,—mentally so weak as to be "incapable of managing his own affairs,"—weak even to the very verge of idiocy; for mental weakness would best excuse him. The court below further finds that "on the nineteenth of October, 1871, Bainter and Barnett went to the farm where Fults lived, and contrived and conspired to cheat and defraud the plaintiff, and obtain his property to their own gain and advantage, well knowing that plaintiff, at that time, was not capable of managing his own affairs; and by means of false and fraudulent representations in-

duced him to agree to exchange the farm in the first paragraph herein described, [Fulfs' farm,] and to pay to the said Bainter, in *330 *addition, as boot-money, \$1,000 in property,—live stock,—which Bainter was to have the privilege of bidding off at auction while the sale was progressing, and did bid off to the value and amount of \$947. On the eleventh of November, 1871, under threats of vexatious litigation, (because of the refusal of plaintiff and his wife to make a deed,) deeds were made and exchanged," etc.,—Fulfs gave a deed for his farm to Bainter, and Bainter gave a deed for his property to Fulfs.

Now, *how* did the defendants "contrive and conspire to cheat and defraud the plaintiff?" And what were the "false and fraudulent representations" which they used to effect their purpose? We cannot tell from the record of the case; but, in order to sustain the judgment of the court below, we must presume that they were such as would authorize the rescinding of the whole transaction. The counsel for plaintiffs in error claims that all these matters should have been set out in the findings of the court, in elaborate detail. He claims that the supposed false and fraudulent representations should have been set out in the findings, so that we could see whether in fact and in law they were such as would authorize the rescinding of the contract. But the defendants below did not ask the court to set out these matters in its findings. They did not ask the court to make special findings on any subject. Neither they nor the plaintiff ask the court to make any findings of any kind. It is therefore the misfortune of the plaintiffs in error, and not of the defendant in error, that the findings do not state the facts in more elaborate detail. It devolves upon the plaintiffs in error to show error, and not upon the defendant in error to show that there was no error. Under the circumstances of this case we think all the necessary facts in this respect are stated in the findings, although stated in very general and comprehensive terms, and therefore we think the findings in this respect are sufficient. Therefore, up to this point, we cannot say that the court below committed any error.

*331 We think that where two men "contrive and conspire to *cheat and defraud" a weak old man, mentally so weak as to be wholly "incapable of managing his own affairs," and by "false and fraudulent representations" do cheat and defraud him, and thereby obtain his property for a grossly inadequate consideration, a court of equity may set aside and cancel all contracts or instruments by which these two men hold the old man's property, and may place the parties in the same situation and condition in which they were before the fraudulent transactions occurred. The irrelevant findings complained of by plaintiffs in error cannot prejudice their substantial rights, and therefore are not sufficient grounds upon which to assign error.

Barnett does not seem from the record to have got any of the plaintiff's property. He made nothing out of the transaction, and is not

a party to either of the deeds. Therefore the judgment rendered against him is erroneous. If the action had been one in the nature of an action at law for damages, instead of one in the nature of a suit in equity to set aside the contract and deeds, etc., and to place the parties in their original situation, it would have been different. If the plaintiff had sued for damages, he could have recovered damages against both Barnett and Bainter.

Under the facts of this case we are inclined to think that the plaintiff had the right to elect to consider the personal property transferred from himself to Bainter either as the specific articles transferred, or as the \$947 in money for which such articles were taken. Hence there was no error in rendering judgment against Bainter for that amount of money, with interest. No question is made that the articles were not worth the money, and they were taken in lieu of the money.

As this was an action to rescind the contracts made between the parties, and to place them in their original situation and condition, it was error for the court below to so render the judgment that the plaintiff could, if he should choose, retain all the property that *332 he received from Bainter, and still recover *from Bainter for the amount of personal property which Bainter received from the plaintiff. Bainter was called into court to have the question determined whether the transaction between himself and Fults should be set aside, and each take the property he originally had. Bainter may have cared but little if such should be done; he may have been willing for Fults to make his own showing in such a case; he may have cared but little if the court should render a judgment, in substance, that the parties should "trade back;" he may have cared but little for a jury trial in such a case as this, and in this kind of action he would not be entitled to a jury trial; and therefore he may have contested this action but slightly; while, if he had known that the judgment was finally to be rendered as one substantially for damages, he may have cared a great deal. In such a case he might have desired to have a jury trial; and, if the action had been one for damages, he would have been entitled to a jury trial. He may have considered the property he gave worth as much as the property he received, and therefore might have been willing for a re-exchange of the property, but not willing that a judgment for a large amount of damages should be rendered against him. Now, a plaintiff who prosecutes an action for relief on the ground of *fraud* should not prosecute one kind of action up to the very last moment, and then, without notice or warning to the other party, take a judgment as though his action was a different kind of action. The plaintiff in his petition states, among other things, as follows: "This plaintiff further shows that he has always been, since the discovery by him that the representations so made as aforesaid by said defendants were falsely and fraudulently made, willing to reconvey to said defendants all the right,

interest, and everything whatsoever conveyed by said defendants to this plaintiff, upon reconveyance to him of the real estate and personal property hereinbefore mentioned, *and now here offers so to do.*"

This was a standing offer of the plaintiff up to the time of the *338 rendition of the judgment, and the judgment ought *not to relieve the plaintiff from fulfilling this offer. Nothing less than the fulfillment of said offer would be right or equitable in a case of this kind.

The judgment of the court below will be reversed as to Barnett; and it will be modified, as to Bainter, as follows: Bainter shall, within some reasonable time, to be fixed by the court below, pay to said Fults said \$947, and interest, and shall convey to Fults, by a good and sufficient deed, all the said real estate heretofore conveyed by Fults to Bainter; but upon this condition only: that Fults shall first convey to Bainter, by a good and sufficient deed, all the said real estate conveyed by Bainter to Fults. In all other respects the judgment of the court below will be affirmed. This case will be remanded to the court below for further proceedings in accordance with the views herein expressed.

(All the justices concurring.)

F. M. DAVIS v. CYRUS A. FILLMORE. (Two Cases.)

July Term, 1875.

Supreme Court: Failure to Furnish Brief: Affirm Judgment. Whenever counsel for plaintiff in error fail to furnish the judges of the supreme court with a brief in the case, the court will, as a rule, affirm the judgment below, without any consideration of the errors assigned.¹

Error from Osage district court.

Two actions were brought by Davis against Fillmore. Both were tried at the November term, 1873, and in each action judgment was given for the defendant. Plaintiff brings both here; the petitions in error being filed March 7, 1874.

Sheldon & Thompson, S. M. Berry, and J. B. Clark, for plaintiff.
Ellis Lewis, for defendant.

*334 *VALENTINE, J. The only question which we shall decide in either of these two cases is the same in both, and hence we shall consider the two cases together. The first case was an action of replevin brought by Davis against Fillmore for a portable saw-

¹Inquiry limited to matters discussed by counsel in their brief. *Campbell v. Phillips*, 28 Kan. 754.

mill. The defendant had purchased the mill from the plaintiff, and was then the owner of the same, but he had also given a mortgage thereon to secure the payment of five certain promissory notes, given by himself to the plaintiff, each for \$500, due respectively in three, six, twelve, eighteen, and twenty-four months from date. There was a stipulation in the mortgage that the defendant should hold possession of the mill until the condition of the mortgage was broken. The only question, therefore, to be tried in the court below was whether said condition had been broken or not. The other case was an action for money founded upon transactions connected with said portable saw-mill. Each case was tried before a jury, and in each case the verdict was for the defendant. In the second case the defendant recovered \$264.78. Judgments were properly rendered on the verdicts, and then the plaintiff brought both cases to this court on petition in error. Both cases came on regularly for hearing in the supreme court; both were regularly called by the court; and both were submitted to the court by the defendant on his briefs. But the plaintiff made no appearance in either case, nor has he made any appearance in either case, by brief or otherwise, at any time since he filed the cases in this court. We must therefore presume that he has waived and abandoned all his assignments of error as untenable, (*Wilson v. Fuller*, 9 Kan. *176, *186; *Howard v. Cobb*, 6 Ind. 5; *Robinson v. Tipton*, 31 Ala. 595;) and probably they are all untenable. We will give some specimens of them. In the replevin case, the *first* assignment of error is "that the said court erred in the instructions given to the jury on the trial of said action." Now, we do not think that the court below committed any substantial error in giving

*335 *instructions to the jury; but must we look through a long list of instructions to hunt error, with nothing more to guide us than the above assignment of error? The *second* assignment is "that the said court erred in refusing to give the instructions to the jury which the said Davis prayed the said court to give." Now, we cannot find in the record that "the said Davis prayed the said court to give" any instructions, or that he excepted to any refused. *Third*, "that the facts set forth in the answer of said defendant are not sufficient in law to constitute any defense." The answer was a general denial, and such an answer we think is good in replevin. *Wilson v. Fuller*, 9 Kan. *177, *190, *et seq.*; *Gilechrist v. Schmidling*, 12 Kan. *269. *Fourth*, "that the said court erred in overruling the demurrer of the said plaintiff to the answer of said defendant." Now, we cannot find from the record that the plaintiff demurred to the answer of the defendant; but, even if he did, we suppose a demurrer to a general denial in replevin should be overruled. *Fifth*, "that said court erred in admitting the evidence of said Fillmore, to which said Davis objected." We think the evidence was competent and proper. But is it our duty, with nothing more than this assignment to guide us, to look through a vast amount of evidence to see whether it is

v.15k.—17

proper evidence or not under the pleadings and previous evidence? *Sixth*, "that said court erred in ruling out the evidence offered by said Davis on the trial of said action." Now, there was substantially no evidence offered by Davis and excluded by the court. The court at one time, rightfully as we think, refused to let Davis prove what Davis himself at a former time had said; but no exception was taken to this ruling, and we think that Davis afterwards proved this same conversation. We can find no other evidence offered by Davis, and excluded by the court. *Seventh*, "that the said court erred in overruling the motion of the said Davis for a new trial of said cause." We have failed to discover the error. *Eighth*, "that said judgment was given for said Fillmore when it should have been given for said Davis, according to the law of the land." We think the

*336 *judgment is correct. *Ninth*, "that the verdict of the jury was rendered in favor of the said Fillmore, when it should have been, according to the evidence, in favor of said Davis." We think the verdict was right; but, even if not, still there was ample evidence to sustain it. These are all the assignments of error in the replevin case, and these are fair samples of the errors complained of in the other case.

If we should examine the two cases thoroughly and critically, we would probably be unable to find any such substantial errors as would authorize a reversal of the judgments. But we do not choose to make any such thorough and critical examination, but choose rather to decide the cases solely upon the ground that the plaintiff has abandoned the supposed errors since filing his cases in this court. Business is accumulating so rapidly in this court that we need all the aid and assistance we can get from counsel. So henceforth, as a rule, whenever the plaintiff's counsel shall fail to furnish us with a brief, we shall affirm the judgment without any consideration of the errors assigned. *Hutchinson v. Bain*, 11 Kan. *234; *Davis v. First Nat. Bank*, 28 Ind. 240; and cases above cited. We decide these two cases upon this principle.

The judgments of the court below in these two cases must be affirmed.

(All the justices concurring.)

JONATHAN DOUGLAS v. RICHARD McFADIN.

July Term, 1875.

Contract: Breach of: Withholding Knowledge of Loathsome Disease, when a Defense. D. leased to M. for one year all the arable land on the farm on which D. then resided. D., on his part, was to furnish everything, and board M. for the year at his house. M., on his part was to perform all the labor in raising the crops on said land. D. was then to have two-thirds of each crop raised on said land, and M. one-third thereof. At the time said lease was entered into, and subsequently *337 thereto, M. was "infected with a loathsome, *contagious, and infectious disease, called syphilis," which disease afterwards, and at the time M. boarded at the house of D., endangered the lives and health of D. and his family, and of which disease D. was, at the time he entered into said lease, ignorant. In ten days after the lease was entered into, and when D. became aware of said disease, he refused to board M. any longer at his house. M. then left the premises, and sued D. for damages, claiming (at least on the trial) as damages the value of the use of said land for one year, and the value of his board for one year. D., as a defense to said action, offered to show (both by his pleadings and evidence) that M. was affected with said disease; that he (D.) was ignorant of the same at the time he entered into said lease; and that he refused to board M. at his house because of said disease, but the court excluded said defense. *Held*, that it was error to exclude such defense, and the evidence offered to support it.

Error from Jackson district court.

The case is stated in the opinion.

Charles Hayden, for plaintiff.

VALENTINE, J. This action was brought originally in a justice's court by McFadin against Douglas for \$300 damages alleged to have resulted from the breach of certain stipulations in a lease. It appears from the record that on August 26, 1873, defendant, Douglas, by a parol contract, leased to plaintiff, McFadin, for the term of one year, the farm upon which Douglas resided, upon the following terms, to-wit: Douglas was to furnish everything, and board McFadin at his house. McFadin was to do all the work. Douglas was to have two-thirds of each crop raised on the premises, and McFadin one-third. On September 4th and 5th, Douglas told McFadin that he could not board him any longer at his house, and wanted McFadin to give up the lease, or allow some other man to fill his place. *338 McFadin did not *agree to this; but still, on September 5th, he left Douglas' house. Three days later, on September 8th, he commenced this action, and alleged, among other things, that Douglas refused to board him, or to allow him to work on said premises. On the 16th the case was tried before a justice and a jury. The defendant filed a bill of particulars, denying generally the allegations of the plaintiff's bill of particulars, and also setting up as a

defense to the plaintiff's action that at the time said lease was entered into, and subsequently thereto, the plaintiff was "infected with a loathsome, contagious, and infectious disease, to-wit, syphilis, which disease afterwards, and at the time the plaintiff boarded at the defendant's house, endangered the lives and health of defendant and his family," etc., and that at the time the lease was entered into the defendant was ignorant of said disease, and that because of such disease the defendant refused to allow the plaintiff to longer board at his house. This defense was stricken out by the court, on motion of the plaintiff. On the trial the defendant tried in various ways to introduce evidence to prove these matters, but the court, in every instance, on the objection of the plaintiff, excluded the evidence; and finally, at the close of the trial, the court instructed the jury "that in making up their verdict they are not to take into consideration any disease that the plaintiff may have been afflicted with, to which allusion has been made during the trial." Exceptions were duly taken by the defendant to these rulings, and to all the other rulings of the justice adverse to him.

We think the justice erred in these rulings. The defendant was not bound to board the plaintiff at his house while the plaintiff was affected with said disease, although the defendant had previously agreed to board the plaintiff. The plaintiff practiced a fraud upon the defendant when he procured from the defendant such an agreement without first disclosing to the defendant his own condition as to health. The plaintiff testified on the trial, among other things, as follows: "Defendant was to furnish team and seed and farm-
*339 ing utensils, and board me at his house." The defendant testified on the trial, among other things, as follows: "I also agreed to board him [the plaintiff] at my house." It was evidently the intention of the parties, at the time of making the contract, that the defendant should have the benefit of boarding the plaintiff at his own house; but, even if it was not, still the defendant could not have hired the plaintiff's board at some other house for the same price that he could have hired the board of a person in good health, and free from said infectious and loathsome disease, and therefore the plaintiff had no right, while so diseased, to demand his board from the defendant under any circumstances. Plaintiff further testified: "Defendant said he did not want me to go on with work, and that he could not board me at his house any longer. Defendant never put me off the premises. He has never refused to let me work the farm." The defendant further testified: "I never turned him [the plaintiff] off the place, or refused to let him work it; but I did not want him to board or lodge at my house while he had the disease." It was also shown by the evidence that the defendant offered to furnish a man for the plaintiff, while the plaintiff was diseased, for sixteen dollars per month, and that the defendant would pay the man, and take the amount out of the plaintiff's share of the crops, but the plaintiff refused, and said

he was not able to hire a man. It was also shown that the defendant offered to pay the plaintiff for what he had done on the premises, provided the plaintiff would give up the lease, but the plaintiff refused. And then, as we have before stated, the defendant refused to board the plaintiff any longer at his house, and the plaintiff left the premises, and then commenced this action.

During the trial, the plaintiff, for the purpose of showing his damages, proved that there were seventy-two acres of arable land on the premises; that the annual rental value thereof was from \$2.50 to \$3 per acre; and that board at a farm-house was worth three dollars per week. The plaintiff's loss was in fact his board for one year, *340 and one third of the crops raised on said 72 acres of *land; or, in other words, one-third of the use of said 72 acres for one year. But he gained the labor that he would have had to bestow on said land. Now, in our opinion, from the evidence, the plaintiff was not entitled to recover anything. He was not entitled to recover for the use of the land, or for one-third of the crops, for the reason that the defendant never refused to let him cultivate the land; and he was not entitled to recover for board, for the plaintiff had a reasonable and legal excuse, under the circumstances, for refusing to board him any longer; or, in other words, the defense the defendant set up and offered to prove was a good one, and the justice erred in excluding it. The jury rendered a verdict for the plaintiff, and against the defendant, for \$30. How much of this verdict was for board, and how much of it was for the use of the land, we do not know, and cannot tell. It may have all been for board; it may have been the value of the board for a year, with something deducted for the value of the plaintiff's labor; or it may have been for the sum of the board and the plaintiff's share of the crops, with the value of his labor deducted. After the verdict was rendered the defendant moved for a new trial for various reasons. The justice overruled the motion, and then, on said sixteenth of September, rendered judgment in favor of the plaintiff, and against the defendant, for \$30 and costs. The defendant then took the case to the district court on petition in error. The district court affirmed the judgment of the justice. In this we think the district court erred, for the reasons already given. After said judgment was affirmed in the district court, the defendant, Douglas, brought the case to this court on petition in error. There has been no appearance in this court on the part of the plaintiff, McFadin, and hence we can only conjecture as to the grounds on which he may rely to sustain his judgment in the justice's court.

As both the justice of the peace and the district court, in our opinion, erred, the judgment of the district court must be reversed, *341 and cause remanded, with the order that the *judgment of the justice of the peace be reversed, and for such further proceedings as may be proper in the case.

(All the justices concurring.)

N. D. EASTMAN v. S. S. GODFREY.

July Term, 1875.

Costs: Security for, in Justices' Courts: Discretion of Court. In an action pending in a justice's court, the justice required the plaintiff, who was a resident of the county, to give security for costs. Afterwards judgment was rendered in favor of plaintiff, and the defendant appealed to the district court. The district court ordered that the plaintiff give additional security for costs. The plaintiff failed to do so, and the court refused to dismiss the plaintiff's action because thereof. Afterwards the plaintiff recovered a judgment against the defendant for debt, in a sum certain, and costs of suit. *Held*, that the court below, in refusing to dismiss the plaintiff's action, did not commit such a material error, affecting the substantial rights of the defendant, as requires a reversal of the judgment.¹

Error from Saline district court.

The case is stated in the opinion.

John Foster, for plaintiff in error.

J. G. Mohler and T. F. Garver, for defendant in error.

VALENTINE, J. The plaintiff in error (who was defendant below) states his case in this court as follows: "This action was commenced before a justice of the peace, who, on the twentieth of February, 1873, required the defendant in error (plaintiff below, and a resident of the county where said action was commenced) to give security for costs. The action was appealed to the district court. At *342 the October term, 1873, of the district court, and before judgment, plaintiff in error (defendant below) made a motion to require said defendant in error to give additional security for costs. The court found the security insufficient, and required said defendant in error to give additional security within sixty days. At the next term of the court, defendant in error having failed to give said security for costs, plaintiff in error made a motion to dismiss the action, which was overruled by the court, and excepted to by plaintiff in error. A verdict and judgment was obtained against plaintiff in error, to which he excepted, and now brings the action to the supreme court to reverse said judgment, and dismiss said action." This statement is substantially correct. And does it appear therefrom affirmatively that the court below committed an error which affects materially the substantial rights of the plaintiff in error? It is only substantial error that will authorize the reversal of a judgment, (Code,

¹ Sufficiency of notice to sureties on costs-bond, see *Sanford v. Frankhouser*, 24 Kan. 98; summons set aside where an attorney at law was the only surety on a costs-bond, *Cook v. Caraway*, 29 Kan. 41; an erroneous ruling of the trial court on a motion to quash the summons, because an attorney at law was the only surety on the costs-bond, cannot be reviewed while the case is still pending in the district court, *Potter v. Payne*, 31 Kan. 218; S. C. 1 Pac. Rep. 617.

§§ 140, 304;) and such error must be made to affirmatively appear. Now, supposing that section 186 of the justices' act, as amended in 1870, (Laws 1870, p. 187, § 15,) gives authority to justices of the peace to require security for costs from resident plaintiffs, still such authority is unquestionably vested in the discretion of the justice, as will readily appear from a careful perusal of the section. As to non-resident plaintiffs, the justice "shall" require security for costs; "but in all other cases the justice *may*" require such security. Why use the word "shall" for non-residents, and "may" for others, if it was not intended that the justice should exercise his discretion in the latter case? And if this authority of the justice is carried to the district court, on an appeal, by section 584 of the Code, (Gen. St. 746,) or by any other statute, then the authority of the district court is also discretionary; and, of course, if the court has a discretion as to whether it will require security for costs, it must also have the same discretion as to whether it will enforce the plaintiff to give security by dismissing his action if he does not do so; that is, the court may exercise a discretion as to whether it will require security for *343 costs to be given, and, if it requires it, *may then exercise a discretion as to whether it will dismiss the plaintiff's action if security for costs is not given. And, where the court below is vested with a discretionary authority, we can reverse only where the court has abused its discretion.

In this case it does not affirmatively appear that the court below did abuse its discretion. At the October term, 1873, the court required additional security for costs to be given. At the March term, 1874, it refused to dismiss the action because security for costs had not been given. At that time the plaintiff had already recovered one judgment in the case, which had been set aside by the appeal; and a trial had also been had in the district court, in which the court had heard all the evidence, and at which the jury failed to agree; and, after hearing this evidence, the court may have had the strongest convictions that the plaintiff ought to recover, and, if so, the court did not abuse its discretion by refusing to dismiss the plaintiff's action merely because he failed to give additional security for costs. Afterwards the plaintiff recovered a judgment against the defendant for \$4.60 and costs of suit. Hence no substantial right of the defendant was affected by the plaintiff failing to give additional security for costs. The defendant has lost nothing. He is to pay the costs, and not the plaintiff. But suppose the court erred either in not setting aside its order requiring the plaintiff to give additional security for costs, or in not dismissing the plaintiff's action, still the defendant has no right to complain. The means by which a court enforces its own orders belong rather to the court than to the parties. The parties can only claim to use such means for the purpose of enforcing substantial rights in their own favor; and where a party has no substantial right to be enforced, as in this case, such party cannot com-

plain of the court for failing to enforce its own orders, however erroneous the action of the court may be in the premises.

The judgment of the court below is affirmed.

(All the justices concurring.)

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*JUSTIS F. DRESSER v. JOHN W. WOOD.¹

July Term, 1875.

1. **Service of Summons: What and How Made.** The service of a summons is sufficient if it "be by delivering a copy of the summons to the defendant personally;" and the copy summons is sufficient if said copy contain everything put in the summons or on it by the clerk. It is not necessary in such a case that the copy should be *certified*, or that it should contain any indorsement put on the summons by the sheriff.
2. ———: **Second or Subsequent Service.** Where service of summons is made on the defendant, and afterwards the plaintiff procures a second service to be made, the procuring of this second service is not so far an invalidation or waiver of the first service as to allow parties or third persons to treat it as a nullity.
3. ———: **Finding as to Service.** Where an action is commenced against five persons, including W., and service is made on W. both personally and by publication, and the court, in rendering judgment, finds that personal service was made on two of the defendants, and service by publication on the other three, including W., and does not even mention the personal service made on W., *held*, that such finding is not an adjudication that personal service was not made on W., and such finding does not invalidate the said personal service made on W., and especially it does not where the court had previously, in effect, on a motion to set aside such personal service, declared that it was valid.
4. **Lis Pendens: Partners: Service on One Partner Only.** Where an action is brought against all the members of a copartnership firm concerning a partnership matter, and one of the members of such firm is served with summons, the action is actually pending from that time against such member, and a *lis pendens* is thereby and at that time sufficiently created, so that no third person can purchase any interest in the subject-matter of the action so as to defeat or affect any right of the plaintiff in the action.
5. ———. And where a *lis pendens* is once actually created by the service of a summons on one of the members of a copartnership firm, and a third person, in violation thereof, but without actual knowledge of its existence, purchases the subject-matter of the action, a subsequent failure on the part of the plaintiff in the action to commence to get service on the other members of the firm for sixty-three days from the time of filing the

¹This case referred to, *Everston v. Central Bank*, 33 Kan. 353; *S. C. 6 Pac. Rep. 606*; *Kansas Pac. Ry. Co. v. Yanz*, 16 Kan. 536; *Hodson v. Tootle*, 28 Kan. 330.

petition in the case will not destroy the force or effect of said *lis pendens* as to said purchaser.¹

6. **Principal and Agent: Attorney: Commencement of Action without Authority: Ratification.** Where an action is commenced by an attorney at law without the knowledge or consent of the plaintiff, the plaintiff may afterwards ratify the same, and thereafter be entitled to all its benefits.
7. ***Lis Pendens: Knowledge of Former Judgment.*** Where an answer sets forth the rendition of a judgment in another action against the plaintiff's vendors, and states that the subject-matter of that action and of this had not been transferred to the plaintiff in this action up to and after the rendition of such judgment, said answer states facts sufficient to authorize the defendant to show that the said subject-matter had not been transferred when that action was commenced, and therefore that a *lis pendens* existed when the said transfer was actually made; and especially is this so where no objection was made to such being shown under the pleadings in the court below.

Error from Jefferson district court.

Two mortgages on the same tract of land lying in Jefferson county were executed by John Branscom and wife, the owners,—one to John W. Wood, for \$2,750, dated October 11, 1867; the other to Warner, Mowry & Hawkins, copartners, for \$4,348, dated October 31, 1871. In the mortgage to Wood the land was described as the "S. W. $\frac{1}{4}$ of section 12, township 11, of range 17," etc. In the mortgage to Warner, Mowry & Hawkins it was described as the "S. W. $\frac{1}{4}$ of survey 12, of the lands known as the 'Kaw Half-breed Indian Lands,'" etc. On Nov. 4, 1871, an action was commenced for Wood, and in his name, to reform his mortgage, in which action the mortgagors, and said W., M. & H., the second mortgagees, were made defendants. Twenty-three days afterwards, November 27th, said W., M. & H. assigned their mortgage to Dresser. Judgment in the action above mentioned, reforming the mortgage to Wood, was given and entered May 24, 1873. Said decree contains the following: "And it is further ordered, adjudged, and decreed that said mortgage deed be held to be a prior lien to the mortgage deed mentioned in plaintiff's petition from John Branscom and Martha A. Branscom to the defendants Warner, Mowry & Hawkins, which mortgage was recorded in the office of the register of deeds in and for said county of Jefferson on the fourth day of November, 1871; and that said mortgage deed *346 *from said John Branscom and Martha A. Branscom to John W. Wood, as reformed, be held to be a lien on the S. W. $\frac{1}{4}$ of survey 12 of the Kaw half-breed Indian lands aforesaid, prior to every

¹ DOCTRINE OF *LIS PENDENS* DISCUSSED. The doctrine of *lis pendens* also requires that all persons, whether parties to the suit or not, shall take notice, to some extent, of judicial proceedings. The doctrine, however, applies only in cases where the suit is about some specific piece of property, and then only to the extent of preventing a purchaser *pendente lite* from acquiring any interest in the thing in litigation, to the prejudice of the adverse party; and in no case is a person, not a party to the suit, bound to take notice of judicial proceedings further than to prevent him from acquiring an interest in the thing covered by the litigation. Per VALENTINE, J. Marshall v. Shepard, 28 Kan. 321.

lien whatever, of every kind and description, of the said defendants Warner, Mowry & Hawkins, or either of them."

Dresser, on the thirtieth of September, 1872, brought his action to foreclose said mortgage given to said W., M. & H., and by them assigned to him. He made the mortgagors and Wood defendants. Wood answered, alleging the prior mortgage to himself, the mistake, the action to reform, and decree reforming the same, (attaching to his answer said mortgage, and a transcript of the record, as exhibits.) His answer also contained these averments: "That all the time prior to and at the time of rendition of said judgment and decree, said Warner, Mowry & Hawkins were the owners and holders of said note and mortgage mentioned in plaintiff's [Dresser's] petition, and still are the real owners and holders of said note and mortgage; and the plaintiff herein has not now, and never has had, any title or interest in or to the same. The plaintiff herein has, all the time since the date of the note and mortgage mentioned in plaintiff's petition, had actual notice of all the matters and things stated in this answer." Dresser replied, a general denial. The action was tried at the November term, 1873, of the district court, without a jury; A. L. W., judge *pro tem.*, presiding. The real controversy was between Dresser and Wood as to the priority of their mortgage liens, and the question was whether Dresser was an innocent purchaser and assignee for value, and without notice, of the W., M. & H. mortgage, or whether he took said mortgage with such notice, actual or constructive, as subjected him to all the equities existing between Wood and said W., M. & H. at the time of his purchase. The district court found in favor of Wood on this question; and, finding that there was due defendant Wood, on his mortgage and notes, the sum of \$4,408, and that there was due to plaintiff, Dresser, on his mortgage and notes, the sum of \$4,813, decided "that the amount so found due to defendant *347 Wood is a first lien on said *premises, and is prior to any lien of said plaintiff thereon," and rendered a decree accordingly.

Riggs, Nevison & Simpson and Charles Dunham, for plaintiff.

No oral evidence was given on the trial in the court below. This court therefore examines the case as though it were an original one, and the presumption that the decision of the subordinate court is correct will not be indulged. *Green v. Goble*, 7 Kan. *297, *316; *Ulrich v. Ulrich*, 8 Ind. 403; *State v. Kinneman*, 39 Ind. 38; *Moore v. Pye*, 10 Kan. *250.

The evidence clearly shows that Dresser was an innocent purchaser for full value. Upon this point there is no contradictory evidence. Nor was Dresser affected by constructive notice arising from the registry of the Wood mortgage, for that mortgage could more properly be referred to another parcel of land than the one in dispute. The court will take judicial notice of the boundaries of counties, and of the government surveys, and of the fact that the land described in the original mortgage to Wood (the south-west quarter of section 12,

township 11, range 17) is situate in Jefferson county. The Wood mortgage, therefore, properly described another parcel than the one in dispute, and situate in another portion of the township. It does not correctly describe the land in controversy; nor would any one suspect that it covered the land embraced in the Dresser mortgage. It should be remembered that Wood was negligent and dilatory in the prosecution of his suit to reform. More than sixty days elapsed, after the filing of his petition, before service was commenced by publication. Whatever *might* have been his equitable claim to the consideration of the court had he shown due diligence has been forfeited by his negligence. He was negligent in taking a mortgage containing a misdescription, and he was negligent in not proceeding to obtain service by publication immediately after the commencement of his action, and is not entitled to relief. 1 Story, Eq. Jur. §§ 146, 147.

*348 Defendant in error insists that, even if Dresser were ignorant of the existence of the Wood mortgage, he is yet bound by the judgment rendered in the action entitled "Wood v. Warner *et al.*" That this position is untenable will appear from the following considerations: Wood, in his answer in the present action, does not allege that the suit of Wood v. Warner *et al.* was pending at the time when Dresser claimed to have bought the mortgage from W., M. & H., nor does he state when that action was commenced. The issue whether Dresser purchased pending the Wood suit was not presented by the pleadings. It is true, evidence was given by both parties to determine whether the Wood judgment was rendered pursuant to a valid service, but no evidence was offered to show that a suit was pending when Dresser bought, because the pleadings did not contain any such allegation. It is true, some evidence was given which might have related to that issue had such an issue been presented by the pleadings. But, as the pleadings stand, that evidence must all be referred to the issue before the court, viz., was the judgment in favor of Wood against W., M. & H. and the Branscoms grounded on a sufficient service? It is too late to invent a new issue to which to refer this evidence. We could not object to the evidence in the court below, for it was properly given to support the Wood judgment, of which judgment Wood in his answer alleges that Dresser had actual knowledge. Had it been offered for the purpose of proving a *lis pendens*, we could have properly objected to it, for the existence of a *lis pendens* was not alleged in the pleadings in the case.

Even admitting that the issue of *lis pendens* had been presented and tried in the court below, (which was manifestly not the case,) we insist that no evidence was given that shows that, at the time Dresser purchased the mortgage in dispute, any action was pending affecting said mortgage, or the rights of Dresser under the same. The service upon Warner was void, as the copy served by the special deputy was not a complete copy. The indorsement on a writ is part of

the writ. When a suit is brought to recover money only, it has always been held that the amount to be recovered must be indorsed *on the copy, as well as on the original summons. A service of a copy without such indorsement would be no service. By parity of reasoning, the authority of the special deputy, being required to be indorsed on the summons, should also appear upon the copy. Whatever the law requires to be written upon the summons is a part of the summons. The special deputy has the same right to omit one indorsement as another. 3 Chit. Pr. 266. The defendant is supposed to know the sheriff and his general deputy. Their authority appears of record in the proper office. But no record seems to acquaint the defendant with the nature of the special deputy's authority. The authority does not appear upon the copy. That copy does not even apprise him that the person who delivered it claimed to be a special deputy. He may have been a mere volunteer.

The paper served did not even purport to be a copy. The well-known custom in serving writs is for the officer who holds the original summons to certify on the copy delivered to the defendant that the same is a true copy. This custom we believe to be universal, and we claim that the legislature must have had this universal custom in view when it enacted that the sheriff should furnish the defendant with a copy of the writ. Indeed, a universal custom is itself law, and does not become more obligatory from being incorporated into a statute. It does not comport with the dignity of courts of record that its processes, as served, should be unauthenticated, and have no voucher for their genuineness. In the present case the copy was uncertified. It is true, after the return-day has passed, the defendant, by making a trip to the county-seat, and examining the records of the court, may ascertain whether the ambiguous transaction was a farce or a reality; but we do not believe it is the intention of the law that he should be subjected to this hardship and delay. Processes of courts should prove themselves. The same is true of copies of such processes, designed to subject citizens to the jurisdiction and judgment of courts.

The seal of the court and the signature of the clerk is a sufficient *authentication of the original writ. Nothing less than the signature of the sheriff can authenticate the copy. A copy made by a person other than the lawful custodian of the original might be a correct transcript indeed, but it would not give the court jurisdiction, nor authorize the taking a default against a defendant. To have such an effect the process must have been served by a person known to the defendant to be an officer of the court, and must have been certified by such officer to be a true copy. To hold otherwise would be to establish a dangerous precedent. Whenever the law requires a written notice to be given, it has always been held that the person required to give the notice should sign the same. It is not a notice *in writing*, unless signed. A summons is a command of the

court, addressed to the sheriff. The copy of the summons delivered to the defendant is a notice given by the sheriff, and should be signed by the sheriff. It is an oral notice from the sheriff, and not a written one, until certified by him. Suppose such a transcript of a summons, uncertified, and wanting the indorsement of the sheriff's authority to his special deputy, should be left at a defendant's residence, by a person other than the sheriff or his general deputy: would it be claimed for a moment that a default could be entered without further service?

Warner, Hawkins & Mowry were joint mortgagees. Their estate was a joint one. 1 Washb. Real Prop. 576; 2 Washb. Real Prop. 136. In actions affecting this joint estate they were all necessary parties, and must have sued and been sued together, (1 Washb. 557; 2 Hil. Mortg. 140; Shirkey v. Hanna, 3 Blackf. 403; 4 Kent, Comm. 407;) and a judgment against several joint defendants is considered a nullity when it appears that one of them was never served with process,—Freem. Judgm. § 186; Holbrook v. Murray, 5 Wend. 161; Duffum v. Ramsdell, 55 Me. 253; Powell, App. Proc. 285; Lapham v. Austin, 6 Pick. 246; Nash, Pl. & Pr. 675, (4th Ed.) It is claimed that Dresser acquired his title *pendente lite*, and that he is therefore bound by the decree in the action entitled Wood v. Warner, in *351 which it was sought to settle the *priorities between the Dresser mortgage and the Wood mortgage. But it will be noticed that the judgment in said action was given pursuant to a publication summons, which was commenced more than sixty days after the filing of the petition. We are content that Dresser should be bound by any judgment which the court could have rendered pursuant to any service made or attempted, or any publication commenced within sixty days from the filing of the petition. No judgment could have been rendered affecting the joint estates of Mowry, Hawkins & Warner, because there was an actual service of process on none of them, and even the pretended service was made on but one. According to the authorities already quoted the judgment rendered pursuant to such a service must have been a nullity. If a judgment had been rendered against Warner alone, it would have been void, not merely because the attempted service was void, but because a joint estate could not be affected by a several judgment against one of the joint tenants. If the judgment had been against the three joint tenants, it would have been void, because no service of process had been ever attempted on two of the joint tenants.

Our Code, § 81, provides that notice of *lis pendens* shall date from the filing of the petition only where the summons is served, or the first publication made, within sixty days after the filing of such petition. In the case of Wood v. Warner *et al.* the service had been made upon the Branscoms, and an attempt had been made to serve Warner, but it was not sufficient to affect the joint mortgage estate of W., M. & H. That estate Dresser had a right to purchase, for it

was unaffected by anything done, or attempted to be done, in the district court at the time of the purchase by Dresser, or within sixty days from the filing of the petition. No service had been made or commenced upon which a decree could be rendered that should affect the joint mortgage estate. Section 20 of the Code provides that *for the purposes of the statute of limitations* an action shall be deemed *352 commenced, as *to defendants jointly interested, as soon as service is had upon one. This provision being expressly limited to statutes of limitation, it follows that the converse is true when the question is one of *lis pendens*, and that the writ is *not* pending as to any defendant unless service on such defendant is made or commenced within sixty days from the filing of the petition.

The attempted service on Warner was clearly waived by Wood when he made affidavit that service could not be made on Warner in this state, and proceeded to serve by publication. Warner clearly had until the answer-day mentioned in the publication notice in which to answer Wood's petition. It follows that Wood waived his rights, such as they were, under the attempted personal service on Warner. If there were any dispute about this, there is the final adjudication of the court that the judgment in Wood's favor against Warner, Mowry & Hawkins was rendered pursuant to the publication notice. This adjudication is binding, and cannot be questioned until set aside by the proper tribunal. Certainly a party counting on a judgment cannot be allowed to controvert one of the points decided in the action, nor to deny one of the findings contained in the judgment. We have not overlooked the fact that the motion made by Warner to quash the summons, and set aside the return of service, was overruled. The action of the court in this matter was clearly proper, for there was no ground for quashing the summons, the said summons being regular, and the motion was not divisible. But when the court afterwards rendered judgment in the case it passed upon the question of service, and found that the personal service was had on the Branscoms, and that service by publication was made upon W., M. & H., which service the court approved. This is a distinct adjudication that the attempted personal service on Warner was void.

The Wood suit was commenced at the instance of Branscom. It was not properly a suit until Wood consented that it should be *353 brought. Wood, who resides in Missouri, *gave that consent "some days" after the commencement of the action. But it is not proved to have been given before the date of Dresser's purchase, and, there being no testimony on that point, there is no evidence nor presumption that the assent was given before the Dresser purchase. *Keeler & Johnson*, for defendant.

Personal service of summons in the case of *Wood v. Branscom et al.* was duly made upon Warner on the fourth of November. It was served by a duly-authorized special deputy-sheriff, and the copy delivered to Warner was a true copy of the summons issued by the clerk.

The indorsement thereon by the sheriff of the appointment of Newhouse to serve it was no part of the summons. Whatever the clerk puts in it, or indorses on it, and that only, is a part of the summons. There is neither reason nor propriety in putting any subsequent indorsement of the sheriff on the copy delivered to a defendant. Strictly and technically it would not be a true copy of the summons *issued* if added to and changed in that manner. If the letter of the statute has been complied with in making a service, the defendant's ignorance of what has been or is thereafter done in the case does not let him out of court. He has the certain means of knowing, and fails to use them at his own peril. No certificate of the deputy-sheriff was necessary on the copy served. The Code, § 64, says: "The service shall be by delivering a copy." If the legislature had thereby meant a *certified* copy, it would have been so expressed, because in another place where it did so mean it said so in the statute. Justices' Act, § 12. In all revisions of the Code the requirement of such certificate has been inserted in the justices' act with reference to constables, and omitted from the general Code with reference to sheriffs. It is unnecessary to give the reasons for this distinction. It is enough that it is so written. The expression of the requirement in the one section conclusively excludes it in the other section where it is not expressed.

*354 The personal service on Warner was not invalidated *nor waived by any subsequent proceedings in the case. Warner moved to set aside said service. His motion was by the court overruled, and the service held to be good. The case of Stevens v. Thompson, 5 Kan. *305, is in point. Upon the filing of an amended petition a second summons was issued, and a second service made, and this court held that such second service cut no figure, not even as to the time and manner of pleading; that, the first service being sufficient, the second summons had no function to perform. Now here there was no waiver by Wood of the personal service on Warner, nor was there any adjudication of the court against it. Warner, with other defendants, actually appeared in the action by filing an answer to Wood's petition. The court found the service by publication to be good, and that by it W., M. & H. were duly notified of the pendency of this action. Can it be contended that the judgment in that case now depends for its validity on the regularity of that service by publication, and that their personal appearance by filing answer cuts no figure,—that the court, by its findings as to service by publication, adjudicated their appearance by answer out of existence? That position is just as tenable as that the personal service on Warner was (without being referred to) thereby adjudicated away.

Wood's action to reform his mortgage was commenced November 4th, and on the same day personal service was made on the two Branscoms and Warner, three of the defendants, and on the sixth of January service by publication was commenced on Mowry and Hawk-

ins, the remaining defendants. Dresser made his purchase of the Warner, Mowry & Hawkins note, November 27th. Under section 81 of the Code, by the purchase at that time Dresser acquired no interest in or lien on the mortgaged premises as against Wood, and Dresser was bound by the decree afterwards made in the action then pending. *Bayer v. Cockrill*, 3 Kan. *282. Said section 81 contains two distinct provisions. The first is that the filing of the petition is notice to the world ("third persons") of the pendency of the action,

but that such notice shall not be of any avail if a service be *355 *not made within sixty days thereunder. This is not such a question as could arise under the statute of limitations. The second provision is that while an action is pending "no interest can be acquired by third persons in the subject-matter thereof, as against the plaintiff's title." It does not say merely that no interest can then be acquired *from a defendant in the action*. Its meaning is not so limited. An interest as against the plaintiff's title cannot be acquired from any person. In this case, Dresser made his purchase from defendants in the action of *Wood v. Branscom et al.*, and one of the defendants from whom his purchase was made had already been served with a summons in the action. The ownership of Dresser's vendors being a joint one, and the purchase being a single and indivisible transaction, he could not thereby acquire any interest as against the plaintiff's title, even if he might have done so by a purchase of that which was owned solely by the two defendants not then served. The interest of Warner in each and every cent of the mortgage lien gives to Dresser's purchase the same bearing on this case as though made from Warner alone. As this is not a direct proceeding to set aside the decree made in the case of *Wood v. Branscom et al.*, the authorities cited by plaintiff in error have little or no bearing on this case. In the case of *Wood v. Branscom et al.*, Wood sued all the joint owners, and eventually obtained service on all, and a decree against all, which decree is still in force.

Inasmuch as Wood ratified and accepted the attorneys' acts in bringing an action for him as soon as he was apprised of them, the action so brought must be treated in all respects as though originally brought at his direction. Such ratification was made long before Dresser's purchase. The expression "some days after" the filing of the petition excludes the idea of its being some *weeks* after.

The plaintiff in error in his brief assumes that Wood was negligent. There is no evidence in the case tending to show that Wood or his attorneys knew or could ascertain the facts necessary to *356 be inserted in an affidavit for publication *prior to the time the affidavit was made. As the question of diligence in making that service by publication is no material element in the case, it is but fair to presume that Wood might have proved diligent inquiry and want of knowledge if such testimony had been proper and admissible

VALENTINE, J. This was an action brought by Dresser against John Branscom, Martha Branscom, and John W. Wood, to foreclose a certain mortgage. The real contest, however, is between Dresser and Wood. Each is the owner of a mortgage given by the Branscoms upon the same land, and each claims priority of lien. Wood's mortgage was executed first; but, as a mistake was made in describing the mortgaged property, Dresser's mortgage would seem to take precedence. Dresser's mortgage was executed originally by the Branscoms to Warner, Mowry & Hawkins, partners in business, and was by them assigned to the plaintiff, Dresser. Immediately after the Dresser mortgage was executed, and while it still remained in the hands of Warner, Mowry & Hawkins, to-wit, on November 4, 1871, Keeler & Johnson, as attorneys at law, commenced an action in the name of Wood, but without his knowledge or consent, against the Branscoms, and against Warner, Mowry & Hawkins, to obtain a decree reforming the Wood mortgage, and making it the prior lien on the mortgaged property. The Branscoms were duly served with summons. Warner was also served with summons, but it is claimed by Dresser that the service was void, and this is the first question raised in the case. The service was not made by the sheriff in person. But he deputized a person by the name of S. Newhouse to serve the same. The authority was indorsed on the summons, in accordance with section 68 of the Code, (Gen. St. 642,) in the following words, to-wit: "I hereby deputize S. Newhouse to serve this summons. E. T. ELLIS, Sheriff." Newhouse served the summons on Warner on the same day, November 4th, by delivering to him *357 a copy of the summons with all the indorsements thereon, except the foregoing indorsement of authority to Newhouse to serve the summons. The copy delivered to Warner was not in any manner certified to be a copy.

It claimed by Dresser that the service of the summons was void, because said copy was not certified, and because said indorsement was omitted therefrom. Now, neither, as we think, was necessary. The statute provides that "the service shall be by delivering a copy of the summons to the defendant personally," etc. Civil Code, § 64. The statute does not require that a *certified* copy of the summons shall be delivered to the defendant, nor does it require that a copy of anything more than the *summons* shall be delivered to him. The summons is the writ as it is issued by the clerk. Code, § 59. It does not deed anything more than what the clerk puts in it, or on it, to make it a summons; and anything more is no part of the summons. Taking the statute as it reads, and these propositions seem clear beyond all doubt; and we know of no reason why we should not take the statute as it reads. This service, then, on Warner, was a good service, and gave Warner notice of all the rights of Wood; and, as a rule, notice to any one of two or more persons interested jointly as partners is notice to all. The action from and after November 4th.

was actually pending as to the Branscoms, and as to Warner. Afterwards Wood filed an affidavit for service by publication, and actually got service by publication, not only upon Mowry and Hawkins, but also upon Warner. It is claimed by Dresser that this second service on Warner invalidated the first, or was at least a waiver of the first. We do not think the claim is tenable. *Stevens v. Thompson*, 5 Kan. *305. Afterwards the defendants Warner, Mowry & Hawkins appeared in the case, filing an answer denying generally all the allegations of the plaintiff's petition. Afterwards, when the case was called for trial, the defendants Warner, Mowry & Hawkins did not appear. The court then found that personal service had *358 been made on the Branscoms, and *that service by publication had been made on the other defendants Warner, Mowry & Hawkins, and did not mention the personal service made on Warner. The court then proceeded to hear the case, and rendered judgment as prayed for by plaintiff, Wood. It is now claimed by Dresser that said finding of the court, that service by publication had been made on Warner, and not mentioning the personal service made on him, was an adjudication by the court that such personal service had never been made, or that the supposed personal service should be set aside. The claim is not tenable. Besides, Warner once made a direct motion to the court to set aside the personal service made on him, and the court overruled the motion; and it was not overruled, as the plaintiff in error now intimates, merely because it was connected with a motion to quash the summons, but it was overruled, as the record clearly shows, because the court considered the service good. And, further, if the court adjudicated the personal service on Warner out of existence, without even mentioning it, did not the court also adjudicate the appearance of Warner, Mowry & Hawkins out of existence? This latter will hardly be claimed.

The petition was filed, and service made on the Branscoms and Warner, on November 4, 1871. The mortgage was assigned by Warner, Mowry & Hawkins to Dresser on November 27th; Dresser having no actual notice of the commencement of the action, or of Wood's rights or claims. And service was not commenced to be made on the other two defendants, Mowry and Hawkins, until January 6, 1872. Hence more than sixty days had elapsed after the filing of the petition, and before service was commenced to be made on Mowry and Hawkins, and hence the *lis pendens* provided for by section 81 of the Code (Gen. St. 645) could not operate as against a purchaser from Mowry and Hawkins, provided they had owned the entire property in the thing transferred. But they did not own the entire property in the thing transferred. They, with Warner, owned the *359 *property jointly as copartners; and Warner had been served with summons, and the action had been actually pending as against him for twenty-three days when the mortgage was assigned to Dresser. But it is claimed by Dresser that as the mortgage was

held jointly, and not in severalty, by Warner, Mowry & Hawkins, no judgment could be rendered against all or any of them upon a service made on Warner alone, and therefore that no *lis pendens* could have existed when Dresser purchased the mortgage from Warner, Mowry & Hawkins. Now, for the purposes of this case, we shall admit that no final judgment reforming the Wood mortgage as against them could have been rendered against Warner, Mowry & Hawkins, or against either of them, on the service made on Warner alone; but we do not think that it follows from this fact that no *lis pendens* could exist at the time when Dresser purchased the mortgage from Warner, Mowry & Hawkins, under which he claims priority. The service on Warner was unquestionably valid, so far as the question we are now considering is concerned. Indeed, there is no way, under our laws, by which a service of summons can be made on a copartnership firm except by making the service on each individual member of the firm; and from the time that each individual member of the firm is so served, the action stands actually pending against such member. If the service were void as to each member when served, it would evidently be void as to all of them when served, which cannot be admitted; but, as the service is valid as to each member when served, it would seem to be clear beyond all doubt that no person could purchase or obtain any interest in the subject-matter of the action from such member, when so served, so as to defeat or affect any right of the plaintiff in the action in which such service was made. But to purchase anything from one of the members of a copartnership firm is to purchase it from every member of the firm. For instance, take the present case. Warner's interest in the mortgage extended to every conceivable or inconceivable portion of the mortgage. No portion of the

*360 *mortgage could be purchased without purchasing a portion of Warner's interest therein; and, as each and every partner who has any authority to make a sale of any portion of the partnership property is, in fact and in law, an agent for that purpose for each and all of the other members of the firm, a purchase from such member, who is an agent, is a purchase from each and all of the other members, who are principals. Therefore a purchase from Mowry or Hawkins or both would be a purchase from Warner, and therefore we think it follows from the foregoing premises that, whenever any member of a copartnership firm is served with a summons, a *lis pendens* is at once created to such an extent that no person can purchase from any member of the firm any portion of the subject-matter of the action so as to affect the rights of the plaintiff in the action. It would be unfortunate if such were not the law. If such were not the law, as soon as one member of a firm were served with summons, the other members might sell the subject-matter of the action to an innocent purchaser, just as was done in this case, and then, if for any reason service should not be personally made or commenced by publication on every other member of the firm within sixty days after fil-

ing the petition, any judgment that might thereafter be rendered might be wholly unavailing and ineffectual for the purpose of protecting or enforcing the rights of the plaintiff therein. And, further, if it be true that no judgment could have been rendered against Warner after he was served with summons, except upon the contingency that both the other members of the firm should also be served with summons, still it is no more true than that no judgment could be rendered against any or all of them except upon the happening of several other contingencies. Even after service is made upon all the defendants in any case, no judgment can be rendered except upon the happening of a greater or less number of contingencies. The judgment usually depends upon the evidence, and connected with the evidence are usually many contingencies; and the last contingency is not *361 removed until the judgment is actually *and finally rendered.

It cannot, therefore, be maintained that every contingency that might defeat the rendering of judgment must first be removed before a *lis pendens* can have any operation. We think a *lis pendens* was created by the service of the summons upon Warner. But it is claimed, however, by Dresser that such *lis pendens* was destroyed by the subsequent failure of plaintiff Wood to commence to obtain service upon Mowry and Hawkins within sixty days after the filing of the petition. Code, § 81. But Dresser purchased the mortgage in twenty-three days only after the petition was filed, and while the *lis pendens* was unquestionably (so far as this question is concerned) in full force and operation, and therefore Wood's laches in not commencing to obtain service on Mowry and Hawkins until sixty-three days had elapsed after the petition was filed, instead of within sixty days, as he had an undoubted right to do, could not have misled Dresser, to his injury. We do not think that the three-days laches of Wood destroyed the *lis pendens* already created and existing.

But it is also claimed by Dresser that said action was commenced without any authority from Wood, and therefore that the proceeding could not constitute a *lis pendens*. But the record shows that "some days after said action was commenced" Wood ratified the same. How many days thereafter is not shown. It evidently could not have been weeks, however, or the record would have said "weeks," instead of saying "days." And it could not have been more than seventeen days at most, for the following reasons: On November 4th the petition was filed and service made on Warner and the Branscoms; on November 16th Warner filed a motion to set aside the service and quash the summons; and on November 21st, just seventeen days after the petition was filed, this motion was taken up for hearing, and Wood appeared in the court to contest the same. It is true,

Wood's appearance was by counsel, but there is no pretense *362 that this appearance was unauthorized. The court overruled the motion. Now, by way of digression, was not this an adjudication by the court that the service on Warner was good? And

the court had jurisdiction both of the subject-matter of the motion and of Warner, who made the motion; that is, the court had jurisdiction of Warner for the purpose of adjudicating upon this motion, for Warner voluntarily appeared for this purpose, and gave the court such jurisdiction. Warner excepted to the decision of the court upon this motion, and made a case for the supreme court. This decision was made on November 21st, and in six days thereafter, on November 27th, the mortgage was assigned by Mowry and Hawkins to Dresser. We suppose that no one will question the power of Wood to ratify and make his own whatever said attorneys had done for him in the way of bringing said suit; and we suppose no one will question the binding effect of the suit after its ratification. The suit was ratified by Wood before the mortgage was transferred to Dresser; and Warner, one of the mortgagees, well knew of the ratification, for only six days before the assignment was made he had had the contest with Wood over the service of the summons.

Dresser also claims that Wood did not sufficiently plead in this action the *lis pendens* of the other action. He set forth in this action, in his answer to Dresser's petition, the rendition of the judgment in the other action. He also sets forth in his answer that at all times up to the rendition of said judgment, and since, Warner, Mowry & Hawkins were the owners of the Dresser mortgage. These facts, if true, certainly constitute a good *lis pendens*. Indeed, it is not necessary that they should all be true, or wholly true, in order to constitute a good *lis pendens*. Suppose, for instance, that instead of Warner, Mowry & Hawkins owning the mortgage up to and after the rendition of the judgment, as pleaded, they merely owned it up to and after the time when the suit was actually pending against Warner, as was the fact, still the *lis pendens* would be sufficient. We think the answer was sufficient. And, besides, all the parties

*363 tried the case on the assumption *that the question of whether a *lis pendens* existed or not was properly raised by the pleadings in the case; and therefore, even if it should now be found that any one of the pleadings was technically defective in this respect, still we should not reverse the judgment of the court below merely for that reason. Parties must generally raise such questions before they come to this court. If any objection had been made in the court below, the pleadings would undoubtedly have been made sufficient, if they were not already sufficient.

The judgment of the court below is affirmed.

(All the justices concurring.)

JOHN DAVENPORT v. FRANK R. OGG, Ex'r, etc.

July Term, 1875.

1. **Trial: Excluding Witnesses: Testimony of Disobedient Witness.** Where the court makes an order excluding from the court-room, during the trial, all witnesses except such witness as may at any time be called in for examination, it is the duty of all witnesses to obey such order; and any person violating the order may be punished therefor. But, where a witness does violate the order, it is error for the court to exclude his testimony, simply because of such violation, over the objections and exceptions of an innocent party to the case who desires to examine the witness.
2. **Witnesses: Conduct of: Credibility.** The testimony of the witness should be received in such a case, and should go to the jury; but the conduct of the witness may also be shown to the jury for the purpose of affecting his credibility.¹
3. ———: **Conduct of Party: Presumption.** Where there is nothing in the record tending to show that the party desiring to examine the witness participated in the guilt of the witness, it will be presumed by the supreme court that such party was innocent.
4. ———: **Presumption: Where Witness is Competent.** Where the testimony of a witness is excluded because it is supposed that the witness is incompetent, it will be presumed, in the absence of anything to the contrary, by the supreme court, if the witness is found to be competent, that the party offering him was prejudiced by the exclusion, although the testimony of the witness may not be set out in the record. The rule seems to be this: Where the court below excludes evidence because the evidence, and not the witness, is supposed to be incompetent, the record must contain the evidence sought to be introduced, so that the appellate court may see whether it is competent or not; but where the court below excludes the witness because the witness, and not his evidence, is supposed to be incompetent, then all that is necessary to put in the record is enough to show whether the witness is competent or not.
5. ———. And, where the competency of a witness is objected to for any particular reason, it will be presumed by the supreme court, unless the contrary appears, that no other ground for his exclusion exists; and hence all that is necessary in such a case for the record to contain, is enough to show whether the particular reason given for the exclusion is sufficient or not.

Error from Johnson district court.

Davenport filed a claim in the probate court of Johnson county against the estate of one M. D., deceased. The claim was resisted by Ogg, the executor, and a trial was had before the probate judge, and a finding for the claimant. The case was appealed to the district court, where a trial was had at November term, 1873. Judgment was given for the executor.

¹ See *Shellabarger v. Nafus*, *post*, *547, and *State v. Kellerman*, 14 Kan.* 185, and note.

Sam E McCracken, for plaintiff in error.

The court erred in excluding the witness for disobeying the order of the court. The fault, if any, was the fault of the witness, and without the knowledge or consent of the plaintiff or his attorney. A witness cannot, by any misconduct of his own, deprive a party of the benefit of his evidence, if there be no fault or connivance on the part of the person who has a right to his testimony. 2 Phil. Ev. 744; *Keith v. Wilson*, 6 Mo. 435; 1 Greenl. Ev. § 432, note; *Cotton v. Ulmer*, 44 Ala. 393; *Roscoe*, Crim. Ev. 163; 1 Bish. Crim. Proc. § 518.

F. R. Ogg, defendant in error, for himself.

*365 **VALENTINE, J.* At the commencement of the trial of this case an order was made by the court below excluding from the courtroom, during the trial, all the plaintiff's witnesses, except such witness as might be called in at any time for examination. During the trial, *Mary Atkinson*, one of plaintiff's witnesses, came into the courtroom in violation of said order, and heard all the evidence in chief of another witness of the plaintiff. Afterwards the plaintiff offered to introduce this witness, but the defendant objected on the ground that she had violated said order. "The plaintiff [then] insisted that the witness should be allowed to testify; that they had called the attention of the court to the fact of the witness being in court as soon as the fact came to the knowledge of the plaintiff's counsel; that it was no fault of theirs, but of the witness; that the fact of the witness being in court before the plaintiff was apprised of the fact of said witness' being in court was known to defendant's counsel." This statement was not sworn to, and whether true or untrue we have no means of determining. And what the testimony of the witness might have been we cannot tell, for the court excluded the whole of it, not even allowing the witness to be examined on any subject, and the plaintiff made no statement as to what the testimony would be. Did the court below err in refusing to allow this witness to be examined? We think it did. There is no pretense that the witness was not a competent witness in every respect, except that she had violated said order; and there is no pretense that her testimony would not have been relevant and competent if it had been admitted. Her testimony was excluded simply and solely because she violated said order of the court. This was probably no punishment to the witness, but was rather a severe punishment to the plaintiff, who, as we must presume from the circumstances of the case, was an innocent party.

*366 *Mr. Phillips* says in his work on Evidence, that "if a witness who has been ordered to withdraw, continue in court, it was formerly considered to be in the judge's discretion whether or not the witness should be examined; but it may now be considered as settled that the circumstance of a witness having remained in court in diso-

bedience to an order of withdrawal is not a ground for rejecting his evidence, and that it merely affords matter of observation." 2 Phil. Ev. (5th Amer. Ed.) 744, *887, and also see cases there cited. This is evidently the correct rule. A hostile witness should not have the power, by violating an order of the court, to deprive an innocent party of his testimony. Nor should the ignorance, mistake, misapprehension, or inadvertence on the part of the witness have the effect to deprive an innocent party of his testimony. The testimony of the witness should be received, and should go to the jury; but the conduct of the witness may also be shown to the jury for the purpose of affecting his credibility. That this view of the question is correct, see, also, *Keith v. Wilson*, 6 Mo. 435; *State v. Salge*, 2 Nev. 321; *Gregg v. State*, 3 W. Va. 705; *Grimes v. Martin*, 10 Iowa, 347; *Bell v. State*, 44 Ala. 393; *State v. Sparrow*, 3 Murph. 487; *Hopper v. Com.*, 6 Grat. 684. The witness may be punished, as for a contempt, by fine and imprisonment for violating the order of the court. So, also, may any party or person who procures or abets such violation; and, if the party who wishes to examine the witness abets the violation of the order of the court, he may be punished by excluding the evidence of the witness; or, at least, this seems to be the weight of authority up to the present time. But all this is punishment for a supposed contempt of the court; and the guilt of the party punished must either come under the personal and judicial cognizance of the court, or it must be proved to the satisfaction of the court by evidence.

No innocent person can be punished in any manner, and no person is to be presumed, without proof, to be guilty; but, on the *367 contrary, every person, in the absence of *anything showing the contrary, is presumed to be innocent. Hence, in the present case, with or without the said statement of the plaintiff, as there is nothing in the record tending to show the plaintiff's guilt, he must be presumed by the supreme court to be innocent. There was nothing that transpired during the trial tending to show his guilt. It will also be presumed that the plaintiff was prejudiced by the exclusion of the testimony of said witness. Mr. Powell says: "It seems that to reject a witness which the record shows to be a competent witness would be error, for it would appear *prima facie* that the party was prejudiced by the rejection. And where a competent witness is excluded as incompetent, no necessity exists to set out in the bill of exceptions the matter expected to be proved by the witness, for the ground of the rejection would have been his *legal* disability to testify in the case, and there the contrary appeared from the record." Powell, App. Proc. 218, 219, § 12. See, also, *Fairley v. Fairley*, 34 Miss. 18, 21; *State v. Salge*, 2 Nev. 321, 326; *Gregg v. State*, 3 W. Va. 705, 709, *et. seq.*; and other cases above cited. In the case of *Fairley v. Fairley*, *supra*, the court say. "The record states that the plaintiffs offered the witness to prove their case, and it must be inferred,

in the absence of any showing to the contrary, that, if the court had permitted the witness to testify, this proof would have been made." The rule seems to be this: When the court below excludes evidence because the evidence, and not the witness, is supposed to be incompetent, the record must contain the evidence sought to be introduced, so that the appellate court may see whether it is competent or not; but where the court below excludes a witness because the witness, and not his evidence, is supposed for any reason to be incompetent, then all that is necessary to be put in the record is enough to show whether the witness is competent or not upon the ground upon which he is excluded; and it is not necessary, in such a case, to put into the record what the witness would testify to. Where the competency *368 of the witness is objected to for any particular reason, it will be presumed, unless the contrary appears, that no other reason for his exclusion exists; and hence, in such a case, all that is necessary, as a general rule, for the record to contain, is enough to show that the particular reason given for the exclusion is not sufficient. In the present case the witness was excluded solely because she herself, without any encouragement from any one else, violated an order of the court. The record contains sufficient to show that such reason is not sufficient, and hence the judgment of the court below must be reversed, and the cause remanded for a new trial.

(All the justices concurring.)

JOHN G. MEHNERT and others v. THERESA THIEME, Adm'x, etc.

July Term, 1875.

New Trial: Accident, and Unavoidable Misfortune. Where a party, acting as his own attorney in a case pending in the district court, fails to appear at the time set for trial, and judgment is rendered against him in his absence, and thereafter a motion is filed to vacate such judgment, and grant a new trial, and in support thereof the affidavit of the party is filed, alleging that he lived twelve miles from the court-house; that he had a large amount of stock, and no male help on his place, and was consequently obliged to be home every night; that in order to be present at the trial he rose on that morning between three and four o'clock, attended to his home duties, and started with his team between five and six o'clock; that he made no stops on the way, and drove with all possible speed, reaching the court-house about 10 o'clock, and after his case had been called and tried; and that the delay in driving in was caused by the bad and almost impassable condition of the roads, but without showing that the roads were for that season of the year, December, exceptionally bad, or that by an unexpected change they had become suddenly bad, or that the party was not fully aware of their exact condition: *held*, that this

was not such a showing of accident which ordinary prudence could not have guarded against, or of unavoidable misfortune, as required the setting aside of the judgment and the granting of a new trial.¹

*369 *Error from Bourbon district court.

The case is stated in the opinion.

John M Galloway, for plaintiffs in error.

McComas & McKeighan, for defendant in error.

BREWER, J. The plaintiffs in error were sued upon a promissory note. Mehnert filed an answer in person, alleging part payment to the amount of \$166.10, and that after the maturity of the note he and his co-defendant had given a mortgage due in twelve months as security, and that this time had not passed. They made no appearance at the trial, and judgment was rendered for the face of the note and interest. On the same day they, by an attorney, filed a motion to vacate the judgment, and grant them a new trial, on the ground that they were prevented from making their defense by "accident which ordinary prudence could not have guarded against, and unavoidable misfortune." This motion was overruled, and this is the error complained of. Mehnert's affidavit was the only testimony offered upon said motion. He testified that he filed the answer, and that it was true; that he lived twelve miles from Fort Scott, where the court was in session; that he had a large amount of stock, and no male help on his place, and was consequently obliged to be home every night; that in order to be present in court in time on that morning he rose between three and four o'clock, attended to his home duties, and started with his team for Fort Scott between five and six o'clock, drove with all possible dispatch, and made no stoppages on the road; that he reached the court-house about ten o'clock, and found that the case had been called and disposed of a few minutes prior

*370 thereto; that *the delay in driving in was caused by the bad and almost impassable condition of the roads. Was this accident which ordinary prudence could not have guarded against, or unavoidable misfortune? It does not appear that the roads were for that season of the year, December, exceptionably bad, or that by an unexpected change in the weather they had become suddenly bad, or that Mehnert did not by frequent travel have full knowledge of their actual condition. At that time it is no uncommon thing for country roads to be very rough, and in very bad condition. Common prudence would dictate that one who was acting as an attorney, and attending to business in court then in session, should not run the risk of getting into court in the morning over such roads from a remote part of the county. The real difficulty was that Mehnert was attempting to per-

¹ See, also, *Green v. Bulkley*, 28 Kan. 135; *Noble v. Butler*, 25 Kan. 650; *Turner v. Miller*, 28 Kan. 50; *National Bank v. Wentworth*, Id. 198; *Winsor v. Goddard*, ante, *118.

form the double part of suitor and attorney. While this is perfectly proper, yet whoever attempts it subjects himself to the obligations and liabilities of both. It is the duty of an attorney having business in court to be present during its sessions. There is his business; there is his work. Oftentimes that which will excuse the absence of a suitor, will come far short of excusing the absence of his attorney. Now, Mehnert was acting as an attorney, intrusted with business in the court then in session. Instead of employing some one to take care of his stock on his farm, and being himself in readiness to attend to his case, he is, with full knowledge of his great distance from the court-house, and the almost impassable condition of the roads, attempting to take care of both stock and lawsuit. He succeeded in the former, but failed in the latter, and failed simply from omitting the ordinary precautions which men take under similar circumstances. *Hill v. Williams*, 6 Kan *17.

The judgment will be affirmed.

(All the justices concurring.)

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*D. C. KNOWLES v. S. E. ARMSTRONG.

July Term, 1875.

1. **Bills and Notes: Protest Damages.** Where a petition on a negotiable promissory note alleges two indorsements, a demand and refusal of payment, and notice to the indorsers, it is not error to award protest damages.¹
2. **Mortgage: Judgment of Foreclosure: Indorsement of Summons.** Where a summons in an action to foreclose a note and mortgage was indorsed by the clerk with the amount of money claimed to be due, and there was no indorsement of a claim for other relief, *held*, that there was no error on account of this indorsement in rendering both a judgment for the money due on the note and a decree for the foreclosure of the mortgage.

Error from Bourbon district court.

The case is stated in the opinion.

McComas & McKeighan, for plaintiff in error.

Harris & Spencer, for defendant in error.

BREWER, J. This was an action in the district court of Bourbon county, to foreclose a note and mortgage given by plaintiff in error and his wife to one Robert Armstrong, and transferred by indorsement of the note, first by the payee to G. W. Stewart, and by Stewart to plaintiff, defendant in error. Personal service was made on Knowles

¹ As to notice, presentment, and protest, see note to *Hume v. Watt*, 5 Kan. 28.

and his wife, who filed an answer, and then, by leave of the court, withdrew their answer and appearance. The errors complained of are that the court allowed protest damages on the note, and that under the summons it improperly rendered other than a money judgment.

In reference to the first, it may be said that the petition alleges *372 two indorsements, a demand and *refusal of payment, and notice to the indorsers. This was sufficient under the statute. Gen. St. 116, § 14. In regard to the second objection, it appears that the summons was indorsed by the clerk as follows: "The plaintiff herein claims \$1,313.80, together with interest on \$1,180 at the rate of 12 per cent. per annum from November 11, 1873, and for which judgment will be taken if the defendants fail to answer." There was no indorsement of a claim for other relief than a personal judgment for money. Hence counsel contends that it was error to take other than such a judgment. This point has been already decided in this court adversely to the claim of plaintiff in error. *Weaver v. Gardner*, 14 Kan. *347.

The judgment will be affirmed.
(All the justices concurring.)

WILTON TOWN CO. v. GEO. S. HUMPHREY.

July Term, 1875.

1. **Execution: When no Protection to Officer.** An execution, which recites a judgment only against B., and is issued upon a judgment only against B., is no protection to an officer in levying upon the property of A., although it commands him to seize the property of A.¹
2. **Corporation: Actions against: Misnomer or Misrecitation.** If a claim sued on before a justice of the peace is a claim against a corporation, service made upon and defense made by the corporation, and judgment in fact rendered against the corporation, such proceedings will not be vitiated by a mere misrecitation of the name of the corporation.
3. **Justices of the Peace: Construction of Proceedings.** Great allowance must be made in the proceedings of justices of the peace for their ignorance of legal phraseology, and their want of familiarity with the requirements of judicial proceedings; and if from the record can be gathered what the magistrate intended to do and decide, and there is that which, however irregularly and inartificially prepared, can be construed into an expression of that intention, the record will be upheld as a sufficient record of the intended act and decision.²
- *373 *4. ———: **Execution: Protection to Officer.** Where an officer, acting under an execution which reads as follows: "You are commanded to take into your possession enough of the personal property of

¹ See *Prell v. McDonald*, 7 Kan. 266, and note.

² See, also, *Barrackman v. Girard*, 26 Kan. 236.

the Wilton Town Company to satisfy a judgment of \$2.55, together with all costs that have or may accrue in a case wherein J. M. H. was plaintiff, and C. H. N. and J. W. B., officers of the Wilton Town Company, defendants, rendered this twentieth day of February, 1874, before H. B., a justice of the peace," etc., levied upon certain personal property of said Wilton Town Company, and where it is doubtful from the entire record whether the proceedings and judgment in the action in which the execution was issued were not in fact prosecuted and rendered against the said Wilton Town Company, and the execution fails to show against whom the judgment actually was rendered, *held*, that this court will not reverse the ruling of both a justice of the peace and the district court, to the effect that the execution protected the officer in making the levy, and that the town company could not maintain replevin from him.

Error from Greenwood district court.

Replevin, brought by the town company against Humphrey, before a justice of the peace, to recover possession of an office desk of the value of thirteen dollars. The defendant justified, and claimed possession, as a constable, under a writ of execution. The justice gave judgment for the defendant, and the town company took the case by appeal to the district court, where it was tried at the April term, 1874, without a jury. The transcript shows that "the court, after hearing the evidence, and being fully advised in the premises, ruled and adjudged that the said execution protected the officer, and was a sufficient justification for him, the said defendant, in taking the property in controversy, and that the defendant is entitled to the possession of the property in controversy." Judgment was given in accordance with this decision in favor of defendant and against the plaintiff, and the costs were taxed at the sum of \$217.

T. L. Davis, for plaintiff.

G. H. Lillie, for defendant.

*374 *BREWER, J. This was an action of replevin, brought by the plaintiff in error, plaintiff below, against the defendant, a special constable. It was first tried before a justice of the peace, and then on appeal in the district court. On both trials judgment was rendered against the plaintiff. The evidence was briefly to this effect, that the property belonged to the plaintiff, and that it was taken by the defendant upon an execution issued by a justice of the peace. The judgment was in favor of John M. Hatfield, and against J. C. Preece, C. H. Norton, R. L. Osborn, and J. W. Borton, officers of the Wilton Town Company. The execution was as follows:

"To G. S. Humphrey, Special Constable: You are commanded to take into your possession enough of the personal property of the Wilton Town Company to satisfy a judgment of \$2.55, together with all costs that have or may accrue in a case wherein John M. Hatfield was plaintiff, and C. H. Norton and J. W. Borton, officers of

the Wilton Town Company, defendants, rendered this twentieth day of February, 1874, before Hiram Bersie, a justice of the peace in and for Lane township, Greenwood county, Kansas. Make legal service and due return according to law. **HIRAM BERSIE, J. P.**

"Dated this third day of March."

This is one of those petty cases which never ought to be brought to this court, one in which the principal matter in interest is now the costs; and one in which it is doubtful whether strict rules of law ought to be enforced in the construction of the judgment and process of a justice of the peace, or great allowance made for his ignorance of legal phrase, for the purpose of giving effect to the probable intention of the magistrate. For it cannot be doubted that an officer is not protected in seizing the property of A. under an execution which recites only a judgment against B., and is issued upon a judgment only against B., notwithstanding it commands him to seize the property of A. So that, if this judgment was really against the *375 officers of the town com*pany as individuals, it furnished no basis for an execution against the property of the company; and an execution reciting such judgment is no protection to the officer in making this levy. On the other hand, if the claim sued on was one against the company, the service made upon the company, the defense made by the company, and the judgment in fact rendered by the justice against the company, a misnomer of the company in the judgment, or a misrecitation of the name under which it should have been sued, ought not to vitiate the proceedings. Great allowance often has to be made in the proceedings of these officers for their ignorance of legal phraseology, and their want of familiarity with the requirements of judicial proceedings; so that if there can be gathered from the record what the magistrate intended to do and decide, and there is that which, however irregularly and inartificially prepared, can be construed into an expression of that intention, the record will be upheld as a sufficient record of the intended act and decision.

With some hesitation we are constrained to sustain the ruling of the district court. The fact that the execution commands the officer to levy upon the property of the company is evidence that it was the party against whom the proceedings were really had, for it is against all probability that upon a judgment against one party an officer should be directed to seize the property of another. Again, if the proceedings were against certain individuals, it would be strange that any description other than their names should be used, while the language actually used is, in many states, the appropriate description of a corporation. A county is in this state sued as the "Board of county commissioners of the county of ———." Gen. St. p. 254, § 5. Again, the parties have omitted to bring before us the record and papers of the case before the justice, and it may well be that that record and those papers would tend to make clear what is now

doubtful as to the party against whom the proceedings were had, as was the case in *Goodsell v. Wheeler*, 34 Conn. 485. But, finally *376 and chiefly, the execution does not recite any judgment. It commands the officer to seize the property of the company to satisfy a judgment rendered in a certain case, but does not declare against whom the judgment was rendered. It is true, the company is not stated as one of the parties, plaintiff or defendant, but it may be that the parties named were the original parties; and though the company was subsequently made a party, yet the justice, in obedience or supposed obedience to section 117 of the Civil Code, which declares that "the title of a cause shall not be changed in any of its stages," continued to describe the action by the names of the original parties. Of course, if the execution were entirely regular upon its face, and recited a judgment against the company, or even recited a judgment in a case in which the company was a party, without specifying against whom it was rendered, it would be protection to the officer, and replevin would not lie. *Westenberger v. Wheaton*, 8 Kan. *169.

The judgment will be affirmed.
(All the justices concurring.)

JOHN HAMLYN v. JAMES C. BOULTER.

July Term, 1875.

Mortgage: Pledge of Chattels: Right of Possession: Conditions.

Where B., being indebted on several judgments before a justice of the peace, procures H. to become surety for a stay of execution on said judgments, and to indemnify him gives a chattel mortgage on certain personal property, which mortgage expressly provides that H. shall have the exclusive control of the goods, shall sell them, and receive the proceeds, until he is fully repaid or otherwise indemnified, *held*, that judgment in favor of B. for the value of a portion of said goods should be reversed, where the findings fail to show that the judgments have been paid, and do show that H. has not realized enough from the sale of the goods to protect himself.¹

*377 *Error from Labette district court.

The case is stated in the opinion.

F. A. Bettis and *David Kelso*, for plaintiff in error.

H. G. Webb and *W. B. Glasse*, for defendant in error.

BREWER, J. The defendant in error, as plaintiff, brought his action in the district court of Labette county, alleging that Hamlyn, the

¹See note on collateral security to *Jones v. Scott*; 10 Kan. 85.

defendant, had converted certain personal property belonging to plaintiff, and asking judgment for its value. The defendant answered that the plaintiff, being a judgment debtor in sundry cases, had requested him to become surety on a stay of execution upon such judgments, and that he had so done; that to indemnify him plaintiff had given him a chattel mortgage upon the property described in the petition, a copy of which mortgage was attached to the answer; that, as authorized in said instrument, he had sold some of the goods and applied the proceeds in payment of said judgments; that he had paid on said judgments more than he had received from the sale of the goods; and, finally, that the plaintiff was indebted to him in sundry matters. A general denial was filed for reply. The case was referred to a referee, who made his report, with a finding of facts, and conclusions of law. The testimony is not preserved. A motion was made in the district court to set aside the report of the referee, because "not sustained by sufficient evidence, and contrary to law." This motion was overruled, and exceptions duly taken. The referee finds, among other things, that the chattel mortgage set forth in the answer was executed as alleged, that the plaintiff was a judgment debtor, and the defendant became security for stay of execution as stated. He did not find that those judgments had been paid, and did find that the defendant had not realized enough from the goods to protect himself. Turning to the mortgage, we find that it expressly gives to Hamlyn the exclusive control of the goods, the sale of them, and the handling of the proceeds thereof, until he is fully repaid, or otherwise indemnified. Indeed, by our statute, in the absence of stipulations in the instrument to the contrary, Hamlyn would have had the legal title and right of possession. Gen. St. p. 585, § 15. No action, therefore, could be maintained against him for the conversion of the goods, or for the value of any portion of them, until he had been fully repaid or indemnified, either by a sale of the goods or otherwise.

The judgment of the district court will therefore be reversed, and the case remanded with instructions to sustain the motion to set aside the report of the referee.

(All the justices concurring.)

ZEPHENIAH HOLCOMB v. JOHN A. DOWELL.

July Term, 1875.

1. **Supreme Court: Assignment of Error: No Exceptions in Record: Limit of Inquiry.** Where a case is tried by the court without a jury, special findings of fact made, no exceptions taken to them, no motion made to set them aside, and no application for further findings, and the only error alleged is, that upon the facts found the court erred in its conclusions of law, this court cannot inquire whether the testimony was properly admitted, whether it sustained the findings, or whether other facts were also proved by it, but is limited to the inquiry, whether upon the pleadings and findings the proper judgment was entered.
2. **Statute of Frauds: Parol Contract for Sale of Lands: Possession, and Lasting Improvements.** Where an action of ejectment is brought, and it appears by way of defense that a parol contract had been theretofore made by the plaintiff for the sale of the premises to the defendant; that under said contract the defendant, with the knowledge, consent, *379 and approval of the plaintiff entered *into possession and made valuable and permanent improvements thereon, said improvements being three or four times the value of the land; that the contract called for subsequent payment, and that payment, though often demanded, had not been made through lack of funds: *held*, that a judgment in favor of the defendant would not be reversed.¹

Error from Brown district court.

The case is stated in the opinion.

C. W. Johnson, for plaintiff.

The district court found that the defendant is in under a contract which gives him such equities; that under the rule laid down in *Courtney v. Woodworth*, 9 Kan. *443, the plaintiff cannot sustain ejectment, but must sue to rescind, or file a bill to foreclose, and have his own homestead sold if Dowell does not pay. The only question is, is this the correct view of the law? In *Courtney v. Woodworth* the defendant had an equity. He had paid for the land two hundred dollars in money and three hundred dollars in negotiable notes. Neither the money nor the notes were tendered back. The land was not a part of the vendor's homestead, and could be aliened without the joint consent of husband and wife. We think the true rule is that whoever pleads or proves a state of facts that would entitle him to the equity of a specific performance, if he were plaintiff, can defend in ejectment on setting up his equity. In this case the contract was void, and Dowell could never enforce it, Mrs. Holcomb objecting, (even if Holcomb should be estopped,) if the ninth section of article 15 of the constitution has any meaning. But Holcomb is not es-

¹ See *Seaman v. Huffaker*, 31 Kan. 262. See also, the notes to *Long v. Duncan*, 10 Kan. 224; *Wiswell v. Tefft*, 5 Kan. 156; *Galbraith v. Galbraith*, Id. 241.

topped. He has never received a dollar of money,—none has ever been tendered; and the defendant's whole defense consists in trying to force a recovery of damages out of a homestead by getting upon it under a parol contract of purchase, and thus compel the application of a homestead claim he could not maintain at law. *380 That ejectment will lie in such cases, we refer to *Wright v. Moore*, 21 Wend. 230; *Gardiniere v. Deyo*, 3 Johns. 422; *Patton v. Nicholson*, 3 Wheat. 211; *Hoatling v. Hoatling*, 47 Barb. 163; *Day v. New York C. R. Co.*, 53 Barb. 155. And to the same effect are the following, which also hold that no notice to quit is necessary: *Jackson v. Moncrief*, 5 Wend. 26; *Jackson v. Miller*, 7 Cow. 747; *McClane v. White*, 5 Minn. 178, (Gil. 139.) Where one enters under a license as purchaser, agreeing to pay, on a failure to pay he becomes a trespasser *ab initio*, liable to be turned out as such, and for mesne profits. *Smith v. Stewart*, 6 Johns. 46. "No notice to quit is necessary where the relation of landlord and tenant has not existed; nor even under tenancies at will." But in the case at bar there was no tenancy at will, because there are no terms of the occupancy except to pay the purchase price within thirty days. The putting in possession was a mere constructive fiction, arising from the fact that Holcomb saw Dowell moving a house on the land, and did not have him enjoined from moving on until payment was made. Ejectment was held to lie against the vendee who would neither perform, nor offer to perform, in the cases of *Powers v. Ingraham*, 3 Barb. 576; *Jackson v. Stackhouse*, 1 Cow. 122; *Prentice v. Wilson*, 14 Ill. 91; *Wales v. Bogue*, 31 Ill. 468. And see *Tyler*, Ejectm. 554. An agreement to sell does not constitute a license to enter. *Erwin v. Olmsted*, 7 Cow. 229; *Kellogg v. Kellogg*, 6 Barb. 116; *Spencer v. Tobey*, 23 Barb. 260; *Suffern v. Townsend*, 9 Johns. 35; *Cooper v. Stower*, Id. 331. Making improvements does not create any equity. *Near v. Watts*, 7 Watts, 321.

W. D. Webb, for defendant.

Ejectment will not lie in this action. It is a purely legal remedy. To recover in ejectment the plaintiff's legal rights must be such as to oust the defendant's equities. Plaintiff made the contract to sell the land to defendant, and both he and his wife (who is not a party to this suit) saw him expending money upon it, erecting his buildings, and improving it daily, without objection. This we think would be "joint consent of husband and wife." The constitution does not provide that the consent shall be in writing, and equity will not permit a man *and his wife* to stand by and see another lay out *381 money, and make valuable and lasting improvements *on their joint land, any more than it will permit the man alone to do so. Both husband and wife in this case are estopped from saying that their joint consent was not given. That ejectment will not lie in this case, we think is settled in this state by *Courtney v. Woodworth*, 9 Kan. *443.

BREWER, J. This was an action of ejectment brought by the plaintiff in error, plaintiff below, for the recovery of a tract of twelve acres, in Brown county. Judgment was rendered for the defendant, and of this judgment plaintiff complains. The case was tried by the court, without a jury. Special findings of fact were made. No motion was made to set aside these findings, no exceptions taken to them, and no application for any further findings. The errors alleged are "that the conclusions of law are not the law of the case on the facts found; that on the facts found plaintiff was entitled to recover the premises, and that plaintiff was entitled to judgment and defendant was not." Hence, the question presented to us is, which party upon the pleadings and facts found is entitled to judgment? We need not inquire whether the testimony was properly admitted, whether it sustained the findings, nor whether other facts were also proved by it. *McGonigle v. Gordon*, 11 Kan. *167. This we think eliminates some matters discussed in the briefs of counsel.

The petition was an ordinary petition in ejectment. The answer alleges a written contract for the exchange of farms; that subsequently it was verbally agreed between the parties that this contract should be set aside; and that plaintiff should deed the twelve acres in controversy and a lot in North Robinson to the defendant, and the defendant should pay therefor \$250; that in pursuance of said agreement the lot was selected and deeded; that plaintiff put the defendant into possession of the twelve acres, and the defendant has put thereon lasting and valuable improvements, describing them; that the defendant has paid seven dollars; that there is due *382 \$243, which the defendant is willing to pay, and *desires a specific performance. A reply was filed containing a general denial. Five findings of fact were made: (1) That plaintiff had the legal title; (2) that the parties made the written contract, that plaintiff's wife did not sign that contract, and that the land plaintiff was to deed was that upon which he then and still resided; (3) that this written contract was set aside, and a parol contract made as stated in the answer; that under this parol contract defendant went into possession, and made permanent and valuable improvements, and that this was done with the knowledge, consent, and approval of the plaintiff, and that defendant has ever since resided thereon; (4) that the money agreed to be paid was to have been paid on the first of June after the contract, but has not been paid, in whole or in part, for want of funds, though payment has been frequently demanded; (5) that plaintiff's wife is still living. Upon these pleadings and findings did the court err in refusing to give plaintiff a judgment for possession, and in giving defendant a judgment for costs? We think not. The court tendered leave to the plaintiff to amend his petition, so as to make it one to foreclose his lien for the unpaid purchase money, but he declined the offer, and claimed the land. Counsel in their brief discuss the question of a parol alien-

ation of the homestead. But there is nothing in pleadings or findings from which it can in any way be inferred that this twelve acres was a part of the plaintiff's homestead. It appears that the land mentioned in the original written contract was the land on which he resided, but it does not appear that this twelve acres is a part of that tract. If we look to the testimony, it would seem probable that it was a part of the homestead; but we find there also evidence tending to show the wife's assent to the alienation, and improvements, and we suppose she can be bound equally and in the same manner with her husband. *Edwards v. Fry*, 9 Kan. *426. The case, then, as it stands, is a case of a parol contract for the sale of lands, accompanied by the taking of possession and the making of permanent and valuable improvements, with the knowledge *383 and assent of the vendor. In this case the improvements were three or four times the value of the land. This, equity declares, takes the case out of the statute, and makes a contract binding upon the vendor, equally with one in writing. There is therefore a contract to sell lands, with payment promised at a subsequent day, and not made as promised, possession taken, and improvements of great value made. Upon these facts will ejectment lie? We think not. *Courtney v. Woodworth*, 9 Kan. *443.

The judgment will be affirmed.

(All the justices concurring.)

J. M. HAGAMAN v. F. W. NEITZEL.

July Term, 1875.

1. **Justices' Courts: Docket Entries: Bill of Exceptions.** The statute directs what matters shall be entered on the docket of a justice of the peace, and if a party desires to preserve the rulings of the justice as to other matters, for review on petition in error, he must take a bill of exceptions.
2. ———. Though a justice enters upon his docket a statement of matters other than those by law directed to be entered thereon, such statement does not thereby become a part of the record and available for review in a higher court upon petition in error.
3. ———. So, where upon a docket in which was entered all the matters directed to be entered, and preliminary to the record of the trial, was this statement: "And now, on this fourth of December, 1873, this cause came on for hearing; defendant, being in the justice's office, requested to know what time it was, and was informed by the justice that it was ten minutes past ten o'clock by his watch, (ten o'clock being the hour for the trial,) whereupon the defendant requested that the case be called. The plaintiff was not present, but had been in a few minutes before, about fifteen or twenty minutes before ten o'clock. The justice stated that the constable was now preparing a more suitable room for the trial

of this cause, and it would be called in a few minutes Defendant departed, and was not in court again by himself or counsel. Shortly
 *384 after, the plaintiff entered the justice's office, and claimed that the hour of trial had not arrived, and produced a watch indicating time at ten minutes to ten o'clock A. M., and insisted upon trial of this case, and would risk judgment if it should be in his favor. Thereupon defendant was called three times, and did not answer; and was not in court during the trial. Trial had," etc. *Held*, that there was nothing in this statement properly before the district court on a petition in error.

4. **Evidence: Exceptions to: Waiver.** Where no exception is taken to the admission of testimony, any error in its admission is waived.
5. **Trespass: Severance and Removal of Property.** Where a trespass has been committed upon real estate, and property severed therefrom and removed, the owner may waive a trespass and sue for the value of the property removed, and the law will imply a promise to pay such value.

Error from Cloud district court.

Neitzel commenced his action in a justice's court, and filed his bill of particulars as follows:

"F. W. Neitzel, the plaintiff, claims and demands of J. M. Hagaman, the defendant, the sum of \$179.35, for—

146 feet of fence, of the value of	-	-	-	-	-	\$73 00
22 loads of stone, of the value of	-	-	-	-	-	44 00
75 bushels of lime, of the value of	-	-	-	-	-	20 50
Cash,	-	-	-	-	-	12 00
Payment made on account of well,	-	-	-	-	-	12 00
Use of scaffolding lumber,	-	-	-	-	-	6 50
2 walnut lintels, of the value of	-	-	-	-	-	2 00
Work done in digging cellar,	-	-	-	-	-	4 50
One-third of cost of trestle used in building,	-	-	-	-	-	4 50
7 glasses of beer,	-	-	-	-	-	35

Making a total of - - - - - \$179 35

—All of which is due from the defendant to plaintiff and unpaid."

The district court, at the December term, 1873, affirmed the justice's judgment in favor of Neitzel.

J. M. Hagaman, plaintiff in error, for himself.

The hour mentioned in the justice's summons for appearance was 9 A. M., and when one hour and ten minutes had elapsed, defendant in error failing to appear, it was error for the justice to refuse
 *385 to call the case, and affected the substantial rights of plaintiff in error. Justices' Act, § 83; Cow. Treat. 353, § 907. The defendant was not bound to wait longer than ten o'clock for the plaintiff to appear, (Justices' Act, § 17;) and he having failed to appear before the defendant left the office, all the proceedings thereafter had were *coram non judice*. But Neitzel claims that the watch of the justice was too fast. Were that true (but it is not) he should not be permitted to profit by it, for he made his own selection of a justice before whom to try the case; he should not expect immunity from loss or defeat by the justice erring in giving the time any more than erroneously giving the law. But the justice's time was not too fast,

as will be seen by his entry: "Shortly afterwards plaintiff and his attorney came into the office and produced a watch indicating time at ten minutes to ten o'clock, and insisted upon trial of the case, and would risk judgment," etc. Now, if he satisfied the justice that his watch was correct, and the justice's wrong, why did he have to "insist" upon trial, and agree to "risk" judgment before he was permitted to go on with the trial? The pretension is an absurd one. But the justice had no right to try the case, no matter though he may have been mistaken in the time, and afterwards become convinced of such mistake. It was an outrage upon the rights of the defendant for him to take up the case and allow the plaintiff to take judgment after he had misled the defendant by his incorrect statement of the time. The time given by the justice to the defendant must be considered and held to be, for the purpose of this case, the correct time. To hold differently would in effect nullify the law. It is not pretended that the justice was engaged in any other business, nor were both parties present at any time. A defendant *may* wait longer than one hour for a tardy plaintiff to appear, but is not bound to, and if he chooses to leave, and does leave, the jurisdiction of the justice is at an end. In specifying a condition upon which the justice may postpone the appearance, or exercise discretion, according to well-settled rules for the construction of statutes, all other *386 grounds are denied; and wisely so, for experience proves that discretionary power in the hands of ignorant men, such, unfortunately, as are often chosen to the responsible office of justice of the peace, becomes a weapon of oppression, instead of means for the furtherance of justice.

A second error is that the justice had no jurisdiction of the subject-matter of the first two items in Neitzel's bill of particulars. The bill of exceptions shows that the "146 feet of fence" and the "22 loads of stone" were a part of the land, and that plaintiff in error committed a trespass upon and injury to Neitzel's land with respect to those items. The action, then, as to these items was an action for "trespass on real estate," and, the amount claimed being more than one hundred dollars, the justice had no jurisdiction. Justices' Act, § 6.

L. J. Crans, for defendant in error.

We submit, "*Omnia præsumuntur esse acta.*" Broom, Leg. Max. 907; Cow. Treat. §§ 907, 909. A party may waive a trespass and sue for the value of the articles taken. *Bernstein v. Smith*, 10 Kan. *67. The statements in the justice's transcript about sayings and doings of the parties, form no part of the record. *Pennock v. Monroe*, 5 Kan. *586; *Snauk v. Holland*, 6 Kan. *144. The defendant below mistook his remedy. He should have appealed, or proceeded under section 144 of the justices' act. He allowed the justice no opportunity to correct any error, and the district court could not examine the evidence. *Coburn v. Weed*, 12 Kan. *182; *Ayres v. Crum*, 13 Kan. *269.

BREWER, J. Neitzel sued Hagaman before a justice of the peace, and obtained judgment for \$125.85. Hagaman took the case by petition in error to the district court, and the judgment was affirmed. Of this he now complains, and asks a reversal. The principal question discussed arises upon a statement of facts in the transcript from the justice's docket. It should be noticed that this transcript shows the filing of a bill of particulars, the issue and return of sum-
 *387 mons, with a *copy of the constable's return upon the writ, a trial, the defendant not appearing, and a judgment. The summons was returnable on the fourth of December, 1873, at 9 A. M. Preliminary to the record of the trial is this statement: "And now, to-wit, on this fourth day of December, 1873, this cause came on for hearing; defendant, being in the justice's office, requested to know what time it was, and was informed by the justice that it was ten minutes past ten o'clock by his watch, whereupon the defendant requested that the case be called. The plaintiff was not present, but had been in a few moments before, about fifteen or twenty minutes to ten o'clock A. M. The justice stated that the constable was now preparing a more suitable room for the trial of this cause, and it would be called in a few moments. Defendant departed, and was not in court again by himself or counsel. Shortly after, the plaintiff entered the justice's office, and claimed that the hour of trial had not arrived, and produced a watch indicating time at ten minutes to ten A. M., and insisted upon trial of this case, and would risk judgment if it should be in his favor. Thereupon defendant was called three times, and did not answer, and was not in court during the trial. Trial had," etc.

Upon this it is contended by Hagaman that he had a right to depend upon the reply of the justice as to the time, and that when the hour for the trial arrived the justice must, if the plaintiff were not present, have dismissed the action, and had no jurisdiction to proceed to a trial thereafter in his (defendant's) absence. On the other hand it is insisted, as a preliminary matter, that this statement of facts is not so presented that any notice can be taken of it. The matters contained in the statement are not matters which properly form a part of the record, and are not preserved in any bill of exceptions. And this we think is correct. The statement is simply one of conversations between the justice and the respective parties. It contains nothing which the statute requires should be entered upon the justice's docket. Justices' Act, § 188. The justice was under no obligations to enter it upon his docket. It was a mere volunteer act on his part. So far from being under obligations to enter
 *388 it, he ought not to have done so. He has no right *to burden a transcript with other matters than those the law requires him to place thereon. A party aggrieved by any act or ruling of his may have the same preserved in a bill of exceptions. One was taken in this very case in reference to some other matters, as

will hereafter appear. And if a party does not care to avail himself of this right, he has no cause of complaint. The mere fact that this statement is found on the justice's docket gives us no right to examine and act upon it. It must be properly there, being either of those matters the law directs to be entered, or else preserved in a bill of exceptions. *McArthur v. Mitchell*, 7 Kan. *173; *Backus v. Clark*, 1 Kan. *303; *Altschiel v. Smith*, 9 Kan. *90. While we do not think this statement properly before us for decision thereon, we may say that it does not appear but that the justice called the case for trial at exactly 10 o'clock by the correct time; and, further, that if a justice does delay calling a case a few moments past the trial hour, as appears by his watch, to allow for differences in time by different watches, or to have a suitable room prepared for the trial, and notifies a party then present that he will call the case in a few moments, and does so call it, he commits no error so far affecting the substantial rights of such party as to compel a reversal. We do not mean by this that a justice may arbitrarily wait an indefinite time, but simply that an allowance of a few moments, accompanied by notice to a party who is present, works no substantial injury to that party.

The other error complained of is presented in a bill of exceptions. The bill of particulars claimed among other things to recover for 22 loads of stone, and 146 feet of fence. The total claim was \$179.35, and included many other articles. Upon the trial the justice received and considered evidence to prove that defendant entered upon the land of plaintiff without his permission, and quarried and carried away a quantity of stone, and also entered, tore down, and carried away certain posts and boards, and that these were the stone and *389 fence sued for, and also received and con*sidered testimony tending to prove an account arising on contract. No objection was made to the introduction of this evidence, and no exceptions taken. Besides, it does not appear that there was any effort to recover for the trespass, but only the value of the articles taken. A party can always waive the trespass and sue for the value of the property taken, and the law will imply a promise to pay. *Bernstein v. Smith*, 10 Kan. *60.

These being the only matters complained of, the judgment will be affirmed.

(All the justices concurring.)

HENRY WHEELER and others v. JOHN JOY.¹

July Term, 1875.

1. **Instructions: General Exceptions.** A general exception to a whole charge is not available, unless the whole charge is erroneous, or unless the charge in its general scope or meaning is erroneous.
2. **Supreme Court: Error: Should be Shown.** Where the complaint in the brief is that the charge was vague and inexplicit, or inconsistent, and counsel fail to point out wherein it was so, this court will make no critical examination of the charge for the purpose of finding out the alleged defects.

Error from Cloud district court.

Action by Joy against Wheeler, Tisdale, Parker, Hawks, and Terry, partners as the "Southwestern Stage Company," to recover damages for injuries sustained by him by the uncoupling and overturning of defendants' stage coach, while plaintiff was being carried therein as a passenger. Trial at the November term, 1874. Verdict and judgment for plaintiff for \$1,800.

*390 **Thacher & Stephens*, for plaintiffs in error, submitted the three propositions quoted in the opinion, *infra*, and in support of the first cited 3 Amer. Rep. 245; 3 Grah. & W. New Trials, 673. *L. J. Crans*, for defendant in error.

BREWER, J. This was an action to recover damages for a physical injury. The only errors complained of are thus stated in brief of counsel for plaintiffs in error: "The court erred in charging the jury that the plaintiff was entitled to recover damages for mental suffering;" "the charge of the court did not present the law in a clear manner to the jury, but was vague and inexplicit, and tended to obscure the case rather than throw light upon it;" "the charge was inconsistent." So far as these last two matters are concerned, it is not pointed out in the brief or elsewhere wherein the charge was vague and inexplicit, or inconsistent. An examination of the charge does not suggest to us anything to sustain these claims, and the record fails to show that it contains all the instructions given, and as counsel have failed to assist us in the matter, we pass it without further consideration. As to the first objection, it is enough to say that the only exception to the charge was thus taken: "To the giving of which instructions defendants then and there objected and excepted." Now, it is well settled that under such an exception a single portion of the charge cannot be singled out, and for error in it the judgment be reversed; but the charge as a whole, and in its general scope, must

¹Principles of this case applied, see *Joseph v. National Bank*, 17 Kan. 260; *Palmer v. Meniers*, Id. 480; *Fullenwider v. Ewing*, 25 Kan. 70; *Hunt v. Haines*, Id. 214; *Hentig v. Kansas, L. & T. Co.*, 28 Kan. 620.

be erroneous, or the exception is unavailing. *Kansas Pac. Ry. Co. v. Nichols*, 9 Kan. *236, *256; *Sumner v. Blair*, Id. *521; *City of Atchison v. King*, Id. *551; *Ferguson v. Graves*, 12 Kan. *39.

These being the only matters referred to by counsel in their brief, the judgment will be affirmed.

(All the justices concurring.)

*391 *CITY OF OLATHE v. E. W. ADAMS and others.

July Term, 1875.

Constitutional Law: Twice in Jeopardy. In a criminal prosecution where the defendant has pleaded "not guilty" to the charge, and where the case is submitted to the court, without a jury, for decision, upon an agreed statement of facts, and the court upon such agreed statement of facts "finds for the defendant," *held*, that such finding is equivalent to a finding or verdict of "not guilty," and is conclusive; and that this court cannot, on an appeal, either ignore said finding, or set it aside, although it may be ever so erroneous, and although the agreed statement of facts may clearly show that the defendant was guilty. [*State v. Phillips*, 33 Kan. 100; *S. C. 5 Pac. Rep.* 436; *Oswego v. Belt*, 16 Kan. 480; *State v. Crosby*, 17 Kan. 396.]¹

Appeal from Johnson district court.

Adams and another were charged before the police judge of the city of Olathe, on the oath of E. M. F., with having "kept open" their dram-shop or saloon, in said city, "on the fourth day of July, 1874," contrary to a certain ordinance passed and approved April 21, 1874. The defendants removed the case by appeal to the district court, where it was tried, at the November term, 1874, upon the following agreed facts: "The plaintiff, the city of Olathe, is now, and was at the time of the filing of the information in this cause, a city of the second class, duly organized under and by virtue of the laws of the state of Kansas. On the fourth of July, 1874, said defendants were the proprietors and keepers of a dram-shop in a one-story frame building situated on lot No. 3 in block No. 51, in said city. On said fourth of July, said defendants, E. W. Adams and N. Julien, kept their said dram-shop open, and admitted divers persons to said dram-shop and transacted business in their line as such dram-shop keepers with the persons so admitted. On said fourth of July there was in force in said city an ordinance entitled 'An ordinance to regulate billiard saloons, dram-shops, ball-alleys, and tipping-houses

¹The rule here stated held not applicable where the trial court made special findings of fact, and the conclusion of law from said findings was "that the defendant is not guilty as charged." *State v. Cumnerford*, 16 Kan. 500.

in the city of Olathe, and repealing certain ordinances in conflict therewith, passed and approved the twenty-first of April, 1874.

Said ordinance was duly passed and published as required by *392 law, and was, so far as the passage and due publication of *the same is concerned, in full force and effect on the said fourth of July, and still remains unaltered and unrepealed. All facts necessary to warrant the court in finding the said defendants guilty are hereby admitted, saving only the question as to *the authority of the said city* to pass the said ordinance." On the trial (says the bill of exceptions) "the defendants, by their attorneys, objected to the admission of said ordinance, on the ground that it was and is in conflict with the laws of the state governing cities of the second class, which objection was by the court sustained, and said ordinance was found, held, and adjudged by the court to be in conflict with the laws of the state, and said ordinance was ruled out." The defendants were discharged.

A. Smith Devenney and John J. McKoin, for the City.

The only question which we need consider is as to the legal force of the ordinance for the violation of which the proceedings before the police judge were instituted; that is, whether, under chapter 100 of the Laws of 1872, p. 192, "An act to incorporate cities of the second class," the legislature left it to the city council to fix the amount of fine to be imposed in case of conviction for violating an ordinance, the *maximum* not to exceed one hundred dollars, (City Charter Act 1872, § 67, p. 212;) in other words, whether the city council could fix a *minimum*, or whether it was left by the city charter to the tribunal trying the cause to fix the amount of fine in each case at such sum as it should deem proper within the limits of the general law. By the ordinance in question the council fixed the *maximum* fine at the sum of \$100, and *minimum* fine at \$25. The council having established a fixed uniform penalty of one hundred dollars as the *greatest* fine to be imposed, and the sum of twenty-five dollars as the *least*, the district court held the ordinance a *nullity*. And yet the limitations fixed by the ordinance are precisely those prescribed by the dram-shop act, (Gen. St. 400, § 4.)

*393 *We contend the ordinance was not void, being within the terms of the authority granted to the city of Olathe by its charter. Laws 1872, pp. 211, 212, § 67. This section authorizes the city council to prescribe "such fine, not exceeding one hundred dollars, or such imprisonment, not exceeding three months, or both *such fine and imprisonment, as may be just for any one offense,*" etc. Sections 47 and 49 give the council *exclusive authority* to regulate dram-shops, impose penalties, etc. The legislature have regulated the subject for the whole state as they deemed proper, and the city government have made such local regulations as they thought fit "for the good order and peace of the city." *City of Emporia v. Volmer*, 12 Kan. *630; *Canton v. Nist*, 9 Ohio St. 441. If the general law

of the state in relation to dram-shops has no application to the case at bar, then we maintain that the sections of the charter referred to authorized the council to legislate in the manner it did by prescribing the *minimum* fine, and taking the power from the court trying the cause. Legislative power may be conferred on the city, and in such case the council becomes the legislative body of the city; and it is acting as such not less when establishing the *minimum* as when establishing the *maximum* of punishment. *City of Lansing v. Van Gorder*, 24 Mich. 456; *State v. Binder*, 38 Mo. 450. That the council had the power to establish the sum of twenty-five dollars as the minimum fine, we also refer to Dill. Mun. Corp. §§ 271, 278; *City of Chicago v. Quimby*, 38 Ill. 274.

In Illinois an ordinance was treated as wholly void because it fixed the minimum fine at *five* dollars, when the general law required it to be *three* dollars. *Petersburg v. Petersburg*, 21 Ill. 205. Is not the *converse* of the proposition true? that is, is not the ordinance valid if state law is followed? In the case at bar the ordinance in question *followed* the general law.

VALENTINE, J. This was a prosecution by the city of Olathe against E. W. Adams and N. Julien for keeping open a dram-shop on the fourth of July, 1874, in violation of a city ordinance. The *394 prosecution was commenced before the *police judge. The defendants were there found guilty, and they then appealed to the district court. In the district court they were acquitted, and the city now appeals to this court. The city claims that the prosecution is in its nature a criminal action, and we think the city is correct, (*Neitzel v. City of Concordia*, 14 Kan. *446;) and therefore the city brings the case to this court by appeal, under section 283 of the Criminal Code, (Gen. St. 865,) instead of by petition in error, as is required in civil actions. For the purposes of this case, therefore, we shall assume (and probably correctly) that this is a criminal action; that it is appealable to this court under the Criminal Code; and that it is governed by all the rules pertaining to other criminal actions so far as such rules can be made applicable to this case. The facts of the case, so far as it is necessary to state them, are substantially as follows: A complaint was made on oath, and in writing, charging the defendants with the said offense. The defendants were arraigned upon the charge, and pleaded "not guilty." Trial was had in the district court, before the court, without a jury. The case was submitted to the court upon an agreed statement of facts; and, for the purposes of this case, we shall assume that the facts showed that the defendants were guilty. "And" (as the record shows) "the court having had the cause under advisement, and having duly considered the issues herein, and the said agreed statement of facts, and being well advised in the premises, finds for the defendants." This finding we think is equivalent to a verdict of "not guilty;" and for the purposes

of this case we shall assume that the finding is erroneous. The court then rendered judgment upon this finding for the defendants for costs, and discharged the defendants. The judgment was the only one that could have been rendered upon said finding. The city now appeals to this court, and asks to have said judgment reversed. Can it be done? If the judgment had not followed the finding, of course it could be reversed. *State v. Walter*, 14 Kan. *375. Or, if this were a civil action, we could ignore the finding of the court below, *395 considering it merely as a conclusion of law from the facts admitted. We could decide the case upon the agreed statement of facts, and could order the proper judgment to be rendered upon the facts agreed to. *Brown v. Evans*, *ante*, *88. But, the case being in its nature a criminal action, we have not the same authority to ignore or overrule the finding of the court below. If we should merely set aside the judgment of the court below, the finding would still remain in all its force and vigor, and no other or different judgment could be rendered thereon. The finding would still require the same judgment as has already been rendered. And we know of no authority in this court, or in any other court, to set aside a verdict or finding of "not guilty" in a criminal action. We think it is the universal opinion, both of bench and bar, that a verdict of "not guilty," in a criminal action, ends the case. The defendant could not be tried a second time against his consent; for under section 10 of the bill of rights (Const. Kansas) he cannot "be twice put in jeopardy for the same offense." Now, although the finding of the court below may be founded upon an erroneous view of the law, still we do not see how we can disturb it. The plea of the defendants was "not guilty." The agreed facts showed them, as we have assumed, to be guilty. The court, however, found them not guilty; and, with our understanding of criminal law, this finding is conclusive.

The judgment of the court below must therefore be affirmed.

(All the justices concurring.)

*396

*STATE OF KANSAS V. JAMES D. REEVES.

July Term, 1875.

Officer: Official Oppression: Ignorance of Officer: Criminal Intent.

In a trial upon an information, under section 207 of the crimes act, against a justice of the peace, charging willful and malicious oppression, partiality, misconduct, and abuse of authority, "in requiring an excessive bond on an appeal from a judgment rendered by him, and in refusing to approve a surety on said bond who was in fact sufficient," it is error to instruct the jury that "gross ignorance of law in a case like this amounts to criminal intent."

Appeal from Mitchell district court.

The case is stated in the opinion.

A. J. Banta, for appellant.

The verdict was contrary to the evidence and to law. A crime cannot be carved out of the evidence. There must be *corruption* in office on the part of the justice, and it must be of the same character that would warrant the impeachment of a district judge, or other officer liable to impeachment. 1 Bish. Crim. Law. (5th Ed.) §§ 460, 462. There is no evidence at all that is *proof* of corruption. One W. O. Smith offered as surety on appeal, and the justice did not think him sufficient. The bond was signed by the surety only. As he was pressed about it, the evidence shows that he inquired of others, and one justice of experience told him he would not take Smith, and another leading citizen told him the same thing; one person told him he thought Smith was good. The evidence, all taken together, simply shows a desire to do what is right, and it can be construed into nothing else. The jury were misled by the instructions of the court, and must have thought that if the bond was in fact sufficient in

*397 *their opinion, then the defendant was guilty. The court misdirected the jury in material matter of law. The court gave the following instructions, the defendant excepting: "Gross ignorance of law in a case like this *amounts to criminal intent*." The effect of the court's instructions is that if defendant was grossly careless or ignorant in the discharge of his official duties, then he is guilty, whether such carelessness or ignorance be in respect to law or fact. The instruction above copied states as a proposition of law that, as to the official acts of justices, gross ignorance on their part as to their duties is a crime. The language of the court is, "amounts to criminal intent;" but the court is kind enough to say to the jury that, if they have "a reasonable doubt" of the gross ignorance of defendant, they may acquit, impliedly saying if they had an abiding conviction of his ignorance, they must find guilty; and to make matters worse, the court leaves the jury to figure out the best they can what *gross* ignorance is. This is indeed strange law. The truth is that in cases of this kind the gist of the offense is the *corrupt* mind of the justice. This mental condition the state must prove, and the burden is on the state at all stages of the trial; and where a mental condition is the gist of the offense, then ignorance or mistake as to law or facts does avail. 1 Bish. Crim. Law, (5th Ed.) §§ 297, 300. To be guilty, the justice must have known the law, and willfully, and with intent to oppress, refused to comply with it.

G. W. Bertram, Co. Atty., for the State.

The evidence all goes to show that defendant, Reeves, was unwilling to have his action in the suit before him (as justice of the peace) reviewed by the district court. In the first place he refused to sign a bill of exceptions to his ruling as such justice, after having his attention repeatedly called to the law, and he even went so far as to

tell the parties, as is shown from the evidence, that he could be compelled to sign the bill by a writ of *mandamus*, showing a willful determination not to do so, unless so compelled. A good and *398 sufficient *bond on appeal was then offered, and he pretended not to be satisfied that the surety offered was a man of property, and demanded a certificate as to the ownership of land which the surety claimed. This was produced, showing a clear title to land, and still he was a "doubting Thomas," and wanted other names on bond, well knowing that the ten days would expire before they could be procured. If a party must get such names as a justice of the peace may dictate to an appeal-bond, then the defendant is a model officer. A justice can require a surety to justify as to his property, and perhaps demand other evidence; but where such proof is furnished he has no alternative but to approve the bond. The evidence all shows that the defendant acted willfully. The instructions considered together are a fair charge, and there is nothing in them for the defendant to complain of. The one most prominent of those is the one on "gross ignorance." See 1 Bouv. Law Dict. 643, 679.

BREWER, J. Defendant was convicted in the district court of Mitchell county upon an information charging "willful and malicious oppression, partiality, misconduct, and abuse of authority, in his official capacity of a justice of the peace," under section 207 of the crimes act, (Gen. St. 363.) That section reads: "Every person exercising or holding any office of public trust, who shall be guilty of willful and malicious oppression," etc. The facts, as they appear, were that the defendant, a justice of the peace, after rendering a judgment against one Fred. E. Smith for \$26.58 debt, and \$13 costs, required a bond for appeal in the sum of \$350, and refused to approve the surety offered. He claimed that he was advised by plaintiff's counsel, and so believed, that the bond must be large enough to cover costs in the district court, and that he was also advised by several disinterested parties that the surety offered was wholly insufficient. Upon the trial the court gave this instruction: "Gross ignorance of law in a case like this amounts to criminal intent."

*399 The same doctrine was recognized in several other instructions. Is this the law? If it is, it makes the office of a justice of the peace attendant with more dangers than is ordinarily supposed. These officers are seldom lawyers; they are chosen, not on account of their knowledge of the law, but on account of their supposed good sense. It may be, and often is, that they are deplorably ignorant of the decisions of the courts, the accepted construction of statutes, and the well-settled rules of evidence and practice. They may be "grossly ignorant" as to these matters. Shall they, intending to do right, and exercising the best judgment they have, be punished criminally for their gross ignorance? Take this very case. The bond required was unnecessarily large, but the statute does not

fix the amount. It says it shall be "in a sum not less than fifty dollars, nor less than double the amount of the judgment and costs." If the justice, on the suggestion of plaintiff's counsel, makes it large enough to cover the possible costs in the district court, or even larger than was necessary for that, and acts in good faith, shall he be punished criminally for his error? Or if, in the same good faith, he rejects a surety in fact good, but whom he believes from the information he has received to be insufficient, must he be fined, or sent to the county jail, for his error? We cannot think this is the law. The grossness of the error may be a circumstance tending to show an intent to do wrong,—may perhaps in some cases be sufficient to sustain a finding of such intent; but that is as far as the law will go. It is a question of fact for the jury to determine whether the erroneous ruling indicates ignorance of the law, or an intent to do wrong. If the latter, it may be criminal. If the former, not. Gross ignorance is not, in a case like this, the equivalent of a criminal intent. It is, by the statute, only "willful and malicious" conduct that renders a party guilty; and no matter how ignorant he may have been, or how grossly he may have erred, he has not violated the statute, unless his acts were willfully and maliciously wrong. See *State v. Mc-*

*400 *Donald*, 4 Har. (Del.) 555; *State v. Porter*, Id. 556; *Com. v. Shed*, 1 Mass. 227; 1 Bish. Crim. Law, (3d Ed.) §§ 299, 320; *Whart. Amer. Crim. Law*, 833, 836; *Clark v. Spicer*, 6 Kan. *440.

The judgment will be reversed, and the case remanded, with instructions to grant a new trial.

(All the justices concurring.)

STATE OF KANSAS v. HARVEY BROWN.

July Term, 1875.

1. **Jurors: Challenges for Cause: Opinion of Juror.** In a criminal prosecution for murder, while the jury were being impaneled, one of the jurors, upon an examination as to his competency to serve as a juror, stated "that he had formed the opinion that the deceased was killed, and that the defendant killed him," and nothing further was shown with reference to the competency of said juror; and the defendant then challenged said juror for cause, and the court overruled the challenge. *Held*, that the court erred.¹

¹Certain parties called as jurors testified on their *voir dire* that they had heard or read of the matters charged in the information, and had formed opinions thereon; but, it appearing from the whole of their examinations that such opinions were not settled or fixed, and that they could give full and fair consideration to all the testimony, and be guided solely by it in their conclusions, it is held that the challenges were properly overruled. *State v. Spaulding*, 24 Kan. 5. See, also, *State v. Medlicott*, 9 Kan. 176, and note.

2. ———. And, the defendant having exhausted all his peremptory challenges in said case, the error will be considered material, although said juror was afterwards discharged by the court on one of the defendant's peremptory challenges.

Appeal from Atchison district court.

The case is stated in the opinion.

F. D. Mills, for appellant.

S. H. Glenn, Co. Atty., for the State.

VALENTINE, J. The defendant, Harvey Brown, was charged
*401 with killing and murdering one William H. Phillips. *The charge was murder in the first degree. The defendant was tried, and found guilty of murder in the second degree. After he was sentenced, he brought the case to this court on appeal. Several errors are assigned, but it will not be necessary to consider many of them.

Among other assignments of error, the defendant claims that the court below erred in impaneling the jury. The record shows that, "upon the examination of said jurors touching their competency to serve as jurors in said cause, L. S. Howe, one of said jurors, answered in response to the question whether he had formed or expressed an opinion upon any material fact in the case, that he had formed the opinion that Phillips, the deceased, was killed, and that Brown (the defendant) killed him." And, again, "the question was asked said juror in the following manner and form: 'Have you formed or expressed an opinion that Phillips, the deceased, was killed, and that Brown, the prisoner, killed him?' and the said juror answered that he had so formed an opinion." Said juror was then challenged for cause, but the court overruled the challenge. Afterwards, however, the defendant challenged said juror peremptorily, and he was discharged on the peremptory challenge. The defendant exhausted all his peremptory challenges. The foregoing is all that the record shows concerning said juror.

Section 10 of the bill of rights of the constitution provides that a defendant in a criminal action shall have the right to be tried "by an impartial jury;" and section 205 of the Criminal Code (Gen. St. 853) provides that "it shall be a good cause of challenge to a juror that he has formed or expressed an opinion on the issue, or any material fact to be tried." We think the court below erred. The question whether the defendant killed Phillips was a "material fact to be tried." It was, indeed, one of the principal facts in this case.

The question of the competency of jurors, as involved in this case, differs widely from the question concerning the same subject decided in the case of *State v. Medlicott*, 9 Kan. *257. There is nothing in this case that tends to show that the opinion of the juror
*402 amounted only to an impression, *slight or otherwise. There is nothing that tends to show that the opinion was founded merely upon newspaper articles or rumor. And there is nothing
v.15k—20

which tends to show that the opinion was hypothetical, conditional, indefinite, or uncertain. It would seem from the record that the opinion was in fact *an opinion*, and that it was definite and absolute. We have no disposition to disturb in the least the rule enunciated by the court in the Medlicott Case. But this case differs so materially from that case that, while this court held that there was no error in impaneling the jury in that case, we must hold that there was error in impaneling the jury in this case; and, as the defendant exhausted all his peremptory challenges, we must hold that the error was material, although said juror was finally discharged by the court on one of the defendant's peremptory challenges.

The judgment of the court below is reversed, and cause remanded for a new trial.

(All the justices concurring.)

STATE OF KANSAS v. FRANK WHITBY.¹

July Term, 1875.

Burglary: Elements of Crime. To constitute the crime of burglary there must be an entry, as well as a breaking, of the building; and an information is fatally defective which fails to charge an entry, and a judgment thereon must be arrested.

Appeal from Crawford district court.

At the January term, 1875, of the district court, Whitby was arraigned for plea upon an information filed against him, by which information it was intended to charge defendant with the crime of burglary in the first degree. Defendant pleaded "guilty" to the *403 facts charged, and then moved in "arrest of judgment, for that said "information did not state facts sufficient to constitute a public offense." This plea was overruled, and defendant was sentenced to imprisonment.

¹ Burglary in the night-time, as defined by section 68 of the crimes act, does not include burglary in the day-time, as defined by section 69 of the same act, *State v. Behee*, 17 Kan. 402; burglary under section 68 of the crimes act may be committed in a "saloon building," *State v. Comstock*, 20 Kan. 650; insufficient information, *State v. Fockler*, 22 Kan. 542; describing manner of breaking and entry, *State v. McAnulty*, 26 Kan. 533; question for jury, see *State v. Jansen*, 22 Kan. 498; the lifting of a latch of a closed door, and the pushing open of the door, with the intent expressed in the statute, is a sufficient breaking to constitute burglary, *State v. Groning*, 33 Kan. 18; S. C. 5 Pac. Rep. 446; evidence of finding of goods, *Cummins v. People*, 3 N. W. Rep. 305; possession of goods taken is not *prima facie* evidence that the possessor committed the burglary when they were taken, *Stewart v. People*, 8 N. W. Rep. 863; what information must state, *Hall v. People*, 5 N. W. Rep. 449; allegation of being armed held surplusage, *Harris v. People*, 6 N. W. Rep. 677; defective indictment, *People v. Stewart*, 7 N. W. Rep. 71; imprisonment held not excessive, *State v. Foster*, 7 N. W. Rep. 643; *State v. Lacy*, Id. 646; inference from possession of goods, *Neubrandt v. State*, 9 N. W. Rep. 624;

J. T. Bridgens and M. A. Wood, for appellant.

The record shows that Whitby, in the absence of his counsel, pleaded guilty to a certain information filed against him, and was sentenced to imprisonment for the term of twelve years at hard labor in the penitentiary, and that such sentence was pronounced on overruling a motion in arrest of judgment. Does this information charge a public offense against this appellant? We think it does not. The information contains no allegation that appellant ever *broke*, or attempted to *break*, into the dwelling-house of the person therein named; nor that he entered into such house. It does not charge an assault upon the person of D. A., named in the information. It only charges an assault upon the dwelling-house of the person therein named. Properly construed, it does not charge the appellant with burglary, nor with rape, nor with the intent to commit either crime, nor with the violation of any statute of this state.

A. A. Fletcher, Co. Atty., and A. M. F. Randolph, Atty. Gen., for the State.

BREWER, J. Appellant was sentenced to the penitentiary for the term of twelve years as upon conviction upon an information for burglary in the first degree. A motion in arrest of judgment was overruled, and this is the error complained of. The attorney general, after an examination of the information, very properly concedes the error. The information is for burglary, but fails to charge any entry. It charges that defendant, "feloniously and burglariously, forcibly burst and did break, with intent," etc. It is well settled that to *404 constitute burglary there must be both a breaking and an entry. Our statute makes no change in the law in that respect. The motion in arrest ought therefore to have been sustained, and the judgment of the district court will be reversed, and the case remanded, with instructions to sustain the motion in arrest. The defendant will be returned from the penitentiary, and delivered over to the jailer of Crawford county to abide the further order of the district court. Under sections 279 and 280 of the Criminal Code a new

evidence held not to support information that prisoner broke and entered a store, not adjoining to or occupied with a dwelling-house, with felonious intent, *Moore v. People*, 11 N. W. Rep. 415; indictment held sufficient, *State v. Ruby*, 15 N. W. Rep. 848; possession of goods recently burglarized, unexplained, will not of itself justify a conviction, *State v. Tilton*, 18 N. W. Rep. 716; such evidence is admissible, *State v. Franks*, 19 N. W. Rep. 882; *People v. Carroll*, 20 N. W. Rep. 66; *Same v. Same*, Id. 575; degrees of offense—description—value of goods, *State v. Kane*, 28 N. W. Rep. 488; evidence of identity—evidence that defendant knew that there was money in the house admissible, *State v. Kepper* 28 N. W. Rep. 304; evidence of ownership of building—variance, *People v. McGilver*, 7 Pac. Rep. 49; evidence of attempt at another burglary, Id.; under the Montana statute, in order to constitute burglary in the day-time, there must be a breaking and entering with intent to commit a felony, and the facts which make up the constituent elements of the felony, and which show the intent to commit the same, must be alleged in the indictment, *Territory v. Duncan*, 6 Pac. Rep. 853; at common law and under Nevada statutes, *State v. Dan*, 4 Pac. Rep. 336; allegation of value, *People v. Stapleton*, 8 Pac. Rep. 6; description of building, *People v. Young*, 8 Pac. Rep. 813.

information can be filed, and the defendant put upon trial thereunder.

(All the justices concurring.)

STATE OF KANSAS *v.* PERRY NULF.

July Term, 1875.

1. **Information: "Prosecuting Attorney."** An information in a criminal action, signed and filed by the proper prosecuting officer, who describes himself in such information as "prosecuting attorney," and not as "county attorney," will be held sufficient if it is in all other respects sufficient.
2. **——: Verification by County Attorney.** The verification of an information by a prosecuting attorney, upon information and belief, is sufficient.¹

Appeal from Ottawa district court.

At the May term, 1875, of the district court, Nulf was found guilty of the offense of grand larceny, and was sentenced to the penitentiary for three years.

J. G. Mohler and Bishop Perkins, for appellant.

R. F. Thompson, Co. Atty., for the State.

The information was prepared and signed by the proper officer. *405 Gen. St. 284, § 136. This section makes the county *attorney the prosecuting officer for *all* criminal actions in which the *state* is a party. In the Criminal Code the prosecuting officer is everywhere designated as the "prosecuting attorney." Now, as the county attorney is the only prosecuting officer in criminal cases, the terms "county attorney" and "prosecuting attorney" are synonymous titles when used after the prosecuting officer's name in those cases. Section 67 of the Criminal Code designates the "prosecuting attorney" as the officer by whom informations may be filed, and directs that he should subscribe his *name* thereto. This last requirement is probably for the purpose of showing the court that the information was filed by the proper officer, and there is nothing in this section, or in our statutes, that requires that the *title* of the prosecuting officer should be annexed to his name. The county attorney is an officer of the district court, of which facts the court is bound to take judicial notice. Nor-

¹A complaint or information filed in the district court charging a defendant with a misdemeanor, and verified on nothing but hearsay and belief, is not sufficient to authorize the issuance of a warrant for the arrest of the party therein charged, when no previous preliminary examination, and no waiver of the right of such examination, have been had. *State v. Gleason*, 83 Kan. 245; 8. C. 4 Pac. Rep. 363.

vell v. McHenry, 1 Mich. 227; Anderson v. Bell, 9 Cal. 315; State v. Postlewait, 14 Iowa, 446; Masterson v. Le Clair, 4 Minn. 163, (Gil. 108;) Thompson v. Haskell, 21 Ill. 215. It follows, then, that if an information is preferred in and signed by the name of the county attorney, it is all that is required; and, if that name should be followed by the title "Prosecuting Attorney" or "County Attorney," this, while it is unnecessary, would only be additional evidence that the defendant was being prosecuted by the proper officer.

That the information is properly verified, see section 3, p. 279, Laws 1871, which provides that the county attorney can verify an information upon "information and belief." This information is verified by the county attorney upon "knowledge and belief." Webster defines "information" as "news or advice communicated by word or writing; intelligence; notion; *knowledge* derived from reading or instruction." And of "knowledge" the same authority says: "That which is known; that which is gained and preserved by knowing; actual acquaintance gained by learning." Knowledge, then, is derived from information; and, if a party is in possession of *406 the former, he must also have the latter; and, when verified upon knowledge, the verification rests upon information, fulfilling the letter and spirit of the law.

VALENTINE, J. This was a criminal prosecution for grand larceny. It is insisted on the part of the defendant (who is appellant) that the court below erred in refusing to quash the information filed in this case, and also in refusing to arrest the judgment. The grounds upon which this claim is based are as follows: (1) The information is not signed by the proper officer; (2) the information is not properly verified.

The information was signed by "R. F. Thompson, Prosecuting Attorney," and he is described in the body of the information as the prosecuting attorney of Ottawa county, state of Kansas. Under the laws of Kansas all criminal informations must be signed and filed "by the prosecuting attorney of the proper county, as informant," (Gen. St. 831, 832, §§ 67, 68, 71;) and also, under the laws of Kansas, the "prosecuting attorney" is always the "county attorney," (Gen. St. 283, 284, §§ 135-137;) that is, every criminal action prosecuted in the name of the state must be prosecuted by the county attorney, who is the public prosecutor. Therefore, for the purpose of prosecuting criminal actions, the prosecuting attorney and the county attorney is one and the same person. Besides, the first statute above cited, which recognizes the public prosecutor as "prosecuting attorney," was passed nearly six years after the other, which gives to him the title of "county attorney." Therefore, in our opinion, a criminal information signed by the public prosecutor as "prosecuting attorney" is equally as valid as though it should be signed by him as "county attorney." He is both. But would the information be void

if he should merely sign his name to the information, and give no description of his official character? The statute does not in terms require that he should give any description of his official character. The description does not seem to be very material; for, even where he described himself as county attorney for the wrong county, the information was nevertheless held sufficient, (*State v. Tannahill*, 4 Kan. *117, *118;) and the district court must always take judicial notice of the official character and identity of the public prosecutor. See authorities cited in appellant's brief, and 5 U. S. Dig. (1st Ser.) 490, pars. 151-163. There is no pretense in this case that the information was not signed by the proper public prosecutor. But, even if there were, it would not be tenable, for the district court recognized him as such. He prosecuted the defendant until the defendant was finally convicted and sentenced, and he is described in other portions of the record as "R. F. Thompson, county attorney of Ottawa county;" and there is nothing in the record that tends to show that he was not the county attorney. We therefore think that the information in this respect was sufficient.

"The verification of an information by a prosecuting attorney, upon information and belief, is sufficient." *State v. Montgomery*, 8 Kan. *351; Laws 1871, p. 279, § 3.

The judgment of the court below is affirmed.

(All the justices concurring.)

STATE OF KANSAS v. BARNEY BOHAN.¹

July Term, 1875.

1. **Venue: Change of, in Criminal Cases.** A motion for a change of venue was supported by the affidavits of the accused and two others, showing facts that made out a *prima facie* cause for a change of venue; but the state filed over ninety affidavits controverting the conclusions of those of the accused. The trial court did not err in refusing a change of venue.²
2. **Evidence: Dying Declarations, when Admissible.** So-called dying declarations are only admissible where the death of the person who made the declaration is the subject of the charge and the investigation.³

*408 *Appeal from Saline district court.

Information for murder. Trial, and verdict of guilty, at the November term, 1874. A motion for a new trial was made, and con-

¹This case in court, 19 Kan. 47.

²Before a court is justified in sustaining an application for a change of venue on account of the prejudice of the inhabitants of the county, it must affirmatively appear from the showing that there is such a feeling and prejudice pervading the community as will be reasonably certain to prevent a fair and impartial trial. *State v. Furbeck*, 29 Kan. 532.

³See note to *Railing v. Com.*, 1 Atl. Rep. 319; *State v. Medlicott*, 9 Kan. 176.

tinued until the March term, 1875, when a new trial was refused, and defendant was sentenced to imprisonment in the penitentiary for twenty years.

Stillings & Fenlon, J. G. Mohler, and J. G. Spivey, for appellant.

As appears by the record, the information charged that appellant did, on the third of November, 1874, murder one Thomas Anderson. It appears by the record that on the same day another information was filed against said appellant, in the same court, charging appellant with the murder of one William N. Anderson. It further appears from the testimony preserved in the record that on the day mentioned in the informations the persons mentioned in the two informations were shot by appellant; that Thomas Anderson died almost instantly, and without uttering a word; that William N. Anderson lived for fifteen hours after the shooting, and prior to his death made certain statements which are called "dying declarations." Ten days after the alleged homicide, and two days after the filing of the informations, the appellant was brought into court to answer to the said informations, and thereupon moved for a change of venue, which was refused. An exception to such ruling was taken by the appellant. The case, being then ordered to proceed, resulted in a verdict against the appellant of "murder in the second degree." A motion was duly filed for a new trial, the hearing of which, and all further proceedings, were postponed and continued till the *409 then next term of said court. At the *next term of court, and on the thirty-first of March, 1875, the motion was overruled, and judgment rendered on the verdict. It further appears by the record that, at the same time Thomas Anderson was killed, William N. Anderson was also killed under precisely the same circumstances; also that at the November term of court, immediately after the homicide, the appellant was, against his protest, tried in Saline county, and convicted of murder in the second degree for the killing of Thomas Anderson, and was subsequently tried, in March, 1875, for the murder of William N. Anderson, and was acquitted.

The evidence shows that, when the appellant was tried for the killing of Thomas Anderson, the public mind in Saline county was *prejudiced, embittered, and poisoned* against the appellant to such an extent that a fair trial could not have been had; and the newspapers, whose articles are copied in the record, do not state *one single fact in the case*, as shown conclusively by the sworn evidence. We submit as part of the history of this case, and a fact to be seriously considered by thoughtful men everywhere, that it is about time that the press, beneficial as it is, should in some way be made to comprehend that the life, liberty, and character of a citizen are not thoughtlessly or ignorantly to be jeopardized by it. It is in this case, as shown by the sworn evidence introduced under all the guards and protections of the law, absolutely appalling to read the statements made by the papers regarding this transaction; and considering their tremen-

dous influence on a moral community, which looks to the home press for facts of local importance, it is not, perhaps, to be wondered at that in November, and but a few days after the affair, a jury, infected by the general horror produced by these newspaper articles, should convict on facts and circumstances which four months afterwards, when the fever had passed away, convinced the calmer minds of the same community that the prisoner on trial was innocent of crime. The strange peculiarity of this case is this: that the killing of Thomas Anderson, when tried therefor in November, was murder, but *410 the killing of William *N. Anderson, under precisely the same circumstances, done at the same time, by the same person, with the same weapon, when tried therefor during the succeeding March, was no crime at all.

The district court erred in not granting the motion for a change of venue. This court will notice that the motion for a new trial was not argued till after the trial for the murder of William N. Anderson, in March, 1875. The evidence introduced on the hearing of the motion for a change of venue at least *tended* to show a state of feeling existing in the community, during the prevalence of which, and for that cause, it might reasonably be supposed it would be dangerous to the prisoner to be tried. The newspaper articles, conclusively proved false and groundless; the proof of the acts of the lawless mob who attempted the life of the prisoner, and attacked the jail of the county in the presence of the judge of the court, and during term-time,—are certainly some evidence tending to show the existence of that state of feeling in which and by which the law, in its justice and humanity, declares no citizen shall be tried. As to these facts, there is no counter-evidence. A number of persons, residents of the county, and doubtless reputable citizens, file their affidavits to the effect that in their opinion a fair trial could be had; and this is all the answer. It is only for convenience sake that the law provides that a person charged with crime shall be tried in the county in which it is alleged the crime was committed. The great purpose and design of the law is that a fair, impartial trial shall be had; and where that cannot be had, or there is rational ground to believe it cannot be had, the law intends, proposes, designs that the venue shall be changed. Of course, a discretion is vested in the trial judge, but this must be a judicial discretion; and, when abused, as we respectfully submit it was in this case, the right of the party injured is to submit the case to this tribunal. There is no arbitrary power granted to the trial judge, no discretion involving the life or liberty of the citizen, that is not subject to revision by this court. It is not unknown to the student of the judicial history of our *own country, as well as *411 that from which we derive the principles and practices of our jurisprudence, that judges, even, have trembled before or at the sound of the popular howl. And the right and the power and the duty of this, the highest judicial authority of the state, and the last resource

of the citizen, to control the action of the trial judge, cannot be doubted; and we submit that when this court takes into consideration the evidence submitted on the hearing of the motion, and the other fact exhibited by the record of the acquittal of the prisoner *on another trial at a subsequent time, on the same facts*, it must (as it seems to us) be apparent that the first conviction was obtained, *not on the evidence*, but by reason of the existing prejudice in the community. If facts such as are shown by the record here,—the false newspaper articles, the mob, and the violence attempted and perpetrated on the public officials and the public buildings, the verdict of an able jury on the same facts at a subsequent period,—if all these do not make out a case for a change of venue as contemplated by the statute, what in the name of reason would make out a case as so contemplated?

The court erred in admitting the so-called "dying declaration" of William N. Anderson. There was no sufficient preliminary proof made that the person making the declaration was *in extremis*. *State v. Gillick*, 7 Iowa, 287; *State v. Nash*, Id. 347. We submit that there is no evidence in this case to show that, at the time William N. Anderson made the statement, he was *then* under a sense of impending dissolution. The fact that he said he did not expect to live, or words to that import, and bid good-bye to the boys, is certainly not sufficient to show that the *last hope of life had fled*; and that condition of mind must be shown, under the authorities, before any dying declaration can be received in evidence. See 1 Greenl. Ev. §§ 156, 158, 162, 346; 3 Phil. Ev. § 236; *State v. Medlicott*, 9 Kan. *257. It is apparent from the testimony of Dr. Stearns that the person making the declaration was not in possession of sound mental faculties at the time such declaration was made. The mental *412 condition of the declarant must be such as would *warrant a court in permitting his testimony if sworn in court. It is shown by the evidence that William N. Anderson, when the declaration was being made, was at least half unconscious, and under the influence of morphine. No such witness could have been allowed in open court to testify. The declaration made was verbal, and that introduced in evidence was the written memorandum of the person who heard it made. The record shows that the whole declaration made by the person was not reduced to writing, but only that part which the witness Cunningham thought was necessary to write out. The person making the declaration never saw or read or heard read or signed the paper received in evidence, or knew its contents. A written paper made by Cunningham—a mere memorandum of his, *not of what the declarant said*, but *of that part of what he said which Cunningham thought material*, not dictated by the declarant, not seen or read by the declarant, not read to him, signed by him, or assented to by him, of the contents of which memorandum the declarant had no knowledge—is offered and received in evidence as declarant's "dying

declaration." We imagine the bare statement of this is sufficient, and we challenge the judicial records of the world to produce any precedent for such ruling.

The dying declaration of *William N. Anderson*, made fifteen hours after the death of *Thomas Anderson*, even if not subject to any of the objections heretofore made, is not competent evidence against the defendant upon his trial on an information for the murder of *Thomas Anderson*. The exception in favor of dying statements, in cases of homicide, is confined solely to the statements of *the person whose death is the subject-matter of investigation*. This is the settled rule in this country and in England. But it is probable cases can be found which in the slightest degree depart from this rule; and these, when examined, do not really depart from the rule. It will not be claimed here, we presume, that this statement was part of the *res gestæ*. And it leaves the bald, naked proposition, for the first *413 time affirmed by any court since murder trials *have been conducted according to known rules of evidence, that the statement of a person whose death is not the subject of inquiry, not under oath, not in the presence of the accused, not subject to cross-examination, not subject to the pains and penalties of perjury, or subject to civil damages, may be had in evidence against the accused. If this be the law, to his enduring honor be it said, a Kansas judge has first discovered it. If *William N. Anderson's* statement, so taken, could be read in evidence, why not the statement of a hundred others who might claim that they were present at the time of the homicide; and, if competent when made fifteen hours after the act of killing, why not fifteen days or fifteen years? If the only fact necessary to make his statement competent was that he was *in extremis, in articulo mortis*, then, if made by him twenty years after the killing, it would still be competent, if he then made it under like circumstances. If he could do so, of course it follows that twenty or a hundred others could at different periods, under like sense of impending death, do the same. This doctrine, carried to its logical result, would break down all the barriers which the wisdom of the judiciary and legislation of ages has enacted for the protection of the citizen. Taking the case all in all, its history and surroundings, our duty to our client justifies us in the assertion that the trial, verdict, judgment, and sentence combined, are a gross judicial outrage, and we confidently appeal to this court for the right which has been denied us elsewhere. This court has heretofore said, (*Horne v. State*, 1 Kan. *42:) "We have no right to consider probabilities in reference to a single case when called upon to apply the general principles of established law, and to register a precedent for the future action of courts. We perform a single and unmixed duty when we declare, upon the call of the accused, what are his legal rights." And in numerous cases, even against popular clamor, this court has laid deep and firm the just principle of the law in this state, that no man

shall suffer unless in accordance with law. The cases of *Horne v. State*, 1 Kan. *42; *Smith v. State*, Id. *365; *Craft v. State*, *414 *3 Kan. *450; *State v. Medlicott*, 9 Kan. *257; *State v. Reddick*, 7 Kan. *143, and other leading cases,—are familiar to the profession and the people, and the principles that underlie them all are the principles of the civilized administration of criminal justice, which may not in this age be set aside.

A. M. F. Randolph, Atty. Gen., for the State.

As to the error first alleged, we submit that the record shows to a moral certainty that, when the appellant was tried for the killing of Thomas Anderson, the public mind in Saline county was not "prejudiced, embittered, and poisoned" against him to such an extent that he did not and could not have a fair and impartial trial in said county. The affidavits of Bohan, Fitzpatrick, and Going, in support of the motion for a change of venue, are utterly overwhelmed by the opposing testimony of ninety citizens of Saline county, representing each and every one of the thirteen townships thereof, said affidavits being to the effect that in the several townships of said county there was no undue excitement or bitterness of feeling over the killing of Thomas and William N. Anderson by the said Barney Bohan; that these three persons were not generally known in said county outside of Brookville, in the western part thereof, and in its vicinity, and in Salina; and that there was no prejudice against said Bohan so that he could not then have a fair and impartial trial in said county. These affidavits show that the jury and the inhabitants of Saline county were not, as it is alleged, "infected by a general horror produced by the newspaper articles" embodied in Bohan's affidavit. The articles were generally calm and temperate in their tone, and did not seek to prejudice Bohan's case. The feeling against Bohan was mostly confined to the personal friends of the Andersons.

We submit that the court did not err in admitting the so-called declarations of William N. Anderson. There was sufficient preliminary proof that the said Anderson was *in extremis* at the time of his making said declarations, and that they were made under a *415 sense of impending death; also, *that he was conscious of his condition at the time of his making such declarations, and that all that was relevant to the shooting was exactly taken down by Cunningham. As to the objection that the statement was not read and signed by the declarant, see the following authorities: 1 Greenl. Ev. § 161; *State v. Nettlebush*, 20 Iowa, 257, 260; *State v. Tweedy*, 11 Iowa, 350-359; *Collier v. State*, 20 Ark. 36, 45; *People v. Glenn*, 10 Cal. 32, 36, 37; *Beets v. State*, 1 Meigs, 106, 107; *Com. v. Casey*, 11 Cush. 417; *Com. v. Cooper*, 5 Allen, 495; *McDaniel v. State*, 8 Smedes & M. 401; *Oliver v. State*, 17 Ala. 587; *Johnson v. State*, Id. 618; *State v. Peace*, 1 Jones, 251; *State v. Tilghman*, 11 Ired. 513; *State v. Arnold*, 13 Ired. 184; *Moore v. State*, 12 Ala. 764; *People v. Grunzig*, 1 Park. Crim. R. 299.

As to the objection that the dying declaration of William N. Anderson is not competent evidence against Bohan upon his trial on an information for the murder of Thomas Anderson, we submit that it was properly received. The killing of Thomas Anderson was inseparably connected with the killing of William N. Anderson as a part of the *res gestæ*. The killing of both brothers was all one transaction. The facts and circumstances attending their deaths linked them together in their last hours as closely as if they were the Siamese twins. *State v. Terrell*, 12 Rich. 321, 329; *Rex v. Baker*, 2 Moody & B. 53; 1 Greenl. Ev. 156, note; *State v. Wilson*, 23 La. Ann. 558.

We submit, further, that if the declaration in writing of William N. Anderson should be held to have been improperly admitted, then that this error is wholly insufficient to reverse the judgments herein. Said statement contains nothing whatever but cumulative evidence. Each and all the facts contained therein were otherwise fully established by competent evidence in the case, mainly by the testimony of Bohan himself.

KINGMAN, C. J. The appellant was tried for the murder of Thomas Anderson, and found guilty of murder in the second degree, and brings the case to this court by appeal. In the argument attention is called to two errors of the court below. These alleged errors are—*First*, in not granting the motion for a change of venue; and, *second*, in admitting the so-called dying declaration of William N. Anderson in evidence.

Did the court err in refusing to order a change of venue? The application was supported by the affidavits of the appellant, the sheriff, and the acting jailer of the county. These affidavits made out a *prima facie* case for removal; but the state read a great number (over ninety) affidavits from citizens of each of the townships of the county, abundantly showing that there was no such state of feeling generally prevailing throughout the county as would prevent the accused from having a fair and impartial trial therein, or would even make it difficult to obtain an impartial jury for the trial. Outside the village of Brookville, where the accused and the deceased had resided, and been generally known, there seems to have been no more feeling than usually prevails in any community where there is a homicide. Two lives were taken by violence. The better feelings of men were shocked by the event. Some intemperance of expression may be expected in such cases from men; but it is obvious that where that feeling existed it created no strong prejudice against the accused. The extracts from the two papers at Salina, while they, in several important respects, stated the facts more harshly against the accused than the testimony justified, yet they, at the same time, cautioned their readers that the statements made were gathered from reports, and must not be considered as being reliable, and that it was the duty of all to wait till the case was heard before forming their opinions. With

this caution before the reader, the mistakes as to the facts would hardly create a prejudice against the accused in the minds of fair men. There were articles in the Brookville paper strongly tending to inflame the public mind, and perhaps so intended; but that paper had little circulation in the county outside of Brookville, and in several of the townships was not known at all. Following the decision in the case of *State v. Horne*, 9 Kan. *119, we are of the opinion that there was no error in refusing a change of venue.

*417 *Was there error in admitting the dying declaration of William N. Anderson? It is so urged on various grounds, the principal of which are these: Because the preliminary proof did not sufficiently show that the person making the declaration was certain that the hand of death was on him; that he was not in possession of sound mental faculties at the time such declaration was made; that all the declarant said was not reduced to writing, but only that part that the writer deemed relevant; and chiefly because the dying declaration of William N. Anderson, made hours after the death of Thomas Anderson, is not competent evidence against the accused upon his trial on an information for the murder of Thomas Anderson only. As our conclusion on the last point suggested is decisive in the case, the consideration of the other points may be waived; especially as their decision depends upon questions of fact raised upon the record, rather than upon controverted points of law.

The facts of the case bearing upon the question under consideration are substantially these: A little before 4 o'clock A. M. on the third of November, 1874, the appellant shot Thomas Anderson and William N. Anderson. The shots (four in number) were in rapid succession, but a brief time intervening between the first and last shots. Of the wounds then inflicted Thomas Anderson died almost instantly, without uttering a word. William N. Anderson lived about seventeen hours, and some time about noon made the statement admitted as a dying declaration. The appellant was tried on an information for the murder of Thomas Anderson only.

On these facts the question arises, can the dying declaration of one person be received as proof of guilt against a party charged with murdering some other person? In *State v. Medlicott*, 9 Kan. *283, the rule on this point was thus stated: "Such declarations, therefore, are admissible only when the death of the person who made the declaration is the subject of the charge, and where the circumstances of the death are the subject of the dying declaration." In that case

the question involved was whether the deceased was in the full belief that he was **in articulo mortis* when he made the declaration; and the attention of the court was mainly directed to that question, and the part quoted need not have been stated. The court, therefore, feels no such embarrassment on account of what was said in that case as will interfere with a full examination of the question now. In 1 Phil. Ev. 287, the rule is laid

down thus: "Such declarations are generally admissible only where the death of the declarant is the subject of the inquiry, and where the circumstances of the death are the subject of the dying declaration;" and to the same effect the rule is laid down in the decisions generally. In a note to section 156, 1 Greenl. Ev., Mr. Redfield states that this evidence is not received upon any other ground than that of necessity, in order to prevent murder going unpunished; and that a misapprehension of the true grounds on which such testimony can be received has sometimes led courts into error, as in England, where at one time such declarations were admitted in other than murder cases. But these decisions have been overruled as not correctly stating the law. The admission of this kind of testimony is an exception to the general rule that excludes hearsay testimony. Its admission can be justified only on the ground of absolute necessity, growing out of the fact that the murderer, by putting the witness, and generally the sole witness, of his crime beyond the power of the court, by killing him, shall not thereby escape the consequences of his crime. On no other ground can the admission of such testimony be justified. It is true that sometimes courts have given, as the reasons for its admission, some of those limitations that have been established as safeguards to prevent the rule from being abused. Such statements are not sound, and are likely to lead to confusion, and in some cases they undoubtedly have done so. Necessity, then, being the only ground on which such testimony can be admitted, it remains to be seen whether that necessity exists so generally, or to so great an extent, where the death of any one else than the declarant is the subject of the inquiry, as to justify the adoption of

*419 a rule *admitting such testimony.

Cases may be suggested where the necessity appears to be strong. Thus, where a murder is committed, and a material witness of the crime, but not affected by it, and by whom alone it can be proven, is dying, and in that hour makes a declaration of the facts which he knows, and which took place months before, this declaration is made under circumstances equivalent to the sanction of an oath; but the accused cannot cross-examine,—cannot call attention to other material facts not thought of by the declarant. No one will contend that this declaration can be given in evidence. The necessity exists, but it applies to a single case, and not to a class of cases, and therefore should not be made an exception to the rule excluding hearsay testimony. It would be as difficult to suggest a case where, as in this, two men are killed at or near the same time, that any necessity exists for the admission of the statement of the one whose death was not the subject of the inquiry, as it is in any other criminal case where a material witness is dead. This case is a fair illustration. If the declaration of William N. Anderson was necessary to convict the accused, then it could have been used on the trial for the murder of William N. Anderson. The accused was as guilty of his

murder as of that of Thomas. There is, then, no necessity for extending the exception further than has already been done. Once break down the barriers established by the wisdom of our law, and extend the exception beyond the reason that permitted it, and it would let in a most dangerous species of evidence in a whole class of cases. The great weight of authority will bear out the rule as laid down in *State v. Medlicott*; and reason is all in favor of holding the rule as there stated. In the cases of *State v. Terrell*, 12 Rich. 321, and of *State v. Wilson*, 23 La. Ann. 558, which greatly resemble this case, such evidence was admitted. The cases do not, in our judgment, rest on authority, and no satisfactory reasons are given for the ruling. These cases stand alone in this country, and we prefer to adhere to well-established rules, rather than follow decisions *420 for which no reason is given, *and which seem dangerous in their tendency. It follows that the evidence was improperly admitted.

The learned counsel for the state, however, suggests that the case was abundantly made out in every particular against the appellant by other evidence. This may be so; and, if so, it is a striking illustration of how unnecessary it was to introduce the dying declaration in this case. But what effect this evidence had upon the jury, and what effect the other evidence had, it is not the province of this court to decide; nor has it the means of doing so. The evidence was admitted after a long struggle, and may well have had more influence upon the jury than it would have upon this court. The evidence was vital; and, as it was improperly admitted, the judgment must be reversed, and a new trial ordered.

(All the justices concurring.)

STATE OF KANSAS v. JAMES TAYLOR.

July Term, 1875.

1. **Larceny: Name of Owner: Variance.** Where an information charges the larceny of the property of Michael Wandler, evidence that the property belonged to J. M. Wandler will not sustain a verdict against the defendant.¹
2. ———. Nor, in such a case, will the fact that on the opening of the trial the county attorney called "Michael Wandler," and thereupon a witness answered, took the stand, was sworn, and testified that his name was "J. M. Wandler," and that he owned the property, sustain a finding that Michael Wandler and J. M. Wandler were one and the same person.

¹The names "Brimford" and "Binford" are not *idem sonans*. *Entrekin v. Chambers*, 11 Kan. 377. Upon facts of case, held, that "Mollie" Brown was "Mary" Brown; that the two names represented the same person, *State v. Watson*: 30 Kan. 282; S. C. 1 Pac. Rep. 470.

Appeal from Davis district court.

Taylor, *alias* "Peter Bergman," was charged by information with the larceny of fifteen head of neat cattle "belonging to one Michael Wandler." Trial and conviction at the April term, 1875, of the district court.

*421 *McClure & Humphrey*, for appellant.

H. H. Snyder, Co. Atty., for the State.

There was evidence presented to the jury that "Michael Wandler," the prosecuting witness, and owner of the cattle alleged to have been stolen, and "J. M. Wandler" were one and the same person. The prosecuting witness was addressed in presence of the jury by the name of Michael Wandler; and J. M. Wandler in presence of the jury acknowledged, by answering when thus addressed, that his name was Michael Wandler. It will be observed that the transcript does not contain the questions asked the several witnesses. If this were the case, it would be seen that in all cases where the name of the prosecuting witness was spoken by the attorneys he was spoken of as Michael Wandler. This was certainly evidence sufficient to lead the jury to conclude, beyond a reasonable doubt, that *J. M. Wandler* and *Michael Wandler* were one and the same person, as the real fact was.

BREWER, J. Defendant was convicted in the district court of Davis county of the crime of grand larceny, and sentenced to the penitentiary for a term of three years. From this he has appealed to this court. A single matter only requires notice, for in that we find a fatal error. The information charged the larceny of certain cattle belonging to *Michael Wandler*. The evidence showed that the property belonged to *J. M. Wandler*, and there is nothing in the evidence, as preserved in the record, to show that *Michael* and *J. M. Wandler* are one and the same person. The only thing in the record bearing upon

this is the recitation of what took place in the opening of the *422 trial, as follows: "The county attorney first called *Michael*

Wandler, who, having answered and taken the stand, was duly sworn, * * * testified as follows: 'My name is *J. M. Wandler*.'

"From this counsel argues that, as the witness who testified that his name was *J. M. Wandler* answered when *Michael Wandler* was called, the jury had sufficient evidence to justify them in finding that *J. M. W.* and *Michael W.* were one and the same person. Counsel says that other things equally significant took place during the trial which do not appear in the record; but, of course, we must take the record as it is; and there is not enough in it to sustain the verdict. The testimony of the witness was that his name was *J. M. Wandler*, and there was no testimony tending to show that he was ever known by any other name. His answering to the call of *Michael Wandler*, and coming onto the witness stand in obedience thereto, took place before he was sworn; and a jury may not bridge a variance between

the charge and the testimony by inferences from the conduct of an unsworn witness. His *conduct* before he was sworn is no more evidence than his *statements* would have been; and it would not seriously be contended that a jury might rest their verdict upon the statements of a witness prior to his being sworn. It may be that this was an inadvertence in the trial, or an oversight in preparing the record; and it may also be that the owner was not Michael Wandler, but an entirely different person, named J. M. Wandler.

The judgment will be reversed, and the case remanded for a new trial. The appellant will be returned from the penitentiary to the jailer of Davis county, to abide the further order of the district court of that county.

(All the justices concurring.)

*423 *JULIUS KUHN v. W. H. H. FREEMAN and others.

July Term, 1875.

Vendor and Vendee: Action for Purchase Money: Against Legal Representatives of Vendee. A vendor of a piece of land gave to the vendee a title-bond, and received in return one-half of the purchase money in cash down, and the other half in two promissory notes. Afterwards, the vendee died, leaving a widow and four children. An administrator was duly appointed. Subsequently, by certain condemnation proceedings, a railroad company obtained a right of way for its road across said land, and paid the damages assessed to the county treasurer. Afterwards the vendor assigned the notes to the plaintiff, and also executed deeds to the widow and children according to their respective rights under the law of descents, precisely in accordance with said bond, except that he did not covenant against the use of said right of way by said railroad company, and delivered said deed to the plaintiff, to be by him delivered to the proper parties when said notes were paid. Said deeds were duly tendered, and payment of said notes duly demanded and refused. The plaintiff then commenced this action against the administrator, widow, children, and treasurer, asking judgment against the administrator for the amount of the notes and interest, and against all the defendants, that the land and amount of money in the hands of the treasurer should be subject to the payment of the judgment. *Held*, that the action may be maintained.¹

Error from Marshall district court.

The case is stated in the opinion.

J. A. Broughten, for plaintiff.

¹See *Hapgood v. Morten*, 28 Kan. 766; vendee assuming mortgage, see note to *Iowa L. & T. Co. v. Mowry*, 24 N. W. Rep. 749.

The petition is sufficient to compel specific performance, and to procure a sale of the land for the satisfaction of the unpaid purchase money. By the contract of sale, Hamaker, the obligee in the title-bond, became the owner of the land. *Champion v. Brown*, 6 Johns. Ch. 402; 1 Story, Eq. §§ 790, 1212; *Sugd. Vend.* 226; *Simmons v. McDowal*, Walk. Ch. 175; *Adams, Eq.* § 140; *Douglas v. Union Pac. Ry. Co.*, 5 Kan. *622; *Courtney v. Woodworth*, 9 Kan. *443; *Stevens v. Shadwick*, 10 Kan. *406. As the damages allowed by the *424 commissioners for the taking of the rail*road right of way took the place of the land taken, plaintiff would, for the purpose of procuring satisfaction of the purchase money, be entitled to the damages so allowed. It may be claimed that the widow and children of the vendee were entitled to covenants against the right of way condemned; but they were not, and any exercise by the sovereignty of the right of eminent domain is not to be considered as contracted or covenanted against. *Rawle, Cov.* 140-145, 184, 185; *Ellis v. Welch*, 6 Mass. 246; *Frost v. Earnest*, 4 Whart. 86; *Carter v. Scraggs*, 38 Mo. 305; *Folts v. Huntley*, 7 Wend. 210; *Dobbins v. Brown*, 12 Pa. St. 75; *Clingan v. Mitcheltree*, 31 Pa. St. 37; *Schuykill & D. R. Co. v. Schmoele*, 57 Pa. St. 273; 102 Mass. 19; *Mobile & Girard R. Co. v. Williams*, 44 Ala. 171; *Walker v. Gatlin*, 12 Fla. 9; *Porter v. Ralston*, 6 Bush, 665; *Whitworth v. Carter*, 43 Miss. 61; *Mayfield v. Barnard*, Id. 270; *Haskill v. Sevier*, 25 Ark. 152; *Hand v. Armstrong*, 34 Ga. 232; *Bass v. Ware*, Id. 386; *Stockwell v. U. S.*, 13 Wall. 655; 1 Washb. Real Prop. (3d Ed.) 54, 460.

VALENTINE, J. On June 29, 1870, Jacob Weisbach was the owner of a certain piece of land in Marshall county. On that day he sold it to Daniel W. Hamaker for \$3,000, receiving one-half in cash down, and the other half in two promissory notes, each for \$750, and payable, one in one year, and the other in two years. Weisbach gave a bond for title to Hamaker. On January 16, 1871, Hamaker died, leaving a widow and four children as heirs to said land. On April 3, 1871, W. H. H. Freeman was duly appointed administrator of Hamaker's estate. During the months of August and September, 1871, the St. Joseph & Denver City Railroad Company located their road through said land, and commissioners, duly appointed for the purpose, assessed the damage at \$219.80, which amount was duly paid to Charles F. Koester, county treasurer of Marshall county, for the owner of the land. Weisbach assigned said notes to the plaintiff, Julius Kuhn, and also, on June 25, 1873, executed deeds for the land to the widow and children of said Hamaker, according to their respective rights under the laws of descents, and placed them in the hands of Kuhn, to be by him delivered to the proper parties *425 when the notes should be *paid. The deeds were duly tendered, and payment of the notes demanded and refused; and then, on September 4, 1873, said Kuhn commenced this action

against said administrator, widow, children, and Koester, to recover a judgment against the administrator for the amount of said notes; and against all the parties, to subject the land, and the money in Koester's hands, to the payment of said judgment. The plaintiff's petition stated all the foregoing and other facts. The defendants demurred to the plaintiff's petition on the following grounds: "(1) That said petition does not state facts sufficient to constitute a cause of action against these defendants; (2) that said plaintiff has not legal capacity to sue herein; (3) that there is a defect of parties plaintiff; (4) that there is a defect of parties defendant; (5) that there are several causes of action improperly joined." The court below "sustained said demurrer on the ground that said petition does not state facts sufficient to constitute a cause of action," and dismissed the plaintiff's action, over his objections and exceptions.

We think the court below erred. If the plaintiff had any cause of action of any kind against any one or more of the defendants,—even a cause of action on the notes for the amount due thereon, or for any portion thereof,—then the court below erred in sustaining the demurrer. And we think the plaintiff had a cause of action. That an action could have been maintained by the plaintiff on the notes, and to subject the land to the payment of the notes against Hamaker if he had lived, and if the railroad company had not obtained said right of way, there can now be no question. *Courtney v. Woodworth*, 9 Kan. *448; *Stevens v. Chadwick*, 10 Kan. *406; *Curtis v. Buckley*, 14 Kan. *449. And we can see no sufficient reason why the plaintiff may not maintain the action against the successors of Hamaker, his administrator and heirs, notwithstanding said right of way. It is certainly true that his administrator, widow, and children have succeeded to all his rights and liabilities, real and personal, which may pass to an administrator and heirs; and it is equally true that *426 the *rights and liabilities involved in this case are such as may pass to an administrator and heirs. It is probable that the demurrer was sustained solely because of the condemnation of a strip of the land for said right of way, and because Weisbach, for that reason, could not convey to said widow and children a perfect and absolute title for said strip of land. There is no other reason that we can think of; and the defendants in error have not chosen to enlighten us upon the subject by filing a brief or otherwise. This reason, we think, is not sufficient. None of the usual or ordinary covenants in a deed can be broken by a portion of the land covered by the covenant being taken under the right of eminent domain. The exercise of the right of eminent domain is the exercise of a sovereign power; and no person is presumed to covenant against the acts of sovereignty. Hence, where the deed has already been executed, and afterwards the vendor sues the vendee for the purchase money, it is universally held that the vendee cannot set up, as a defense to the action, that a portion of the land has, since the execution of the deed,

been taken under the right of eminent domain, and therefore that some of the covenants in the deed have been broken. Nor can the vendee sue the vendor, in such a case, in a separate action, on the supposed broken covenant. He must pay the vendor the full amount of the purchase money, and receive the condemnation money paid as damages for his compensation. This is the only remedy he has.

The case at bar, however, is to some extent different from the above. The deed in this case was not executed at the time when the sale was made; and before the deed was executed the easement of the right of way had attached to the land, so that the vendor cannot now make as absolute and perfect conveyance as he agreed to do. But still this difference in the facts we do not think should make a difference in the decision of the question involved. It cannot be presumed, when the vendor agreed to make a good and perfect conveyance, that the parties contemplated that he was agreeing to do a thing notwithstanding what might be the future acts of the sovereign au-

*427 thority. *When Weisbach agreed that he would make a good title, he had absolute and complete title to the land. By the agreement and sale the land became in equity the property of Hamaker. The legal title was allowed to remain in Weisbach merely as a security for the payment of the notes, and may be considered merely in the light of an equitable mortgage. When Hamaker died, the land descended to his widow and children. When the right of way was established, it was in fact obtaining an easement on the land of the widow and children of said Hamaker, and not upon the land of Weisbach, and they were entitled to receive the money paid by the railroad company as damages; and Hamaker's estate remained liable to the holder of the notes, just as it was before, for the balance of the purchase money not yet paid on the notes. But suppose this were not true, what would be the remedy of Weisbach; or, rather, what would be the remedy of Kuhn, the assignee of Weisbach? Even Weisbach, if he still owned the notes, could not rescind the contract, and get the land back, after one-half of the purchase money had been paid to him by the vendee, and possibly after valuable improvements had been put upon the land; and he certainly could not maintain an action of ejectment for the land. But, as Weisbach has transferred his interest in the notes, he cannot maintain an action of any kind. For the same reason that Weisbach could not rescind the contract, nor maintain ejectment, Kuhn cannot do so; and there is this additional reason why Kuhn cannot do so: he never owned the land. But suppose that Kuhn and Weisbach should agree that they would never convey the legal title to said land to said widow and children, how would even that benefit them while the widow and children continue to hold the equitable title and the possession of the premises, and have all the benefit and enjoyment of the same? The notes amount to \$1,500, exclusive of interest. The damage done to said land was only \$219.80, and the widow and children are entitled

to draw that amount. Now, must Kuhn lose his \$1,500 because \$219.80 worth of land was converted into money? And it was *428 no fault of *Kuhn or Weisbach that said strip of land was taken for a roadway. Neither of them had any power to prevent it. It was taken under the sovereign authority of the state, and therefore it must not be held that any one was blamable or censurable. But all parties must perform their contract just as far as they can, and where they cannot they are excusable. Weisbach has performed his part of the contract just as near as he can. The title he offers to convey is perfect and absolute except for said right of way. We think the plaintiff may recover.

The judgment of the court below will be reversed, and cause remanded, with the instructions to the court below to overrule both of the demurrers filed in this case, and for such other and further proceedings as may be proper.

(All the justices concurring.)

KOHN & WEIL v. FIRST NAT. BANK OF FORT SCOTT.

July Term, 1875.

Statute of Frauds: Principal and Agent: Verbal Promise to Pay Moneys Advanced to Agent. Where K. & W., by a parol agreement with a certain bank, promise that if the bank will cash a certain draft to be drawn by and in the name of a certain agent of theirs upon T., L. & Co., that said K. & W. will be responsible for its payment, and afterwards such agent does draw such draft, and the said bank cashes the same, and afterwards said draft is dishonored by said T., L. & Co., *held*, that the bank may maintain an action to recover from said K. & W., on said parol promise, the amount paid out on said draft, with interest.¹

Error from Bourbon district court.

Action by the First National Bank to recover from Samuel Kohn and Jacob Weil, as partners, certain moneys paid to one Ruhman as their agent. The facts are fully stated in the opinion. The *429 bank, at the September term, *1873, (C. W. B., judge *pro tem.*, presiding,) recovered judgment for \$1,108.89, and costs, and Kohn & Weil bring the case here for review.

Hulett & McCleverty, for plaintiffs in error.

The bank seeks to recover upon the ground of a parol promise and agreement alleged to have been made by the defendant Weil to McDonald, president of the bank, in a conversation with said McDonald, to the effect that Ruhman was to act as agent of Kohn & Weil at Fort Scott, in the purchase and shipment of hides, etc., to be shipped by

¹ See *Grant v. Pendery*, *ante*, *286, and note.

Ruhman, for their account, to Taussig, Livingston & Co., St. Louis, and that the bank might cash Ruhman's drafts upon Taussig, Livingston & Co. to the amount of \$1,500, and Kohn & Weil would be responsible therefor. It was further alleged that Ruhman drew this draft as the agent of Kohn & Weil, and in and about their business; that the bank had cashed the draft upon the faith of the alleged promise, forwarded it for collection, and that it was returned protested for non-acceptance and non-payment; that the amount paid to Ruhman was used by him in and about the said business of Kohn & Weil. The defendants admitted an agency in Ruhman, but limited, and of the extent of which the bank had notice, but alleged that no promise in writing had been made to the bank, or that any *such* promise had been made, and denied generally all allegations.

The court erred in admitting the conversation detailed by McDonald, over the objection of the defendants. If the defendants could be charged as acceptors of this draft by reason of the alleged promise, then it must have been in writing. A promise to accept, to amount to an acceptance, must be in writing. Gen. St. 115, §§ 8-10; Coolidge v. Payson, 2 Wheat. 66; Loonie v. Hogan, 9 N. Y. 435; Schimmelpennich v. Bayard, 1 Pet. 264; Boyce v. Edwards, 4 Pet. 111; Goodrich v. Gordon, 15 Johns. 6; Bissell v. Lewis, 4 Mich. 450; Elliott v. Miller, 8 Mich. 132; Blakiston v. Dudley, 5 Duer, 373. These cases hold that such a promise, if in writing, amounts to an acceptance, provided, however, that the terms of authority are strictly

followed. That a parol promise to accept is not binding, *430 *see Loonie v. Hogan, 9 N. Y. 435; Blakiston v. Dudley, 5 Duer, 373. But if this action is intended to bind Kohn & Weil for the default or failure of Taussig, Livingston & Co. to honor this draft, or of Ruhman to pay it, then the statute of frauds would require the promise to be in writing; so that in any view parol testimony would be incompetent, and the court erred in admitting it.

We think, however, that the conversation detailed by McDonald does not, by any fair construction of language, constitute a promise. All it does show was that Ruhman was to act as agent of Kohn & Weil, and, to provide funds, could draw on Taussig, Livingston & Co., not more than \$1,500. McDonald says, "I was authorized to pay to that extent." Does not that simply disclose the fact that a limited agency existed? If limited, then all persons were required to acquaint themselves with the extent of the agency. Taussig and his book-keeper swear that Ruhman had already overdrawn about \$1,450; so, if Ruhman, as the agent of Kohn & Weil, could only draw to the extent of \$1,500, as McDonald says, then this draft, even if it had been in proper form, was rightly protested. If an agent exceeds his authority, the principal will not be bound. Nixon v. Palmer, 8 N. Y. 398; Beach v. Vandewater, 1 Sandf. 265.

The witness Osburn, who cashed the draft, testifies that nothing was said between him and Ruhman at the time the draft was drawn

The draft-register shows that the draft was charged, not as the draft of Kohn & Weil, but as the draft of Ruhman. Not a syllable of the evidence tends to show that this draft was in any way connected with the business of Kohn & Weil, but shows beyond doubt that the bank treated it as if it were the draft of Ruhman, drawn by him for his own personal benefit, and charged against him individually, until the bank, by this action, seeks to bind third parties, whom they have not in any way connected with the transaction. Had this draft been signed by Ruhman as agent of Kohn & Weil, and in such a manner only as an agent must sign in order to bind his principal, then, of course, it would have devolved upon the alleged principals, by way of

*431 *defense, to show either that Ruhman was not their agent, or that he had not acted for them, or within his powers; but, this draft being at least *prima facie* the draft of Ruhman, with nothing about it to show agency for any one, we submit that it must require more evidence than simply that Ruhman had drawn this draft, and the bank teller paid it, without either exchanging a word, in order to bind Kohn & Weil. The draft being executed by Ruhman individually, it is not any evidence against Kohn & Weil; and no evidence tending to bind Kohn & Weil upon such a draft would be proper, since it would be contradicting a written instrument by parol. *Minard v. Mead*, 7 Wend. 68. "No person in making a contract is considered to be the agent of another, unless he stipulates for his principal by name, stating his agency in the instrument he signs." *Stackpole v. Arnold*, 11 Mass. 27; *Story*, Ag. §§ 147, 154, 161; 1 Pars. Cont. 54. In *De Witt v. Walton*, 9 N. Y. 571; *Eastern R. Co. v. Benedict*, 5 Gray, 561; *Bank of N. A. v. Hooper*, Id. 567; and *Ander-ton v. Shoup*, 17 Ohio St. 125,—it is decided that, even where an agent executes commercial paper in his own name, though he discloses his principal, still it is only the contract of the agent and not of the principal, though the principal may have had the benefit of it. So all evidence in this case was improper, and the petition does not even state facts sufficient to constitute a cause of action.

McComas & McKeighan, for defendant in error.

The court substantially instructed the jury that, if they found the facts as detailed by witnesses for the bank, they should find for it; if as detailed by Weil, against the bank. The jury found for the bank; and that finding disposes of the questions of fact.

This is not an action on an acceptance, and hence the argument of counsel, and cases cited on this point, have no application. The statute of frauds, however, is one of the defenses set up in defendant's answer, and urged in the instructions asked below, though apparently abandoned in the argument. The agreement of K. & W., that they should be responsible for all money advanced on drafts drawn

*432 by T., L. & Co., was *not a promise "to answer for the debt, default, or miscarriage of another." It was not a collateral, but an original, undertaking; the promise being that, if the bank

would advance money to K. & W. through their agent, on his drafts, they would be responsible. The advantage to be gained ran to K. & W., and not to Ruhman or the bank. *Emmerson v. Slater*, 22 How. 28, 43; *Castling v. Aubert*, 2 East, 325; *Townsley v. Sumrall*, 2 Pet. 170. But, even if this was an action on a failure to accept, we do not think it would come within the provision of our statute relating to bonds, notes, and bills. That provides "that no person within this state shall be charged as an acceptor of a bill of exchange, unless his acceptance shall be in writing." Gen. St. 115, § 8. This provision would hardly excuse the non-performance of a promise to a bank or other person to accept a draft if such bank or other person would advance money to the drawer on the draft. The consideration of the advance being the promise to accept, a promisor would, we think, be forced to make it good.

It is claimed that this action cannot be maintained, because it is an attempt to charge persons other than as shown by the draft. It is not an action to charge Kohn & Weil as parties to the draft, but an action on their original promise, and for money had and received by the principals, K. & W., through their agent, Ruhman. It makes no difference to the bank what Ruhman did with the money. The bank was not their agent, and could not follow it, and see it properly applied; and whether it was or not properly used the record does not show. This is the true test, viz.: that where the written instrument is merely used, among other things, as evidence to show the right or liability, the party really liable may be sued. 2 Pars. Cont. 56, note.

VALENTINE, J. This was an action on an alleged parol contract entered into between the First National Bank of Fort Scott and the firm of Kohn & Weil. The alleged contract was made on the *433 part of the bank by B. P. McDon*ald, its president, and on the part of Kohn & Weil by Jacob Weil, a member of the firm. At the trial of this case in the court below both McDonald and Weil testified with regard to what said contract was; and there was but very little if any other evidence with reference thereto. McDonald and Weil differed in some respects with regard to the terms of the contract; but as the whole case was fairly submitted to a jury, and as the jury found a general verdict in favor of the bank, and against Kohn & Weil, we must now presume that the contract was just what McDonald testified that it was. The jury made no special findings, and there is nothing else in the record than what we have mentioned that would tend to impeach the general verdict of the jury. Then, upon the theory that the contract was just what McDonald testified that it was, the principal facts in the case are substantially as follows: During the winter of 1872, Kohn & Weil, of Leavenworth, were general dealers in hides, wool, etc., and William Ruhman was their agent for such business at Fort Scott. Weil went to the bank of the

plaintiff below, and told McDonald that Ruhman was going to purchase hides, etc., inclusively for their firm, and ship the same to Taussig, Livingston & Co., St. Louis, Missouri; and in order to obtain funds for such purpose Ruhman would draw drafts on Taussig, Livingston & Co., not to exceed \$1,500 at any one time, and that if the bank would cash such drafts they, Kohn & Weil, would be responsible for their payment. McDonald, for the bank, agreed to cash said drafts. Afterwards Ruhman drew the following draft, to-wit:

"\$1,000. Fort Scott, February 17, 1872.

"Pay to the order of First National Bank, Fort Scott, one thousand dollars, value received, and charge same to account.

"W. RUHMAN.

"*To Taussig, Livingston & Co., St. Louis.*"

The bank cashed this draft, then sent it to St. Louis, where it was presented to Taussig, Livingston & Co., who refused to pay it. It was then duly protested, and sent back to the bank at Fort *434 Scott. The bank then commenced this *action against Kohn & Weil, asking judgment for the amount of the draft, with interest, protest fees, damages, and costs. The facts are all fully set forth in the plaintiff's petition; and therefore, if the plaintiff may recover at all, if the bank has any cause of action against Kohn & Weil on the foregoing facts, the plaintiff may recover in this action.

The objections to a recovery seem to be about as follows: (1) No action can be maintained against Kohn & Weil on the draft, for they are not parties thereto, either as drawers, acceptors, or indorsers. (2) No action can be maintained on the parol contract, because—*First*, it does not purport to make Kohn & Weil acceptors of the draft, and could not if it did, for an acceptance, or agreement to accept, must be in writing, (Gen. St. 115, §§ 8-10;) *second*, the contract is void, being in contravention of section 6 of the statute of frauds, (Gen. St. 505,) which requires that all promises to answer for the debt or default of another shall be in writing. There are perhaps some other objections made, but they are based upon what counsel think the facts ought to be, and not upon what the record actually shows them to be. For instance, counsel for Kohn & Weil would take the parol contract as Mr. Weil testified that it was, while we must take it as Mr. McDonald testified that it was. We do not think that any of the objections, or all of them taken together, are sufficient to defeat a recovery. In order to hold Kohn & Weil liable, it is not necessary to consider them as parties to said draft. They were certainly not parties on the face of the draft, and yet their agent was; and generally, where an agent does business for an unnamed principal, he makes the principal as well as himself liable. *Wolfley v. Rising*, 12 Kan. *535; *Butler v. Kaulback*, 8 Kan. *668, *674, *et seq.* No one claims that Kohn & Weil were acceptors of the draft, or that they ever agreed to accept it. Taussig, Livingston & Co. are the only persons who could have ac-

cepted the draft before it was dishonored, and no one would suppose that a contract would be made before a draft were drawn for any person to accept such draft "*supra protest*." Said parol *435 contract is not void as being in contravention of section 6 of the statute of frauds. *Townsley v. Sumrall*, 2 Pet. 170, 181, 182. It is an original promise of Kohn & Weil that they will pay their own debt contracted by their agent, Ruhman, if Tausseg, Livingston & Co. do not pay it.

The bank took judgment in the court below for merely the amount of money paid out by the bank on the draft, with 7 per cent. interest per annum. This judgment will be affirmed.

(All the justices concurring.)

MISSOURI, K. & T. RY. CO. v. CITY OF FORT SCOTT.¹

July Term, 1875.

1. **Case Made: Power of Judge pro Tem.** Under section 1 of chapter 85 of the laws of 1870, a judge *pro tem.* may, after the expiration of the term at which a case has been tried before him, if within the time allowed by law, or the order of the court, settle and sign a case made.

¹The making and serving of a case are the acts of the plaintiff in error; the suggestion of amendments, the act of the defendant in error; and the settling and signing of the case, the duty of the judge. The jurisdiction of the judge to settle the case is a special and limited jurisdiction, which only arises at the time, and under the circumstances, specified by law; and in the absence of any appearance of the opposite party, or a waiver of amendments, it should appear upon the face of the record—*First*, that the case had been duly served; and, *second*, that amendments had been suggested or waived, or that the opposing party had notice of the time and place of the settling of the case. *Weeks v. Medler*, 18 Kan. 426. Case made, signed, and settled by judge *pro tem.* *Garvin v. Jennerson*, 20 Kan. 371. Trial judge has the power, on his own motion, to make such alterations, erasures, and additions in it as may be necessary to make it speak the truth. The decision of the trial judge, that a case made, as prepared for his signature by one of the parties to the action, is untrue, is conclusive and final. *Building Ass'n v. Beebe*, 24 Kan. 363. The district court has no power to extend the time for making a case, after the time fixed by the statute and by order of the court or judge has once elapsed. *Ætna Life Ins. Co. v. Koors*, 26 Kan. 215. But see *Baker v. Hall*, 29 Kan. 617. Insufficient certificate, *Allen v. Krueger*, 26 Kan. 74; *Edmondson v. Beals*, 27 Kan. 656; authentication of, *Muscott v. Hanna*, 26 Kan. 770; withdrawing case for authentication, *Pierce v. Myers*, 28 Kan. 364; presumption, *Hammerslough v. Hackett*, 30 Kan. 57; S. C. 1 Pac. Rep. 41; *Douglass v. Parker*, 32 Kan. 593; S. C. 5 Pac. Rep. 178; supplementary proceedings, *Taylor v. Mason*, 28 Kan. 381; *Salina B. & S. Ass'n v. Beebe*, 24 Kan. 363; correction of, *Edwards v. Porter*, 28 Kan. 700; omissions cannot be supplied by stipulation of counsel, *Parker v. Remington S. M. Co.*, 24 Kan. 81; after expiration of term of office of trial judge, *Gruble v. Wood*, 27 Kan. 535; see *Taylor v. Mason*, 28 Kan. 381; may delay settling and signing, how and when, *Hammerslough v. Hackett*, 30 Kan. 57; S. C. 1 Pac. Rep. 41; court rules in reference to, *Jones v. Menefee*, 25 Kan. 426; sufficiency and validity of, determined, see *Meixell v. Kirkpatrick*, 25 Kan. 13; *Farlin v. Sook*, 26 Kan. 397; *Muscott v. Hanna*, Id. 770; *Baker v. Hall*, 29 Kan. 617; see, also, *Morgan v. Chapple*, 10 Kan. 168, and note.

2. ———: **Time for Settling: Suggesting Amendments.** The statute allows three days, after the time fixed for making and serving a case, for the suggestion of amendments; and an extension of time for making and serving a case does not take away the three days for the suggestion of amendments, and such latter time commences to run, not from the date of the actual service of the case made, but from the expiration of the period of extension.
3. ———. Where, by the order of the court thirty days are given in which to make and serve a case, it is settled and signed in time, if settled and signed within thirty-three days from the date of the order.
4. ———: **Certificate of Judge: False Certificate Disregarded.** Where the certificate of the trial judge to a case made, or bill of exceptions, is shown to be intentionally false, and to have been fraudulently prepared, this court may disregard it; but it should be wholly disregarded. If the falsehood and corruption be in favor of the plaintiff in error, and to secure a reversal, ordinarily the rights of the defendant in error can be protected in a new trial. If in *favor of the defendant in error, and to prevent a reversal, cases may arise in which it will be the duty of this court to set aside the judgment and order a new trial, upon the presumption, on account of such corruption in the preparation of the case made, or bill of exceptions, that the plaintiff in error was wronged upon the trial.
5. ———: **Certificate not to be Altered or Reformed.** But not even in such a case will this court attempt to reform the certificate by striking out or adding thereto. So that, where a motion has been made in this court to strike out a portion of the certificate of the trial judge to a case made, on the ground that it was intentionally false, and fraudulently prepared, and the charge is made that there was a conspiracy between the said judge and the counsel of defendant in error to prevent the plaintiff in error from obtaining a case for review, such motion must be overruled without regard to the questions of fact raised thereby.
6. **Municipal Corporations: Contract with Railroad Company: Breach of Contract: Damages.** The city of Fort Scott subscribed \$75,000 of stock in the Missouri, Kansas & Texas Railway Company, and issued \$75,000 of its bonds in payment therefor. It also, by virtue of the said contract, issued to the said company \$25,000 of its bonds for the purchase of the right of way through the city, and grounds for machine-shops, engine-houses, etc. The subscription was made upon condition that the company should construct, within six months, a railroad from Sedalia, Missouri, through Fort Scott, to connect with the line running from Junction City in a south-easterly direction; that it should make this the great through line to the Indian Territory and Texas, and construct no other line of road south of Fort Scott in the same direction; and that it should make Fort Scott the end of a division, and erect engine-houses and machine-shops at or near said place before doing so at any other point south-west of Sedalia on the through line of its road. The company complied with this contract, except that it did not make Fort Scott the end of a division, and did not erect the engine-house and machine-shops there, but did so erect them at Parsons. In an action by the city against the company for damages, for failing to comply with this part of its contract, testimony was admitted for the purpose of proving the damages sustained, over the objection of the company, tending to show a decline in the population of Fort Scott, and a depreciation generally in the value of real estate through the city during a period commencing subsequently to the construction of the road, yet prior to the building of the shops and engine-

houses at Parsons, and ending after the fact of such building had become known at Fort Scott. *Held*, that such testimony was improperly admitted, and that such matters did not enter into or form a part of the proper measure of damages.

- *437 *7. **Damages: Speculative Damages not Allowable.** Such testimony is objectionable because it is speculative, and because amid the variety of causes tending to produce such results there is no means of determining how much is due to this single cause; it is also tantamount to inquiry into profits, and those not the direct and immediate fruits of the contract, but remote and uncertain; and it does not disclose the direct pecuniary loss of the city, which, in an action *ex contractu*, is the proper measure of damages.
8. —: **Rules for Measuring.** The following may be laid down as true rules for ascertaining the damages in cases like this: Wherever it can be shown by the contract, or *aliunde*, that a certain and definite amount was paid as a consideration for the condition broken, such sum and interest may be properly recovered. Or, where the unperformed condition is the erection of buildings, or other improvements, within the city, the value of such improvements for purpose of taxation may be treated as the measure of damages.
9. —: **Where Contract is Entire.** Where the contract is an entirety, and there is in it no means of apportionment, and nothing can be shown *aliunde* to establish an apportionment, nor to show the relative or absolute values of the several conditions, no action can be maintained to recover the consideration, if unpaid, nor upon a *quantum meruit*, until all the conditions are performed; and if the consideration has been paid in advance, and only part of the conditions are performed, the entire consideration can be recovered back. Yet to this conclusion, in any given case, the law reluctantly comes, and only when it is perfectly clear that by no construction or evidence can there be any apportionment or determination of values.

Error from Bourbon district court.

The city of Fort Scott brought its action to recover from the Missouri, Kansas & Texas Railway Company the sum of one hundred thousand dollars, for alleged breach of contract, upon the statement of facts set forth in plaintiff's petition, in substance as follows:

"The city of Fort Scott is, and was at the time mentioned therein, a city of the second class, organized under the laws of Kansas. The defendant company, in the year 1870, was engaged in the construction of a railroad via Fort Scott from Sedalia, Missouri, to Denison, in the state of Texas. Said railway company, in order to secure aid from the city of Fort Scott in the construction of its road through the state of Kansas, proposed to said city that if it would subscribe \$75,000 to its capital stock, and issue the bonds of the

*438 city *in payment therefor, and also issue the bonds of the city in a sum not exceeding \$25,000 for the purpose of procuring the right of way through the city for its road, and of purchasing not exceeding twenty-eight acres of land for depots, engine-houses, machine-shops, and yard-room, it would, within six months from an election thereafter to be held upon the question of issuing said bonds, con-

struct, or cause to be constructed, and put in operation a line of railroad from Sedalia, Missouri, to the city of Fort Scott, and that it would extend the road, as soon thereafter as practicable, in a south-westerly direction to a point therein named on the defendant's road; that the company would make said line of railway from Sedalia, or any point north-west thereof to which the company might thereafter extend the line of its road, the great through line by way of Fort Scott to Texas; that the company would make Fort Scott the end of a division upon its road, and would erect engine-houses and machine-shops at or near Fort Scott, before doing so at any other point south-west of Sedalia, upon the through line from Sedalia by way of Fort Scott to the Indian Territory and Texas, as soon as the business of the line should, in the opinion of the company, render such shops necessary. Thereupon the city council of the city of Fort Scott passed an ordinance submitting said proposition to the qualified electors of said city, and an election was held in accordance therewith on the thirtieth of August, 1870, and resulted in favor of the proposition contained in the submission. On the fifth of December, 1870, the city of Fort Scott subscribed \$75,000 to the capital stock of the company, by an ordinance passed on that day. On the twenty-second of December, 1870, the city passed another ordinance giving to the company \$25,000 in its bonds, in lieu of the grounds it had agreed to purchase and donate for right of way, etc.; and on the eleventh of February, 1871, the city delivered \$75,000 in the city's bonds to the defendant in payment of such first-mentioned subscription.

"And the plaintiff avers that it has duly kept and performed all the conditions of said contract upon its part, and delivered \$100,000 of the bonds of said city to said railway company, which has negotiated them, and they have passed into the hands of innocent purchasers; but said company did not comply with its part of said contract, but, on the contrary, neglected and refused, and still neglects and refuses, to make Fort Scott the end of a division upon said line of its road,

and neglects and refuses to locate its engine-houses and machine-shops, any or either of them, at the city of Fort Scott, or at or near said point; but has located its machine-shops and built its engine-houses at the city of Parsons, which is south-west of Sedalia, on the line of its said road. In the fall of 1878 the defendant did erect engine-houses and machine-shops at the city of Parsons, and have them finished and in operation for the purpose of doing the business of their line of road, contrary to the terms of the aforesaid agreement.

"And plaintiff charges that it has been greatly damaged by reason of the conduct of the defendant in this behalf; that if the defendant had complied with its said agreement, and made the city of Fort Scott the end of a division on the line of its road, and erected the engine-houses and machine-shops at or near said city, the so doing would have greatly increased the business and augmented the population

and wealth of the city, and thereby decreased the rate of taxation necessary to pay the interest on said bonds so issued to the defendant.

"The plaintiff avers that the sole consideration of and for the last-named twenty-five thousand dollars in bonds, was to enable the defendant to purchase grounds for said engine-houses, machine-shops, etc.; and that the defendant received said bonds, negotiated them, and applied the proceeds to other and different purposes, and did not apply the proceeds to the purposes mentioned in the contract.

"And the plaintiff avers that the said bonds (viz., the \$75,000 and the \$25,000) were obtained from the plaintiff by the defendant by lying, fraud, deceit, and hypocrisy on the part of the defendant, with the intent to cheat and defraud the plaintiff.

"Wherefore the plaintiff prays and demands judgment against the defendant for the value of the said bonds, and the damages so sustained as aforesaid, to the amount of one hundred thousand dollars."

A copy of the ordinance (ordinance No. 108) reciting and designating the terms of the proposed subscription, and submitting the question to an election on the thirtieth of August, 1870, was attached to and made a part of said petition. The plaintiff attached to its petition, and as a part thereof, ordinance No. 129, approved December 5, 1870, making the subscription of the \$75,000 voted at

*440 said election of the *thirtieth of August, which last-mentioned ordinance has a preamble as follows:

"Whereas, heretofore, to-wit, on the thirtieth of August, 1870, a special election was, in pursuance of ordinance No. 108, and of due proclamation, and notice thereof, held in the several wards of the city of Fort Scott for the purpose of submitting to the qualified electors of said city the question of subscribing, in the name of said city, \$75,000 to the capital stock of the Missouri, Kansas & Texas Railway Company, and of selling and assigning said stock for a nominal consideration to the capitalists engaged in the construction of said railway, under the name of the Land Grant Railway & Trust Company, of New York, and of issuing and delivering the bonds of the city of Fort Scott to said company in payment of said subscription, for the purpose of aiding in the construction of the railroad of said company south-westwardly from said city, upon certain terms and conditions in said ordinance contained; and whereas, upon the canvass duly made of the votes cast at said election, it appeared that there were cast in favor of the proposition submitted 523 votes, and against said proposition three votes, and that the same were thereby adopted; and whereas, the terms and conditions upon which said subscription, and the issue and delivery of said bonds to said company, depended, have been complied with by the said company: Now, therefore, be it ordained," etc.

The defendant answered, admitting the due incorporation of plaintiff and defendant, the passage of the ordinances mentioned in the

petition, the submission therein provided, the election, the subscription of the \$75,000, and the delivery of the city's bonds therefor, and the giving to defendant of \$25,000 additional in bonds, as claimed; but defendant denied all the other averments of the petition, and alleged performance by defendant. The action was tried at the March term, 1874, of the district court, J. M. G., judge *pro tem.*, presiding. The plaintiff called Samuel Proctor, F. Gould, Geo. W. Chess, and Wm. Fletcher, as witnesses, from whose testimony it appears that Fort Scott is 108 miles south-westerly from Sedalia, and Parsons is 51 miles south-westerly from Fort Scott; that the defendant, the Missouri, Kansas & Texas Railway Company, *441 *commenced the building and erection of their round-house at Parsons in the fall of 1871, and their machine-shops at the same place in 1872, all of which were in running order in the summer of 1873; that said round-house has fourteen stalls, and is used for the Sedalia branch of defendant's road, and the machine-shops are 100 feet wide by 300 feet long, and used for repairing machinery and rolling-stock in use on defendant's road; that said round-house cost about \$60,000, and said machine-shops about \$80,000; that at said shops about sixty-five men were kept constantly employed, whose aggregate monthly pay was about \$3,000. Plaintiff also called George A. Crawford, H. T. Wilson, James S. McCord, E. M. Hulett, C. F. Drake, B. P. McDonald, all for many years residents in the city of Fort Scott. Their testimony showed that the population of Fort Scott in 1870 was about 4,000; that it was upwards of 5,000 in 1872 and in 1873, and between 5,000 and 6,000 now, (time of trial, March, 1874;) that real estate was higher in Fort Scott in 1870 than in June, 1872, and about one-third higher in June, 1873, than in 1873; that defendant had built no machine-shops in Fort Scott; that it was known in July, 1872, that defendant had commenced building its machine-shops in the city of Parsons; that the depreciation in the value of property in Fort Scott commenced in 1872, and was from 25 to 50 per cent. lower, according to location; that the decline in property commenced before the panic which caused a depreciation in property in almost all the towns in this state since 1870 and 1872. All this testimony relating to shops and buildings and business at Parsons, and population and values in Fort Scott, was admitted over defendant's objection and exception. The record shows that "it was here admitted that these \$25,000 in bonds were delivered to the defendant for the purchase of right of way and grounds, as provided in the ordinance of the city of Fort Scott of July 25, 1870, referred to in plaintiff's petition, and accepted by the defendant in full compliance with section 8 of that ordinance. It was also admitted by the defendant that the \$75,000 in bonds first mentioned in *442 *plaintiff's petition have passed into the hands of innocent holders."

Defendant called Augustus Wilson and George W. Chess, residents in Parsons, who testified that the population of Parsons in 1872, and

also at the time of the trial, was about 2,500, and that real estate in Parsons had depreciated generally from 25 to 35 per cent. as compared with the prices of June and July, 1872. O. B. Gunn, a witness called by defendant, testified that "the Missouri, Kansas & Texas Railway Company, defendant, within six months from the date of election at which bonds were voted by the city of Fort Scott, constructed and put in practical operation a line of railway from Sedalia, Missouri, to the city of Fort Scott, and immediately thereafter extended the line in a south-westerly direction to the city of Parsons, where it joins another part of its road, called the Neosho Division, and which was formerly known as the Union Pacific Railway, Southern Branch. The company have made the railway from Sedalia the great through line by way of Fort Scott to the south-west and south, through the Indian Territory to Texas, and they have constructed no other road from Nevada, Missouri. The company have erected here at Fort Scott passenger-house, freight-house, and round-house. The freight-house cost \$4,700; the passenger-house, \$4,000, and the round-house, \$3,000 or \$3,500." "It was here admitted that the defendant had purchased the right of way through the city of Fort Scott, and between fifteen and twenty acres of land within the city for depot grounds, yard-room, and other purposes connected with its business."

H. C. Luey, another witness called by defendant, testified as follows: "I am the agent of the defendant at Fort Scott. The engines of all freight trains, going both ways, are changed at this point. At least three engines are always kept at Fort Scott."

The transcript does not contain the charge or instructions given by the court to the jury. The defendant's counsel asked the court to give the following instructions to the jury, to-wit:

*443 "(1) If the jury find from the evidence that real estate in the city of Fort Scott has depreciated in value since June, 1872, before they can take that matter into consideration in estimating the damages in this case, they must further find from the evidence that such depreciation was the natural and proximate consequence of the breach of the contract alleged in plaintiff's petition.

"(2) If the jury find from the evidence that such depreciation was the natural and proximate consequence of the acts complained of in the plaintiff's petition, the damages to the plaintiff are remote and speculative, and the plaintiff can only recover nominal damages.

"(3) Before the plaintiff can recover other than nominal damages, it is incumbent on it to show by competent testimony the amount and value of the real estate alleged to have been affected by a breach of the contract set forth in the petition. If the plaintiff has failed to do that, in substance, the jury have no data upon which to estimate the damages, and can render a verdict only for nominal damages.

"(4) While the law implies damages for the breach of every contract, if the plaintiff would recover more than nominal damages, it must prove such damages by competent testimony; and the jury can-

not infer damages, but must find the same as a fact from the evidence.

"(5) The real question for the jury to determine is, what damages, if any, the plaintiff has sustained in not making the city of Fort Scott the end of a division, and in erecting engine-houses and machine-shops at other points south-west of Sedalia on the through line of railroad from Sedalia, by way of Fort Scott, to the Indian Territory and Texas, before erecting the same at or near Fort Scott,—said damages to be determined by the rules before stated."

The court refused to give the second and third instructions, and the record does not show whether the first, fourth, and fifth were given or refused. The defendant also submitted to the court in writing six special questions, and requested the court to direct the jury to find upon the particular questions of fact so stated, and to direct them to return a written finding thereon. Said questions, and the answers thereto, as returned by the jury, and their general verdict, are as follows:

"We, the jury, find for the plaintiff, and assess its damages at one hundred thousand dollars.

*144 "To the questions of fact submitted to them, the jury find as follows, to-wit:

"(1) Did the defendant construct its machine-shops and engine-houses at Parsons, before any were constructed at Fort Scott? *Answer.* Yes.

"(2) Has it erected any machine-shops or engine-houses at Fort Scott? *Answer.* No machine-shops; but one small engine or round house.

"(3) Has it made Fort Scott the end of a division? *Answer.* No.

"(4) If the defendant has failed to construct its machine-shops and engine-houses at Fort Scott, has the plaintiff sustained any damages thereby? *Answer.* Yes.

"(5) If the answer to the last-named question be 'Yea,' how much damage has the plaintiff sustained? *Answer.* One hundred thousand dollars.

"(6) If the jury find plaintiff sustained more than nominal damages, how are such damages made up, and from what data? *Answer.* From the evidence, and from breach of contract."

Upon the return of said jury, and the delivery to the clerk of the court of their written findings to said questions of fact so submitted to them, defendant objected to their answer to the sixth question submitted to them, and requested the court to resubmit that question to the jury, with the instruction to bring in a written finding responsive to the question; which the court refused to do, and defendant duly excepted. Afterwards, at the same term, and on the second of April, defendant's motion for a new trial was overruled, and judgment was entered on the verdict in favor of the plaintiff for \$100,000, and costs. And the record shows that on said second of April, "and

by consent of parties, made in open court, it is ordered that said defendant have thirty days from the date of this entry in which to make a case and exceptions, which case so made shall be served upon plaintiff's attorneys at least five days before the same shall be submitted to the judge *pro tem.* of this court for allowance, settlement, and signature. And, by like consent of parties, it is ordered that execution be stayed for forty days from this date."

The transcript shows that defendant's attorney made a "case" *445 and served it on plaintiff's attorneys, April 21, 1874. *To the case so served are appended several papers, to-wit:

First. A protest by plaintiff's attorneys against the settlement of the case by the *pro tem.* judge, denying "the right and jurisdiction of said J. M. G. to sign, make, or allow said case after adjournment of the court *sine die*, and while the regular judge" was present in the county, and "because no copy of said case as presented was served upon the plaintiff, as required by the court;" to which protest were annexed three proposed amendments to the case. This "protest and amendments" was marked, "Filed with me, April 22, 1874;" which indorsement was signed by the *pro tem.* judge.

Second. A notice, which, after the title, is as follows:

"GENTLEMEN: Please take notice that on Friday, the first day of May, 1874, at 2 o'clock in the afternoon, or as soon thereafter as counsel can be heard, I shall present the case made in the above-entitled action, and served on you the twenty-first day of April, 1874, to the Hon. JOHN M. GALLOWAY, the trial judge of said case, at his office in the city of Fort Scott, Kansas, for signature and certification

"Yours, etc., T. C. SEARS, Attorney for Defendant."

—Which notice has this indorsement:

"We admit service of a copy of the within notice, this twenty-ninth day of April, 1874.

"McCOMAS & McKEIGHAN, Plaintiff's Attorneys."

Third. An affidavit which, after the title and venue, is as follows:

"T. C. Sears, being duly sworn, deposes and says that he is the attorney for the defendant in the above-entitled action; that on the twenty-first day of April, 1874, he served a copy of the annexed case upon McComas & McKeighan, attorneys for the plaintiff herein; that no amendments have been made, served, or suggested by or on behalf of said plaintiff; that, pursuant to the notice served on plaintiff's attorneys, April 20, 1874, this affiant went to the office of JOHN M. GALLOWAY, the trial judge of this action, at 10 minutes before 2 o'clock P. M. of May 1st, and remained there without leaving for a moment until half-past 6 o'clock; that said office was open, but neither the said GALLOWAY nor either of the plaintiff's attorneys ap-

peared there, nor any one in their behalf; that deponent made inquiries as to their whereabouts, but could only learn that the *446 said GALLOWAY left his office about *noon of that day; that at half-past six deponent went to the residence of said GALLOWAY, and was then informed by his wife that she was not aware of his whereabouts, and that he had not been home since morning; that deponent again went to the residence of said GALLOWAY soon after 9 o'clock in the evening, but could not find him, or hear anything about him.

T. C. SEARS.

"Subscribed and sworn to before me this first day of May, 1874.

"M. V. Voss, Judge Sixth Judicial District."

Fourth. A certificate made by the regular district judge, which, after the title, is as follows:

"And now, to-wit, May 1, 1874, it appearing to me that a copy of the foregoing case was served on Messrs. McComas & McKeighan, plaintiff's attorneys, on the twenty-first day of April 1874, and it further appearing from the notice and admission of service thereof, hereto attached, that the said foregoing case would be presented to the Hon. JOHN M. GALLOWAY (the *pro tem.* judge of this court who tried this cause) for signature and certification at his office at 2 o'clock P. M. of this day; and it further appearing from the affidavit of T. C. Sears, defendant's attorney, hereto attached, that he, the said Sears, attended at the office of said GALLOWAY at the hour mentioned in said notice, and remained there the whole time until half-past six P. M. of this day, and that said GALLOWAY was not there, and neither said McComas nor McKeighan, plaintiff's attorneys, came to said office during said time; and it further appearing from said affidavit (which is hereto attached, and made a part of this certificate) that no amendments to said case have been made or suggested, (wherefore said case is deemed and taken as true:) now, therefore, that the said case so as aforesaid made and served, and the several objections and exceptions therein stated and contained, may be entered and become a part of the record of this cause, I, M. V. Voss, Judge of the Sixth judicial district, at the instance and request of said defendant's attorney, and in the presence of W. C. Stewart, city attorney, and of counsel for said plaintiff, do hereby order and direct that the said case be filed and made a part of the record herein.

"Witness my hand at my office, in Fort Scott, at 10 o'clock P. M., May 1, 1874.

M. V. Voss, Judge."

A fifth paper attached to said case was the certificate of J. M. *447 G., the trial judge, made and dated May 4, 1874. *The petition in error and transcript being filed in this court, the defendant below, as plaintiff in error, filed in this court a motion, which is as follows:

"And now comes the Missouri, Kansas & Texas Railway Company, plaintiff in error, and moves the court to strike from the record of said action filed in this court all that portion thereof purporting to be 'amendments,' and signed by McComas & McKeighan and Stewart, and purporting to have been filed with JOHN M. GALLOWAY, judge *pro tem.*, on the twenty-second day of April, 1874, because (1) the same was not presented to the party making the case, nor his attorney; (2) the said paper, or so-called 'amendments,' were not made nor suggested until after the expiration of the time allowed by the statute. And the said plaintiff in error moves to strike out from the so-called certificate of JOHN M. GALLOWAY, *pro tem.* judge, all that portion of said certificate attached to the record herein commencing with the words, 'and at the same time and place,' and ending with the words, 'and does not contain the charge of the court;' and also, from the last clause of said certificate, the words, 'with amendments thereto,'—on the grounds (1) that the same and the whole thereof is surplusage; (2) that the statements therein contained are intentionally false, and were fraudulently incorporated. This motion is founded upon the record filed herein, and upon affidavits to be filed.

"T. C. SEARS, Attorney."

Subsequently, and on the twenty-seventh of October, 1874, this court made an order appointing A. A. Harris, of Fort Scott, as commissioner "to take depositions in this case in behalf of both said parties, and that he have power as such commissioner to issue subpoenas and bring before him at such time as he may designate, prior to January 1, 1875, any person or persons, and the same with books and papers, to testify what is known to them concerning the matters contained in said motion of plaintiff in error, and to reduce such testimony to writing, and transmit the same to this court on or before the first judicial day of the next (January, 1875) term of this court." Said commissioner thereupon took and filed the testimony of W. H.

Moore, T. C. Sears, W. C. Webb, John G. Stuart, Ira D. Bronson, and Wiley Anderson, on the part of plaintiff in error, to sustain said motion, and of W. C. Stewart, J. H. Sallee, J. E. McKeighan, John M. Galloway, James F. Holt, and H. C. McComas, on the part of defendant in error, in opposition to the matters alleged in said motion. Said motion, and the case itself upon its merits, were heard and submitted together. Elaborate briefs were filed by both parties, mainly upon said motion, but as the court declined to pass upon the merits of the motion, beyond the question of *power in the court* to grant the motion, all those portions of the briefs addressed to the questions of fact alleged in said motion are omitted.

T. C. Sears, for plaintiff in error.

Section 547 of the Civil Code (Gen. St. p. 787) gives to a party desiring to have any judgment or order of the district court, or a judge thereof, reviewed by the supreme court, permission to "make

a case, containing a statement of so much of the proceedings and evidence, or other matters in the action, as may be necessary to present the errors complained of, to the supreme court." Section 548, as amended, (Laws 1871, p. 274,) provides that "the case so made, or a copy thereof, shall, within three days after the judgment or order is entered, be served upon the opposite party, or his attorney, who may within three days thereafter *suggest amendments* thereto, in writing, and *present the same to the party making the case, or his attorney.*" Section 549, as amended, (Laws 1870, p. 168,) provides "that the court or judge may, upon good cause shown, extend the time for making a case, and the time within which the case may be served; and may also direct notice to be given of the time when a case may be presented for settlement after the same has been made and served, and *amendments suggested*, which, when so made and presented, shall be settled, certified, and signed by the judge who tried the cause. * * * If no amendments are suggested by the opposing party, as above provided, said case shall be taken as true, and containing a full record of the cause, and certified accordingly.

*449 *On the twenty-first of April, 1874, a copy of the proposed case was served on the attorneys of defendant in error. On the twenty-ninth of April a notice was served on the same attorneys that the case would be presented to the *pro tem.* judge on the first of May following, at 2 o'clock p. m., for signature and certification. This notice was quite unnecessary, as no amendments had been suggested, and the case was settled, as we claim, by law.

It is a conceded fact that no amendments in writing were "presented to the party making the case, or his attorney." Now, section 548 clearly governs when the case is made within the three days. It provides that "the case and amendments" shall be "submitted to the judge, who shall settle and sign the same." Section 549, as amended, after giving the court or judge power to extend the time for "making a case, and the time within which the case may be served," gives the court or judge the further power "to direct notice to be given of the time when a case may be presented for settlement *after the same has been made and served, and amendments suggested,*" etc. So that the court or judge may direct within what time the defendant may "make a case." The court in this case gave the plaintiff in error "thirty days from the date of this entry in which to make a case." The only further order pertaining to the case was that it should "be served upon plaintiff's attorneys at least five days before the same shall be submitted to the judge *pro tem.* of this court for allowance, settlement, and signature." These provisions of the order were complied with literally. The statute then further provides that notice may be given of the time when the case may be presented for settlement "after the case has been made and served, and amendments suggested." It does not, by implication or otherwise, change or affect in any respect the provisions of section 548, that "the opposite party may, within

three days thereafter, suggest amendments thereto in writing and present the same to the party making the case, or his attorney." Now comes the last clause of the section: "And if no amendments *450 are suggested by the opposing party, as above provided,"—that is, in the previous section 548,—"*said case shall be taken as true.*" Counsel for defendant in error claim that the force of this last clause is broken by pretended "amendments" alleged to have been filed with the *pro tem.* judge on the twenty-second of April, the day after the service of the case. Granting that the paper which GALLOWAY attached to the case was filed with him on the day it purports to have been, it is no compliance with the statute, and has no more significance than if counsel had filed it in their own office. The law only gave the opposite party the right, within three days after the service of the case, to suggest amendments, and directs the manner in which they shall be served. And these pretended amendments are no part of the record, and must be disregarded. It is palpable that no amendments were "presented to the opposite party or his attorney," and the right to make them was gone. If the statute of 1870 be construed to mean what it says, viz., that "if no amendments are suggested by the opposing party as above provided, *said case shall be taken as true,*" then the right to suggest amendments was absolutely gone, and all that GALLOWAY had the power to do was to certify the case. Hence, the matters contained in his certificate, further than was necessary to certify that it might become a part of the record, are surplusage.

The powers and duties of a judge *pro tem.* are referred to by attorneys for defendant in error, and it is contended that they are restricted to the time while such judge is *holding court.* Such is not the meaning of the statute. The words "while holding court" are not a limitation, when taken in connection with the remaining part of the sentence: "The judge *pro tem.* shall have the same power as the regular judge while holding court, and in respect to cases tried before him, or in which he may be selected to act." If the construction sought to be established by counsel for defendant in error had been contemplated, it would have read, "while holding court in respect to cases tried before him." The word "and" clearly indicates that he is to have such *451 power "while holding court," and in respect to cases tried before him, or in which he may be selected to act; that is, when a case is tried before him his powers and duties to the end are the same as the regular judge. Such judge *pro tem.* is a trial judge, as contemplated in the amendment of 1870 made to section 549. The judge is not to determine whether any allegation is or is not proved, but to certify as a matter of fact what the rulings of the court were, and what the witnesses said. The legislature could have conferred this authority upon any other person, as well as the trial judge. The pretense that the act of 1870 is unconstitutional, as containing more than one subject, is hardly worthy of consideration.

The issues really made by the pleadings are: (1) That the railway company neglected and refused to make Fort Scott the end of a division, and neglected and refused to erect its machine-shops at Fort Scott, before it did so at any other point south-westwardly from Sedalia. (2) That by reason thereof the city of Fort Scott has been greatly damaged in this, viz.: "That if the defendant had complied with its said agreement, and made the city of Fort Scott the end of a division on the line of its road, and erected the said engine-houses and machine-shops at or near said city, *the so doing would have greatly increased the business and augmented the population and wealth of the said city, and thereby decreased the rate of taxation necessary to pay the interest on said bonds so issued to the defendant.*"

The allegation in the petition that "the sole consideration of and for the said \$25,000 in bonds was to enable the defendant to purchase grounds for said engine-houses and machine-shops, etc.," is flatly contradicted by ordinance No. 108, § 8. The averment "that the defendant received said bonds, negotiated them, and applied the proceeds to other and different purposes, and did not apply the proceeds thereof to the purposes aforesaid," (supposing that the "purposes aforesaid" refer to the matters mentioned in said section 8,) is disproved by the plaintiff's own admission on the trial, "that the defendants *452 had purchased the right of way through the city of *Fort Scott, and between fifteen and twenty acres of land within the city for depot-grounds, yard-room, and other purposes connected with its business."

The power of the city of Fort Scott to make the subscription to the capital stock of the defendant company, and to issue its bonds in payment therefor, is given in sections 51-53, c. 23, Gen. St. 1868. Section 51 provides that "the board of county commissioners of any county, the city council of any city, or the trustees of any incorporated town, may take stock for such county, city, or town in, or loan the credit thereof to, any railway company duly organized under this or any other law of the state." The remaining sections above cited provide for the manner in which such subscription can be made, and how it can be paid, but do not in terms make provision as to the method by which any of the corporations named might "loan its credit." The general powers of cities of the second class are found at section 4, c. 19, Gen. St. 1868, and are as follows, viz.: * * * *Second.* To purchase and hold real and personal property *for the use of the city.* * * * *Fourth.* To make all contracts and do all other acts in relation to the property and affairs of the city, *necessary to the exercise of its corporate or administrative powers.* * * * Section 5 then provides "that the powers hereby granted shall be exercised by the mayor and council of such cities, as are hereinafter provided." These statutes were passed by the legislature at the same session. It is clear from the provisions made for subscription

to the capital stock of the company, and the payment thereof, that the legislature did not intend to confer that authority in the general powers delegated to cities of the second class. It is equally clear that the examination of those powers as enumerated demonstrates the fact that the legislature did *not* delegate any such powers. The only authority comes from sections 51-53, c. 28, Gen. St. What authority, then, did this latter statute confer? Simply to permit the city to subscribe to the capital stock of the railway company, and pay up such subscriptions in its bonds, or loan its credit to

*453 *such company. No authority was given to enter into speculations in building machine-shops, engine-houses, speculating in real estate, or any such thing. If it had entered into a contract for such subscription or loan, with the conditions that are attached to the ordinances herein, it is barely possible it could enforce it in case of breach, by a recovery in damages,—but only such damages as would bear a *pro rata* proportion between those conditions performed, and those not performed. In other words, that it could only make such a contract as would itself furnish the measure of damages. It could take the necessary measures to protect itself in *what it paid*, but no further. Profits *outside*,—mere results,—disconnected with the consideration paid or received, although growing out of the contract, cannot inure to a municipal corporation. Individuals, or localities within the corporate limits, may be benefited, and make great gains, by the establishment and operation of machine-shops, the construction of engine-houses, depots, etc., that may have been secured by municipal liberality and expenditures; but the *municipality*, never. Its powers are restricted to purely municipal objects, and its property to municipal uses, only. This court has fully sustained this position in the case of the City of Leavenworth v. Norton, 1 Kan. *432. "All powers," says the court, "not expressly granted by the charter, or necessary to carry out the powers expressly granted, are denied. The corporation can take nothing by implication." The same doctrine is recognized in City of Leavenworth v. Rankin, 2 Kan. *357. But, independently of such restricted powers, I submit that the conditions upon which this subscription was made and paid, constitute such a contract, and *only* such an one, as furnishes its only measure of damages in case of breach. Sedg. Dam. 236. The only damages alleged in the petition are contained in the following paragraph, viz.: "*The so doing would have greatly increased the business and augmented the population and wealth of said city, and thereby decreased the rate of taxation necessary to*

*454 *pay the interest on said bonds, so issued to pay said defendant.*" The "City of *Fort Scott" holds no legal relation whatever to the business, population, or wealth within its corporate limits. It has no title, legal or equitable, to any of the property of citizens within its jurisdiction, and can *acquire* none except

for municipal purposes. Its citizens are in no sense stockholders, and the city is in no sense a trustee. If it may, under legislative permission, subscribe to the stock of railway companies, upon conditions providing for the construction of machine-shops, engine-houses, etc., it may, under the guise of such permission, by attaching the necessary conditions to such subscription, embark in speculative adventures *ad libitum*; thus calling into exercise corporate functions that are expressly prohibited. For the purposes of this argument I admit that it may enforce the performance of the conditions upon which the subscription was made, provided they are legal and mutually operative. But, in case of breach, it can only recover such damages as grow out of the contract, and then to be measured *pro tanto*. In the case at bar it is conceded that the railway company performed all the conditions except making Fort Scott the end of a division, and erecting at or near the city, machine-shops, etc., before doing so at any other point southwest from Sedalia. What proportion does the non-performance of these conditions bear to all the conditions attached to the subscription? That proportion ascertained, the measure of damage is easily fixed; and it is the only legal rule by which they can be fixed.

The damage alleged in the petition is too remote,—purely speculative. Who can say, or who can give an intelligent opinion, (which is not testimony,) that “the so doing would greatly have increased the business, and augmented the population and wealth, of said city?” The allegation of the petition attempts to make a statement of what can only be characterized as “loss of profits.” In this class of cases the contract furnishes the measure of damages by fixing *data* capable, by the aid of evidence *aliunde*, of reducing the damages to almost mathematical certainty. But in this class of cases there must *455 be proof,—conjecture will not do. *Lentz v. Choteau*, 42 *Pa.

St. 485; *Griffin v. Colver*, 16 N. Y. 489; *Sedg. Dam.* 72. The breach of every contract carries with it, *ipso facto*, the right to recover nominal damages. If a recovery is to be had beyond them, it can be sustained only by competent evidence. The petition in this case alleges a breach. The right to recover nominal damages follows as a matter of course; hence the defendant could not demur. Beyond this right to recover nominal damages upon the allegations of the petition, it is submitted that the petition states no cause of action whatever, nor one that could, by any proper amendment, be made sufficient. The contract between the defendant company and the city of Fort Scott was an entirety. Upon the face of the petition it is alleged that the city performed its part, and that the company did not perform all the conditions imposed upon it; thus admitting that it did perform all of its obligations except those specifically enumerated, viz., the failure to make Fort Scott the end of a division, and to construct engine-houses and machine-shops. Now, as the contract (as

court of appeals in the case of *Clark v. Norton*, 49 N. Y. 246: "It is no answer to say that the plaintiff has sustained no injury. Courts cannot speculate as to probable or possible injury resulting from a departure from the statutory regulations touching the rights of person or property of others."

Plaintiff put to the witness William Fletcher the following question: "You may state, if you know, what amount the Missouri, Kansas & Texas Railroad Company pay monthly to their employes at the machine-shops above spoken of,"—those at Parsons. The question was objected to by the defendant on the ground that it was incompetent, irrelevant, and immaterial. The court overruled the objection. The witness answered: "For the last two months it has been something over \$3,000 per month." In any possible aspect, the question was incompetent for any purpose whatever. The only object counsel could have had in view was to furnish the jury some *data* upon which to estimate the damages the city of Fort Scott had sustained because the machine-shops were not located there. As I have argued before, the city of Fort Scott could not recover consequential damages, under the contract with the company, and the question was directed only to damages of that character. The money the company paid to its *own employes* for their service, *if they had been residing at Fort*

Scott, and the money paid them there, would have no effect in
 *559 *any way upon that city as a municipality.* The fact that this very money should be spent in that city, distributed among its different classes of trade, could in no possible legal sense affect the *corporation* of Fort Scott.

I have before referred to the fact that the contract between the city and the company failed to describe the character of the shops to be erected,—their extent and capacity. The contract would have been fulfilled by the erection of shops that might cost not to exceed one thousand dollars, and the employment of half a dozen operatives. The erection of shops of greater extent at Parsons, and the employment of a much greater operative force there, furnish no sort of evidence as to what the company ought to do under their contract with the city of Fort Scott. The necessities for extensive shops at Parsons might be apparent, while at Fort Scott those of much smaller capacity might supply the demands of the company. The *assumption* that the contract called for shops at Fort Scott similar to those at Parsons is unauthorized. Hence any evidence based upon it is clearly incompetent, and might mislead the jury. So, also, the assumption that the same number of hands *ought* to be employed at Fort Scott as at Parsons, receiving and paying out the same amount of money per week or per month, is equally unauthorized.

Plaintiff in error excepted to the introduction of testimony as to the comparative value of real estate in Fort Scott during the years 1870, 1871, 1872, 1873, and 1874. The evidence on this point shows—*First*, that real estate in the city of Fort Scott had depreciated

in value since July, 1872; and, *second*, that the fact became generally known in Fort Scott that the railway company had commenced the erection of shops at Parsons "sometime in July, 1872," from which it was claimed that the jury might infer that the latter fact caused the depreciation of real estate of sundry citizens of Fort Scott, and that thereby they might find that the city of Fort Scott had been damaged in the sum of *one hundred thousand dollars!* The *460 legal aspect of this kind of evidence had already been *discussed. It was incompetent in any and every view of the case. The jury, from these facts alone, had no *right* to draw such inference. If the people of the city of Fort Scott concede the fact that their prosperity and the value of their property depended upon so comparatively a trifling circumstance as the location of machine-shops "at or near their city," they admit what I, who have some knowledge of their business and resources, and the energy and enterprise of its leading citizens, do not believe.

But all this testimony is clearly improper for another reason. If the proposed evidence tended to prove anything in the way of damages, they were *special damages*. Special damages cannot be proved nor recovered without special allegations in the petition. The plaintiff's petition contains no allegations of that character, and none that can be construed as embracing them. As before shown, the only special damage alleged is that the "business would have been greatly increased," and the "population and wealth of the city greatly augmented." It cannot be pretended that such a plea justifies the introduction of evidence to show that there has been a depreciation of the real estate in the city. The one contemplates a "loss of profits" that would have accrued; the other, the loss of actual value of a thing already possessed. 1 Chit. Pl. 385; Butler v. Kent, 19 Johns. 228; Dumont v. Smith, 4 Denio, 319; Sedg. Dam. 67. Again, it is a fact well known to every intelligent citizen that there has been a general depreciation of real estate in every portion of the west,—in the towns and cities particularly; and it is a fact which constitutes a part of the experience and common knowledge of the day. Hence a fact of which the court will take judicial knowledge. Oppenheim v. Wolf, 3 Sandf. Ch. 571. Of facts that are "matters of public history, affecting the whole people," no proof is needed; courts take judicial notice of them. 1 Greenl. Ev. 8; Swinnerton v. Columbian Ins. Co., 37 N. Y. 174; Smith v. New York Cent. R. Co., 43 Barb. 225; U. S. v. Four Thousand American Gold Coin, 1 Woolw. 217; Buford v. Tucker, 44 Ala. 89; Payne v. Treadwell, 16 Cal. 220.

Thus, the evidence as to the depreciation of real estate in Fort *461 Scott proves nothing as to damages as resulting from *the failure of the company to erect their machine-shops at that point, because there was a *general depreciation* throughout the whole state.

It was error to refuse to give the special instructions asked for by plaintiff in error. The first instruction was based upon the theory

that the jury would find any fact necessary to give a verdict against the defendant. The result showed the correctness of the theory. If given, it would have instructed them that if they found from the evidence that real estate in the city of Fort Scott had depreciated in value since June, 1872, before they could take that matter into consideration in estimating the damages in the case, they must further find from the evidence that such depreciation was the natural and proximate consequence of the breach of contract alleged in the plaintiff's petition. Of course the jury found the fact, and the further one that such depreciation was the natural and proximate consequence of the breach of the contract.

The second instruction asked was to the effect that, if the jury found from the evidence that such depreciation was the natural and proximate consequence of the acts complained of in plaintiff's petition, the damages to plaintiff are remote and speculative, and the plaintiff could only recover nominal damages. This instruction the court refused to give. The questions involved in this instruction and refusal have been considered in a previous portion of this argument. The proposition is too evident to require a word more of argument.

As to the whole case, upon the evidence submitted, I have a few words to say. The fact that machine-shops were constructed at Parsons before they were at Fort Scott is not denied. That such act on the part of the company is at least a technical violation of the contract is evident. I have no doubt the company had good and sufficient reason for such action. But if it is liable for such breach, such liability should be enforced in accordance with the rules the law has established, and not by dishonest, fraudulent means. There
 *462 *is absolutely no testimony tending to show any fact that can justify the verdict of the jury, and, under the allegations of the petition, none was admissible. Conceding every fact alleged in the petition to have been proved, the verdict could not be sustained. The contract between the city and the company was performed by the latter in the main. The railroad was constructed, depots built, right of way purchased, land bought for depots, engine-houses, yard-room, etc., and every real, substantial condition performed. The city has secured, for all time, its benefits for the purposes of business, convenience, and taxation. The great controlling object for which the subsidy was given has been obtained. But all this it ignores, and asks that it may recover back the full consideration it agreed to pay, because, forsooth, some portion of the contract has not been performed.

McComas & McKeighan, for defendant in error.

In respect to the motion in this case, which is in effect an effort to induce this court to change the certificate of the judge of the district court to a case made, we submit: *First*. This court possesses no power to grant such a motion. *Second*. The only thing the plaintiff in error can with any show of justice complain of, is the statement in the certificate that the "case" made does not contain all the evidence.

Upon the evidence taken under this commission, is this court satisfied that it does? If not, then the certificate is true, and to change the certificate would be compelling the district judge to certify to a falsehood. If this were an application to compel his signature to the certificate prepared by plaintiff in error, this court would say, "The decision of the trial judge that a bill of exceptions tendered him for his signature is untrue, is final and conclusive." Yet here the judge signs "the case made," and says in his certificate that it does *not contain all the evidence*, and the plaintiff in error asks that his certificate in this respect be modified. This is an attempt to do indirectly just what this court in *Shepard v. Peyton*, 12 Kan. *616, decides cannot be done. See, also, *McClure v. Gulf R. Co.*, 9 Kan. *373.

*463 *The plaintiff in error alleges aggrievance by the statement of the judge in his certificate that the case made does not contain the charge of the court. *It does not contain it.* The case is before this court to speak for itself. Should the judge tell the truth, and say the case made did not contain the instructions, or sign a certificate which is not true? Section 275 of the Code provides: "When the argument is concluded the court shall give general instructions to the jury, which shall *be in writing, and be numbered, and signed by the judge*, if required by either party." Now, this record does not show, the pretended case made does not show, the plaintiff in error does not attempt by his depositions to show, that either party required the court to reduce its charge to writing, and number and sign the instructions. The most that is claimed is that the charge was in writing; that after it was delivered the judge *pro tem.* handed it to Sears; that he read it, handed it back to the judge, stating, "There are one or two points to which I wish to except." Is there any way for this court to find out what these points were, or did he inform the court below? Is it our fault that the error, if there was any, is not made affirmatively to appear? The most that can be claimed is that the judge made a written charge without being requested so to do; that it was not excepted to, except by the attorney stating to the court that there were "one or two points to which he wished to except," without stating what they were, or excepting to the asking, or that any specific exceptions be allowed, and noted on the record; and the said charge was lost or mislaid, and no copy has been supplied. These are the only material changes that the plaintiff in error seeks to make in the certificate by this motion; that is, the statement that the case made does not contain all the evidence, and does not contain the instructions of the court. To this modification we object, because (1) this court has no power or authority to change the certificate; (2) if it had, it will not do it, because the evidence shows that the certificate in this respect is true.

*464 The plaintiff in error claims that, under the statute of *1870, (Laws 1870, p. 168,) there could be no amendments to this case made, because no amendments were *served upon the opposite*

party, or its counsel, and the judge was bound to sign it as it was. The material portion of said statute is as follows:

"Sec. 549. The court, or judge, may, upon good cause shown, extend the time for making a case, and the time within which the case may be served; and may also direct notice to be given of *the time when a case may be presented for settlement* after the same has been made and served, and amendments suggested, which, when so made *and presented*, shall be settled, certified, and signed by the judge who tried the cause. * * * And if no amendments are suggested by the opposing party, as above provided, said case shall be taken as true."

That is, when so presented to the judge within the time. Now, this statute will not bear the construction attempted to be given to it. Under the order in this case, made by consent, the plaintiff in error has thirty days in which to make a case. *No time is fixed within which defendant in error was to suggest amendments.* Such amendments could therefore be suggested at the time when the case was presented for settlement; this matter is governed by this consent order; this does not require that the amendments should be served upon any person. "If no amendments are suggested, etc., the case shall be taken as true." When shall it be taken as true? When the case is *made and presented to the judge*? And this case was not presented until the time had expired within which it was to be presented. Plaintiff in error had thirty days within which it might make and present to the judge for settlement a case. When the thirty days had expired, the power of the judge was exhausted. He could neither settle it nor certify it. At least, before they can get the technical advantage they claim under this statute, by reason of no amendments being properly served, a compliance with the order of the court must be shown on the part of plaintiff in error. But it is con-
 *465 tended that the case was prepared, and on the afternoon *of the twenty-ninth day after the order of the court the attorney was at the office of the *pro tem.* judge, and the judge was not there; and also that the attorney called at the judge's office several times the next day, and did not find him. Suppose this case had been tried before the regular judge, and plaintiff in error had been given thirty days in which to make a case, and that he waited until the last day in the afternoon, or until the next to the last day, and then went to the office of the judge and found that he had left the county that morning, going perhaps to hold court in another county, and that he did not return until the time had expired,—whose fault would it be that no case could be settled? In this case the cause was tried before a *judge pro tem.* The plaintiff in error does not ask the court to charge the jury in writing; does not preserve or except to the charge of the court; files no bill of exceptions; takes thirty days to make a case; lets twenty-eight days of the time expire; comes to the law-office of the lawyer who acted as *pro tem.* judge, but serves no notice

upon him to be at his office that day; finds him absent; spends the afternoon at such office; does not see the *pro tem.* judge until two days after the time has expired; then presents the case, not for "settlement," but for "signature and certification," and now claims that this court must change GALLOWAY's certificate so as to make it show a falsehood, because no amendments were served upon the opposite party or his attorney by the defendant in error. At most, such a "signature and certification" could only be made when the case is "presented to the judge." In law it was never presented, as the whole proceeding upon the fourth day of May was a nullity.

But if we take the transcript as it is, what does it show? It appears from this record that there is here what is claimed to be "a case made" under the provisions of the statutes, to which document there are two certificates,—one by the regular judge, who did *not* try the case, certifying that "the case" is correct, and another from the judge *pro tem.* who *did* try the case, certifying that such "case *466 made" is not correct. It *further appears from the record that the regular judge's certificate is based upon an affidavit filed before him by the attorney for the plaintiff in error, showing that upon one day he went with his case to the office of the judge *pro tem.* to have it settled and signed, and remained there from 12 o'clock M. to 6 o'clock P. M., without finding the judge *pro tem.*, and not showing that he notified the judge *pro tem.* that he would be there on that day, or that he made any attempt on any day before or after that, within the thirty days he was given by the court to make a case, to see said judge *pro tem.*, or to get him to settle and allow said case,—which affidavit is no part of the record or proceedings in this case, and can only be considered by the court as a matter of legal curiosity. It appears from the certificate of the regular judge that the sole ground upon which he certified to the correctness of the case made, was the statement in the said affidavit that no "amendments" were suggested to the case by the attorneys for the plaintiff below, while the certificate of the judge *pro tem.* shows that such amendments *were* suggested, and a copy thereof handed to him the day after the pretended case was served upon said plaintiff's attorneys, and he further certifies that said amendments were correct. "Under which king?" Whose certificate to the case are we to take? Who is to settle the case,—the judge who tried it, and who heard the evidence, or the judge who *did not* try the case, and who did not hear the evidence? The fact that the regular judge in his certificate professes to make it at the request of the attorney for plaintiff in error, and upon an *ex parte* affidavit, made not in the cause, but before him at chambers, of itself demonstrates his utter want of authority in the premises. It is the duty of the trial judge to settle the case. "The case and amendments shall be submitted to the judge, who shall settle and sign the same, and cause it to be attested by the clerk, and the seal of the court to be thereto attached." Laws 1871, p. 274. The

attestation of the clerk and seal of the court are attached to the case as signed by the judge *pro tem.* on the fourth of May, and not *467 to the certificate *of the regular judge on the first of May.

We therefore contend that the certificate of the regular judge, appended to said supposed "case," is irregular, unauthorized, and void, and will be disregarded by this court. *Hodgden v. Ellsworth Co.*, 10 Kan. *637.

In regard to the case settled and signed by the judge *pro tem.*, we say that that also, and every part thereof, should be disregarded, and that none of the questions attempted to be thereby raised can be considered by the court, for the following reasons: *First.* This pretended case made is not a case, but simply a bill of exceptions. Bills of exceptions *must* be signed *during* the term. Code, § 300. "A case" is "so much of the proceedings and evidence or other matters in the action as may be necessary to present the errors complained of to the supreme court." Code, § 587. *Second.* The judge *pro tem.* was elected to hold the March term on account of the sickness of the regular judge. What are his powers and duties? These are prescribed in section 8, c. 28, Gen. St. p. 304: "The judge *pro tem.* shall have the same power as the regular judge *while holding court*, and in respect to cases tried before him, or in which he may be selected to act." "He shall have the same power as the regular judge," with this limitation, that such power is to be exercised "while holding court." The other two clauses being a further limitation of power, this power must not only be exercised *while holding court*, but it must be "in cases tried before him" while he is holding court, or in cases "in which he may be selected to act;" that is, cases on the docket of the term when he is elected. He has this power, "while holding court," as court, and not as a judge at chambers. The judge *pro tem.* has such power as is given by statute, and none other. This statute must be strictly construed, and the powers of the judge *pro tem.* cannot be extended by implication or construction. This is the general rule in respect to all bodies of limited or special jurisdiction. The judge *pro tem.* may be selected for two purposes: One is where the *468 disability of the judge extends to a particular case; there he would have authority, perhaps, over that case until it was ended; the other is where the disability of the judge extends to all the cases on the docket, as in case of the sickness of the judge. In the latter case his authority ends with the term. When court adjourns *sine die*, his official life is terminated; beyond that he has no power as judge or court, and no order he can make, by consent or otherwise, can confer power not given by statute, or extend his jurisdiction beyond the time when "he is holding court." His power is given "while holding court," and it dies with the term. Therefore, a judge *pro tem.*, after the adjournment of the term for which he was elected, has no power or right to "settle" and "sign" a case, or cause "it to be attested by the clerk, and the seal of the court to be thereto

attached." Section 1 of the act to amend the Code (Laws 1871, p. 168) does not apply to this class of cases: "Where the term of office of the trial judge shall have expired, or may hereafter expire, before the time fixed for making, settling, or signing a case, it shall be his duty to certify, sign, or settle the case in all respects the same as if his term had not expired." This language has no reference to a judge *pro tem.*, but to the trial judge,—the regular judge who tried the case. The judge *pro tem.* has no "term of office" in the sense of the language used. This act is unconstitutional. Article 2, § 16. It contains more than one subject, in this, that it provides for the making and settling of a case, and also for extending the term of office of a district judge; and it repeals section 549 of the Code, to which it is an amendment. It attempts to extend the term of office of the district judge, which is fixed by the constitution. By section 5 of article 3 of the constitution the district judges hold their office for four years, and by section 12 until their "successors shall have been qualified." The term of office of a judge, therefore, cannot expire until the four years have expired, and until his successor "shall have been qualified." After "the term of office of the trial judge shall have expired," which can only be after his "successor shall have been qualified," he has no judicial power, and an act attempting to *469 *confer it upon him is unconstitutional and void,—would be, in effect, to have two district judges in one district exercising their several functions at the same time.

It is claimed by counsel for plaintiff in error that because notice of amendments to the case was not served upon him, but handed to the judge, the case should be considered correct. The provisions of section 1 of the Laws of 1871, p. 274, only apply when the time for making the case is *not* extended: "The case so made, or a copy thereof, shall, within three days after the judgment or order is entered, be served upon the opposite party, or his attorney, who may, within three days thereafter, suggest amendments thereto in writing, and present the same to the party making the case, or his attorney." Under this section the duty of the judge is to "settle the case," amendments or no amendments. It is not this section which provides if no amendments be suggested "the case shall be taken as true." This provision is section 1 of the Laws of 1870, p. 168, and is an amendment of section 549 of the Code, and contemplates cases only where the time for making the case is extended by the court, and this section is silent as to whether the amendments shall be suggested to the court. The order of the court gave the plaintiff in error thirty days from the date of the order to make a case, and afterwards, before the case was made, adjourned *sine die*. This was April 2, 1874. The order is as follows: "And by consent of parties, made in open court, it is ordered that said defendant have thirty days *from the date of this entry* in which to make a case and exceptions, which case so made shall be served upon the plaintiff's attorney at least five days before

the same is presented to the judge *pro tem.* of this court for settlement, allowance, and signature." No time is given for amendments. Under this order we contend that it was the duty of the judge *pro tem.*, if he had any authority in the premises, to settle the case if it was presented to him in thirty days. The case was not presented to the judge until *thirty-two* days had expired. It was then too late. The order giving the plaintiff in error thirty days in which to make *470 a case, does not mean thirty-two days. So, "in any view of the case, we maintain that the court can only consider such questions in this record as arise outside of the pretended case made.

The first error complained of is that the court refused to give special instructions asked for by the plaintiff in error. We answer: The record, outside of this pretended case made, does not show any such instructions were asked for. Neither the record, nor pretended case, shows what instructions the court did give, or that the court was asked by either party to instruct the jury in writing. It is not necessary for the court to repeat its instructions. *Rice v. State*, 3 Kan. *152; *City of Topeka v. Tuttle*, 5 Kan. *312; *State v. Volmer*, 6 Kan. *371. The instructions asked for by plaintiff in error *might* have been in the general charge. Error must be made to affirmatively appear. This is the settled doctrine of all appellate courts. *Moore v. McIntosh*, 6 Kan. *39; *Hall v. Jennes*, Id. *356; *Woolledge v. Converse*, 8 Kan. *473; *Winsor v. Cole*, 10 Kan. *620, *625. Equally universal is the presumption that the court below did its duty. *Linton v. Housh*, 4 Kan. *536. Where the charge of the court is omitted from the record, the supreme court will presume the proper instructions were given, and, on this presumption, will not examine instructions refused. *Pacific R. Co. v. Nash*, 7 Kan. *280. As a whole, the instructions asked for by the plaintiff in error are not law, and ought to have been refused. *Douglas v. Wolf*, 6 Kan. *88.

The second error complained of by plaintiff in error is that the facts set forth in the petition are not sufficient to entitle the plaintiff in error to more than nominal damages. Why not? If, *under any proof* that could or might be offered, under the allegations of the petition, the plaintiff could show itself entitled to recover \$100,000, then the petition states facts sufficient to justify the verdict. The amount of damage in actions of this character can only be ascertained from the evidence. Code, § 128. The "advantages" or "benefits" from a "public improvement," railroad, or machine-shops, are susceptible of being estimated by the jury under proper evidence and instructions. *Miles v. Hannibal & St. J. R. Co.*, 31 Mo. 407; *State v. Evans*, 2 Scam. 208, 210; *State v. Wilson*, Id. 226. Suppose the railway company had received and appropriated these bonds without *471 complying with any of the stipulations of its contract? The city could not defend against the bonds in the hands of innocent purchasers for value. Its only remedy would be to pay them, and sue upon the contract. Certainly, in such a case, the measure

of damages would not be less than the amount of the bonds. Is this changed by the company performing a part of its contract, unless it could be at least shown that such part performance was of some benefit or advantage to the city? And is this not a subject of evidence? There is nothing in the petition to show that this part performance was of any benefit to the city. Suppose the company were suing on these bonds; would it not be a good defense in whole or part, depending on the evidence, to show that it had failed in whole or part to comply with its contract? To the same extent cannot an action be maintained against the company where it has sold the bonds to an innocent purchaser?

The next error complained of is that improper evidence was admitted. This assignment is disposed of by the argument made upon the fourth assignment, namely, none of the evidence is before the court for review.

The remaining error complained of by plaintiff in error is that the jury did not give a proper response to that part of the finding embraced in the words, "How are such damages made up, and from what *data*?" To answer the question, must the jury make an analysis of a general verdict, or must they explain all the mental processes by which they severally reached their conclusions? Courts sometimes give a bad reason for a good judgment. Juries would *generally* do so. If they in each case were required to state how their verdicts were "made up," and their verdicts set aside when any illogical steps in the process were detected, this statute would have a most benign effect in the administration of law and justice. And upon "what *data*." This is a Latin word, in the plural number, and to find the *data* upon which a verdict rests, would be to find all the facts, and not "a particular fact." The jury are to be governed by the evidence; and to ask them upon what *data* they found their verdict is *472 equivalent to asking them upon what evidence? The court ought not to have propounded this question to the jury, but as it did so—at the instance of the plaintiff in error—it cannot complain, and the response of the jury was a wise answer to a foolish question.

As to what is the measure of the plaintiff's damages in this action, whether the amount of the bonds issued, or the injury which necessarily and proximately results from an admitted breach of the contract by the plaintiff in error, it may be somewhat difficult to say. The petition puts it in the alternative. If this is an entire contract, and the plaintiff in error is compelled to perform all its conditions, or return the consideration it receives, then, of course, there is no material error in respect to the admission of evidence on the subject of damages, as the jury only found the amount of the bonds given to the railroad company by the city. *Baldwin v. Bennett*, 4 Cal. 392; *Hunt v. Test*, 8 Ala. 713. Where it is impossible to estimate the damages, the consideration paid is the measure of damage. Coffee

v. Meiggs, 9 Cal. 363. Suppose that in the case at bar the railway company had complied with the contract in full, and the city had failed, or it had partially complied, and the city had prevented it from complying, can it be doubted that in such a case, in an action by the company against the city, the measure of damages, in the language of the California cases, would be "the price agreed to be paid," because, from the "nature of the contract," it would not be practicable to estimate the damages? Suppose the railway company had complied with the contract in every particular, what would be its damages upon a suit against the city for the breach of the contract? Manifestly the amount of the bonds. Here the city has paid the company in advance. It was to subscribe \$75,000 to the capital stock of the company. It has done it. It was to assign that stock to the company, or a person by it named, for a nominal consideration. It has done that. It was then to donate \$25,000 to

*473 the company for grounds for machine-shops, etc. It *has done that,—which is all admitted in the answer of plaintiff in error. The railroad on its part was to build its through line via Fort Scott, and make Fort Scott the end of a division. This was an entire contract. The city advances the \$100,000; the railroad company fails to perform its contract. Cannot the city recover it back? Was not the performance of all the stipulations of its contract a condition precedent to the right of the railroad company to demand the bonds? Having received and converted them without complying with its contract, does not the amount of the bonds furnish the measure of damages in an action by the city? Can the company be allowed to pocket the full consideration for its contract, and perform only in part, and then, because it is difficult or impracticable to assess the *real* damages sustained, say, in court of justice, that the plaintiff is only entitled to nominal damages? The principle may be further illustrated: If the railroad company had simply built the road, and had not made Fort Scott the end of a division, or erected its machine-shops there, it could not, in an action, compel the city to issue the bonds, or recover their value, because the *contract is entire*. It is only where the party *agrees* to receive a part performance that the other party can recover *pro tanto*, or where the law implies such an agreement. If A. make an absolute purchase of two hundred bushels of corn, at 25 cents per bushel, to be delivered in thirty days, and B., the vendor, delivers 100 bushels in ten days, but delivers no more, B. can recover, after the thirty days expire, for the 100 bushels delivered; because, by A.'s accepting the 100 bushels when he could have refused to accept it, and keeping it when he could have returned it, the law implies an agreement on his part to treat the contract as severable; but this implication arises only when a part performance is accepted, where it could be refused, or where the things delivered could be returned. This exception cannot apply to the city. It could not have refused to accept the advantages of this

part performance; it could not have returned the advantages derived therefrom to the company. 1 Story, Cont. §§ 25-25*d*; 2 Pars. *474 *Cont. 658-560. Is not the converse of this proposition true also? Where the railway company has only performed part of an entire and indivisible contract, but has succeeded in getting the full consideration for its entire performance, cannot the city recover back the whole consideration? "A party is always entitled to recover on a breach of contract such damages as are the natural, direct, and proximate result of such breach, and such other damages as may reasonably be supposed to have been in the contemplation of both parties at the time of the contract." *Johnson v. Mathews*, 5 Kan. *118. This is a general principle. It is to be presumed that the court so charged the jury in this case. It may be difficult to tell exactly what particular facts the jury ought to take into consideration in deciding upon the amount of damages the plaintiff should recover. The difficulty and delicacy of the question have nothing to do with the right of the plaintiff to recover, or else we would have a wrong without a remedy. "Where, from the nature of the case, damages cannot be estimated with certainty, all the facts and circumstances reasonably tending to show damages should be placed before the jury to enable them, in the exercise of good sense and judgment, to find such probable estimate as will produce adequate compensation." *Gilbert v. Kennedy*, 22 Mich. 117; *Allison v. Chandler*, 11 Mich. 542. The verdict can be sustained under proper evidence and instructions, upon the allegations of the petition, upon this theory. The petition, therefore, states facts sufficient to justify the verdict, and that is the only question which can be examined upon this record.

BREWER, J. At the March, 1874, term of the district court of Bourbon county, the city of Fort Scott, defendant in error, obtained a judgment against the plaintiff in error for the sum of \$100,000, for an alleged breach of contract. To reverse that judgment *475 the railway company brings this proceeding *in error. At the outset we are met with an unpleasant controversy of a personal character. It is insisted by counsel for the city that no valid case made is here, and that we can only consider such questions as arise upon the pleadings and judgment. On the other hand, the counsel for the company moves to strike out certain portions of the certificate of the trial judge to the case made, on the ground that they are surplusage, and that they are "intentionally false, and were fraudulently incorporated," and charges a conspiracy between the counsel for the city and the trial judge to prevent the railway company from obtaining a case for review.

The case was tried before a judge *pro tem.*, who, on the day of the rendition of the judgment, the second of April, gave thirty days in which to make and serve a case. The case was not signed by such judge until the fourth of May. It is insisted that upon the expira-

tion of the term the powers of the judge *pro tem.* ceased, and that he could not thereafter do any act in the suit, not even to the extent of settling and authenticating a case made. The case was signed by the regular district judge on the first of May, and it is claimed that a judge has no power to settle and sign a case made, except in proceedings and actions regularly had and tried before him. In other words, the claim is that, upon the expiration of the term at which a case is tried, if tried before a judge *pro tem.*, the power to obtain a case made ceases. It may be remarked that it does not distinctly appear that the term had expired at the time this case was signed by the judge *pro tem.* Nothing in the law prevented the continuance of the March term beyond the fourth of May. There is no positive affirmation in the record that the term had been adjourned. The counsel for the city objected, it is true, to any action of the judge, on the ground that the term had been adjourned; but the judge overruled the objection, and it may be that he so ruled because the fact was not as asserted, instead of because he deemed the law not to be as claimed. We do not, however, rest any decision upon this *476 ground, for, while there is no positive assertion that the *court was adjourned, it seems probable, from the ruling of the judge upon the objection of the city's counsel, as well as from the opening words of his certificate, that such was the fact. The certificate of the trial judge, although a judge *pro tem.*, and made after the adjournment of the term at which the case is tried, is, if there be no other objection to it, sufficient. That the judge before whom a case is tried is the proper officer to settle the record of the proceeding upon such trial, is manifest. And the power of a judge to settle and sign a case, although his term of office has expired, and although there be no statutory authority therefor, has been affirmed by courts of the highest authority. *Fellows v. Tait*, 14 Wis. 156; *Davis v. Village of Menasha*, 20 Wis. 194; *Hale v. Haselton*, 21 Wis. 320. We have a statute bearing upon this question. In section 1 of chapter 85 of the Laws of 1870 it is provided that the case made, "when so made and presented, shall be settled, certified, and signed by the judge who tried the cause;" and, also, that "in all causes heretofore or hereafter tried, when the term of office of the trial judge shall have expired, or may hereafter expire, before the time fixed for making or settling and signing a case, it shall be his duty to certify, sign, or settle the case, in all respects as if his term had not expired." A statute like this is not to be construed in any restricted, technical manner, but liberally, in the ends of justice, that defeated litigants may have a full opportunity for the re-examination in the supreme court of the questions decided against them below. In *Thurber v. Ryan*, 12 Kan. *453, we held this statute applicable to a case where, before the time for settling and signing a case made, a law took effect detaching the county from one and transferring it to another judicial district, thus giving to the county a new district judge. It may be

that it is, strictly speaking, hardly correct to speak of the "term of office" of a *pro tem.* judge. Perhaps he may not technically have a "term of office;" and yet such an expression does no great violence to language. It clearly comes within the spirit and *477 purpose of this statute, that whenever the judge before whom a case is tried shall, before the expiration of the time allowed for settling and signing the case made, have ceased to be judge, he shall nevertheless settle and sign the case made. His judicial life has ended, yet he may and must prepare for the review of the appellate court the record of the proceedings before him. We think, therefore, the certificate of the trial judge must be held good, notwithstanding this objection.

Again, it is insisted that the case made must be disregarded because it was not settled and signed until after the expiration of the time allowed therefor. This claim we think arises from a misapprehension of the statute,—a misapprehension evidently shared by counsel on both sides. On the second of April an order was made that the railroad company "have thirty days in which to make and serve a case." On the fourth of May the case was settled and signed. This, it is true, was more than thirty days after time of the order of extension. But that order did not fix the time for settling and signing the case, or direct notice to be given of the time for presenting the case for settlement. It simply extended the time for *making and serving* the case. The making and serving of a case are the acts of the plaintiff in error; the suggestion of amendments, the act of the defendant in error; and the settling and signing of the case, the duty of the judge. Section 547 of the Civil Code (Gen. St. 737) authorizes a party to make a case. Section 548 provides that he shall, within three days after the judgment or order is entered, serve such case made upon the opposite party, or his attorney, who may, within three days thereafter, suggest amendments, and present the same to the party making the case. "The case and amendments shall be submitted to the judge, who shall settle and sign the same; and the case so made shall thereupon be filed with the other papers in the action." Section 549, as amended in 1870, (Laws 1870, p. 168,) gives the court power to extend the time for making and serving a case, *478 and also to direct *notice to be given of the time when the case may be presented for settlement, after it has been made and served, and amendments suggested. Now, the extension of the time for making and serving a case does not take away the time for suggesting amendments. The three days *thereafter*, in which to suggest amendments, still remain. And where there is no order fixing the time for presenting the case for settlement, and only the simple order giving an extension of time for making and serving a case, the case is duly settled and signed, if settled and signed within three days after the time fixed for making and serving a case. It is true, the statute may be read so as to mean that the three days in which

to suggest amendments shall be three days after the actual service of the case, and not after the time given in which to serve. Thus, in this case, the case was served on the twenty-first of April, several days before the expiration of the time granted. Upon such a construction, amendments would have been required by the 24th. But the other construction, that making the three days to commence upon the expiration of *the time given* for making and serving the case, while equally warranted by the language, is more in harmony with the definitions and regularity of judicial proceedings, and, therefore, to be preferred. A party whose adversary has taken time to make a case knows exactly when he must be ready with his amendments, and can arrange his business accordingly, while otherwise he must be in suspense waiting the action of his adversary, and ready to proceed immediately after such action. We conclude, then, that as the case was settled and signed within the three days after the expiration of the time given for making and serving it, it was settled and signed in time.

The certificate having been signed by the proper officer, by one having authority to sign, and within the legal time, we come to the motion of plaintiff in error to strike out a part of the certificate. We give the certificate in full. It is as follows:

*479 "I, JOHN M. GALLOWAY, being a practicing lawyer in the city of Fort Scott, Kansas, and having held the March term, 1874, of said district court, within and for the county aforesaid, as judge *pro tem.*, duly elected and qualified, because of the sickness and absence of the Hon. M. V. Voss, the regular judge of said district, and, as the said judge *pro tem.*, having heard and tried the above-entitled cause at said March term, 1874, do hereby certify that the above and foregoing case made by defendant was presented to me by Wm. C. Webb,¹ attorney for the defendant, the M., K. & T. Railway Company, on this fourth day of May, 1874, for settling, signing, and allowing the same as of record. And at the same time and place appeared H. C. McComas, John E. McKeighan, and William C. Stewart, attorneys for the plaintiff, the city of Fort Scott. And the said attorneys for plaintiff objected to the said case presented being examined, settled, signed, or allowed by me, because the time for making, presenting, settling, and allowing said case had expired; and because a *pro tem.* judge, after the adjournment of the term of court which he held, has no further power to act as judge, and because the order herein made, by which the time was fixed for making, presenting, and

¹NOTE OF HON. W. O. WEBB, STATE REPORTER.

Although wholly immaterial to any question controverted or decided in this court, it is due to the "truth of (personal) history," to say that Mr. Webb was *not* then, or at any time, *the* attorney or *an* attorney for the Missouri, Kansas & Texas Railway Company in this action or proceeding; but, in presenting the case made to the trial judge, for his signature, Mr. W. was merely performing a friendly office for (and at the personal request of) Judge SEARS, the company's attorney, who was at that time absent.

allowing said case was a consent order, and could not be altered or extended by the court, which objection was by me overruled and denied, and to which ruling the plaintiff, by its attorneys, duly excepted. And I do hereby refuse to extend the time for making and presenting this case, and do find, as a matter of fact, at the request of the plaintiff, that the time for making, presenting, settling, and allowing said case has expired, and that no case made was presented to me within the time allowed the defendant by the order in said case made.

"I further certify that the foregoing case made, together with the amendments suggested by the plaintiff, and submitted to me in writing on the twenty-second of April, 1874, is correct, except that it does not contain all the evidence, and does not contain the charge of the court. It is therefore ordered and directed that the case as above made and presented, with amendments thereto, be filed with the clerk of said district court aforesaid, and made a part of the record."

*480 *The motion is to strike out that portion commencing with the words, "And at the same time and place," and ending with the words, "and does not contain the charge of the court," and also from the last clause the words, "with amendments thereto." Upon this motion a large amount of testimony has been taken in depositions before a commissioner heretofore appointed by this court. We forbear commenting upon this testimony, for it is conflicting as well as voluminous, and anything like a fair statement of it would require more space than we can afford to give. And besides, conceding that the charge were proven as fully and as broadly as it is made, that the facts were exactly as claimed by the plaintiff in error, that the statements objected to were intentionally false, and fraudulently incorporated, and that there was a conspiracy between the counsel for the city and the judge *pro tem.* to prevent the company from obtaining a case made, still we should be constrained to hold that the motion must be overruled. It involves the reformation of the certificate, and, in substance, asks this court to make a new certificate. The correction here sought is the *striking out* of a portion; but the principle would be the same if the application were to *add* something. In either case the effect is to set aside the certificate as made, and substitute a new one. It becomes really the certificate of this court, instead of the trial judge's. It may well be that if a certificate is shown to be intentionally false, and fraudulently prepared, this court should disregard it; but it should be wholly disregarded. The verdict of a jury may be shown to be willfully false to the evidence, and fraudulently prepared, but the court has no power to reform it by eliminating the false and adding the true. It must be rejected altogether. The statute we have quoted heretofore provides that the case should be settled and signed by the trial judge. If he has acted

corruptly and fraudulently, the whole act of settling and signing the entire certificate is worthless. If the corruption is in favor of *481 the plaintiff in error, and to *secure a reversal, ordinarily the rights of the defendant in error will be protected in a new trial. If in favor of the defendant in error, and to prevent a reversal, cases may arise in which it will be the duty of the reviewing court to set aside the judgment and order a new trial, presuming, on account of such corruption in the preparation of the case, that the plaintiff in error was wronged in the trial, especially when this corruption involves a conspiracy between the judge and the defendant in error. But even in such a case we should not attempt to make, by addition or subtraction, a correct certificate, but should reject it altogether. For the correction of a certificate involves a determination of what actually took place,—of what is true, and what is false. This court, before it could make a correction, must determine, not merely that the trial judge acted corruptly, but that his certificate was false in fact. For if the certificate be in fact true, the plaintiff in error has suffered no wrong. And no matter how corrupt and bad the judge may have been, the party has no right to have anything but the truth in the case or certificate. *Kansas Pac. Ry. Co. v. Simpson*, 11 Kan. *494. And upon a motion like this, to inquire into what actually took place in the trial of a case in the district court,—a trial which may have been tedious and protracted,—and to settle, upon affidavits and depositions, a bill of exceptions or case made, is a proceeding not warranted by authority, nor likely to accomplish successfully the intended result. Suppose the judge had refused to sign the certificate prepared, claiming it to be untrue: Would this court, by *mandamus*, compel him to sign it, or hear evidence to show that it was true, or that the judge corruptly refused to sign it? *Shepard v. Peyton*, 12 Kan. *616. Take the case before us: To strike out the portions of the certificate objected to would leave the case made with a statement that it contained the entire testimony certified to be correct. With the certificate as it stands, it appears that other testimony was also admitted. Now, conceding the corrupt and fraudulent conspiracy, it does not follow that this particular statement in the certificate is untrue. The case as prepared *482 may *not in fact contain the entire testimony, and it would be wrong to leave it with such a certificate. And how can we determine its truth or falsity, except by a tedious and unsatisfactory inquiry as to what testimony was actually offered and received on the trial? Surely, such a proceeding is unreasonable, and would tend to error and injustice. The motion, therefore, to strike out must be overruled. The only substantial difference between the record with the certificate as it stands, and with it as sought to be corrected, is that in the one case it does not appear to contain the entire testimony, and in the other it does. For the record does not purport to

contain the charge of the court; and one of the matters presented by plaintiff in error, on the hearing of its motion, is a claim that it could not obtain from the judge his charge.

Upon the case as it stands before us appear two principal questions; one involving the validity of the original contract between the parties, and the other the measure of damages for the breach of such contract. On the twenty-fifth of July, 1870, an ordinance was passed by the city council of the city of Fort Scott ordering an election on the thirtieth of August following, upon the question of subscribing to the stock of the corporation, plaintiff in error, and issuing the bonds of the city in payment therefor. The election was held, and resulted in favor of the subscription. The bonds were issued, and the subscription and bonds accepted by the company. For a breach of the terms of this subscription was this action brought. The first, fourth, fifth, and eighth sections of this ordinance are the only material ones, and read as follows:

"Section 1. That a special election be and the same is hereby ordered to be held in the several wards of the city of Fort Scott, on Tuesday, the thirtieth of August, 1870, for the purpose of submitting to the qualified electors of said city the question of subscribing, in the name of the city, and on the conditions hereinafter prescribed, for seventy-five thousand dollars of the capital stock of the Missouri, Kansas & Texas Railway Company, and also the further question of authorizing the mayor and city council of said city to issue
*483 *the bonds of the city in a sum not exceeding twenty-five thousand dollars, for the purpose of procuring the right of way for the road of said company through the corporate limits of the city, and, in addition thereto, of purchasing grounds, as hereinafter provided, not exceeding in the aggregate twenty-eight acres, for depots, engine-houses, machine-shops, and yard-room, and donating the same to said company.

"Sec. 4. If, upon a canvass of the votes cast at said election, it shall be found that a majority of such votes are in favor of the stock and donation, the mayor and city council shall be authorized and required to subscribe, in the name of the city of Fort Scott, for seventy-five thousand dollars of the capital stock of said company, on the following fundamental conditions, to-wit:

"*First.* That the said company, their successors, or assigns, shall, within six months from the date of the election above provided for, construct, or cause to be constructed, and put in practical operation, a line of railway from Sedalia, in Missouri, to the city of Fort Scott, and shall extend the same, as soon thereafter as practicable, in a south-westerly direction, to a point on the Missouri, Kansas & Texas Railway, lately known as the Southern Branch of the Union Pacific Railroad, Eastern Division.

"*Second.* That said company shall make said line of railway from Sedalia, or from any point to the north-westwardly thereof, to which

said company may hereafter extend its road, or cause the same to be made, the great through line by way of Fort Scott, to the south-west and south, through the Indian Territory, to Texas; and no other line of railway shall be constructed by said company, or its successors, from Nevada, in Missouri, south of Fort Scott, through Bourbon or Crawford counties, in Kansas.

"*Third.* Said company shall make or cause Fort Scott to be made the end of a division on said line of road, and shall erect engine-houses and machine-shops at or near said point, before doing so at any other point southwest of Sedalia, on the through line of railroad from Sedalia by way of Fort Scott to the Indian Territory and Texas, as soon as the business of said line shall, in the opinion of said company, render such shops necessary.

"Sec. 5. The mayor and city council shall be further authorized and required to issue the bonds of the city in payment for said stock, at par; that is, to the amount of seventy-five thousand dollars. Said bonds shall be issued in sums of not less than one thousand dollars each, shall bear interest at the rate of seven per centum per annum, payable semi-annually in the city of New York, where the principal shall also be payable, shall have interest coupons attached, shall be payable thirty years after the date thereof, and shall be executed in due form of law."

"Sec. 8. It shall also be the duty of the mayor and city council, in case the election hereinbefore provided for shall result in *484 favor of the stock and donation, to proceed forth*with to confer with the proper officers of said company, or its successors, and ascertain at the earliest possible moment the route selected by said company, or its successors, for the line of their road through the corporate limits of the city, and also the grounds chosen by them for depot and other purposes; and they are hereby authorized and required to proceed, in such manner as may be deemed most conducive to the interests of the city, to purchase so much land as may be necessary for the right of way through said city, and also twenty-five acres exclusive of the right way, at such point, convenient to the city limits, as the officers of said company may select, for depot, engine-houses, machine-shops and yard-room; and they are further authorized to issue bonds of the city, not exceeding twenty-five thousand dollars in amount, for the purpose of raising funds to pay for the same: provided, however, that in case the mayor and city council shall be of the opinion that the interest of the city will be better subserved by purchasing eight acres within the city limits, and twenty acres outside the city, at some point to be designated by the proper officers of said company, for machine-shops, engine-houses, and yard-room, they shall be authorized, and hereby required, to do so, and to issue the bonds of the city in payment therefor, as above provided."

Section 10 provided for donating to the company the right of way and grounds, when purchased. By subsequent arrangement between

the city and the company, the twenty-five thousand dollars of bonds were issued directly to the company, in lieu of the purchase by the city of the right of way and grounds. It appears that the company has complied with the first and second conditions of the subscription, but has broken the third, by building engine-houses and machine-shops at Parsons, and none at Fort Scott, and by making Parsons, and not Fort Scott, the end of a division. The petition, after the allegations necessary to show the breach of contract by the company, contains these, and only these, allegations as to damages:

"And the plaintiff charges that it has been greatly damaged by reason of the conduct of the defendant in this behalf; that if the defendant had complied with its said agreement, and made the city of Fort Scott the end of a division on the line of its road, and *485 erected the said engine-houses and *machine-shops at or near said city, the so doing would have greatly increased the business and augmented the population and wealth of the said city, and thereby decreased the rate of taxation necessary to pay the interest on said bonds so issued to the defendant. The plaintiff avers that the sole consideration of and for the said twenty-five thousand dollars in bonds was to enable the defendant to purchase grounds for said engine-houses and machine-shops, etc.; and that the defendant received said bonds, negotiated them, and applied the proceeds to other and different purposes, and did not apply the proceeds thereof to the purpose aforesaid."

In reference to the validity of the contract, so far as it involved the condition of locating the machine-shops, etc., at Fort Scott, it is hardly so presented by counsel as to justify us in deciding the question. Counsel for the city ignore it entirely, and assume, virtually, that there is no question of its validity. Counsel for the company do not directly attack its validity, nor discuss the power of the city to attach such a condition to its subscription. We quote the language of the brief. After referring to the act for the organization of cities of the second class, to show that no power is there delegated in reference to such a subscription or contract, and asserting that the only power given is that by sections 51, 52, and 53 of chapter 23 of the Laws of 1868, it says:

"What authority, then, did this latter statute confer? Simply to permit the city to subscribe to the capital stock of the railway company, and pay up such subscriptions in its bonds, or loan its credit to such company. No authority was given to enter into speculation in building machine-shops, engine-houses, speculating in real estate, or any such thing. If it had entered into a contract for such subscription, or loan, with the conditions that are attached to the ordinances herein, it is barely possible it could enforce it in case of breach, by a recovery in damages,—but only such damages as would bear a *pro rata* proportion between those conditions performed, and those not performed. In other words, that it could only make such a con-

tract as would itself furnish the measure of damages. It could take the necessary measures to protect itself in *what it paid*, but no further. * * * For the purpose of this argument, I admit that it may enforce the performance of the conditions upon which the subscription *was made, provided they are legal and mutually operative. But in case of breach it can only recover such damages as grow out of the contract, and then to be measured *pro tanto*."

We shall therefore assume that the contract of subscription, with the conditions attached, was valid and binding. It is obvious that the question of power of a municipality, in this direction, may arise in at least two ways: *First*, where, without any subscription to the capital stock, a municipality makes a contract with a railroad company for the location by the latter of its engine-houses and machine-shops in consideration of municipal aid; and, *second*, where the location is made as a condition of a subscription to the stock. Chapter 29 of the Laws of 1869, amending the sections of the law of 1868 heretofore cited, provides in terms for subscriptions by municipalities "upon such condition or conditions as may be prescribed" by them. So that express statutory authority is given for a subscription upon conditions other than the mere cash or bond payment for the stocks.

We pass, then, to the remaining question as to the measure of damages. As the charge of the court is not in the record, we cannot say what rule was laid down by the court for the admeasurement of the damages, and can only inquire whether the testimony admitted, bearing upon the matter of damages, was properly admitted. While the certificate of the judge shows that the record does not contain all the testimony, yet as the amendment suggested by counsel for the city was to insert, in lieu of the statement that it contained the entire testimony, the statement that "the foregoing is the *substance* of the testimony taken upon said trial and submitted to the jury," we feel justified in assuming that we have in the record the main matters of evidence upon which the jury based their estimate of damages. Whether this be so or not, if matters improper for their consideration were submitted to them, we cannot say that such matters did not enter into and form a part of their estimate of damages, and so prejudice the rights of the plaintiff in error. Referring to the record, we *487 find that the court *permitted testimony, over the objection of the defendant, tending to show the changes in the population and in the values of real estate in the city, the number of manufactories, dry-goods stores, etc., the price of fuel, etc., from the year prior to the subscription, and until after the building of the machine-shops and engine-houses at Parsons. And, so far as population and values are concerned, the inquiry was not directed to the number of hands which would be employed about the shops and engine-houses, nor to the value of shops and houses as taxable property, but to the general changes of population, and the depreciation generally through

the city of the value of real estate. It also permitted, over like objection, testimony as to the amount paid monthly by the railroad company to their employees at the machine-shops at Parsons. It is obvious that this testimony had no bearing on the question of a breach of the contract, but must have been admitted as bearing upon the question of damages. These matters, therefore, were presented as tending to show how much the city had been damaged by the failure of the company to comply with its contract. In other words, if the city had lost in population since the building of the shops at Parsons, the jury might attribute the loss to that fact, and mulct the company in damages accordingly. If real estate had declined in value, if the number of stores, factories, etc., had decreased, the same fact might be taken as the cause, and the company held responsible therefor.

We are clearly of the opinion that this testimony was inadmissible, though we are not so clear as to what, in a case like this, is the proper rule for the measurement of damages. The testimony was inadmissible for two or three reasons.

First. It involves a mere speculation. There is no certain connection of cause and effect between the failure to build machine-shops and engine-houses, and the decline in population, or decrease in values. Granted that the failure may tend to produce the decline and the decrease, yet it is but one of many causes; and who can tell, or by what process can it be determined, how much of the result is *488 due to *this cause? A general or local financial depression, or failure of crops, the lack of business energy or tact on the part of the citizens, the jealousy of rival places, or the prejudice of the surrounding population, the superior activity and prosperity of adjacent cities, and many other causes, may all have been actively at work, and the main if not the sole causes of the depreciation. To prove the result, and permit the jury to attribute it wholly to the single cause, would often work the greatest injustice. To present all these phenomena, and ask them to determine the extent to which this single cause has contributed to the result, is to invite the jury to the wildest speculation. It is something beyond the power of human wisdom to determine.

Again, this is tantamount to an inquiry into profits,—and profits both remote and uncertain. The city seeks to recover, not what it has paid out, nor the value of that which the company agreed to build, nor the amount which it would be entitled to collect in the way of taxes off from such improvements, but rather what profits it would have made out of the shops and engine-houses if they had been built according to contract. For the results in the way of increase of population, values, and business are really nothing but the profits which might be expected to flow from the performance by the company of its contract. Now, while profits are sometimes a legitimate matter of inquiry in actions for damages on account of breach of contract, yet it is only when such profits are the direct and im-

mediate fruits of the contract. The direct result of the performance of the contract would be the addition to the taxable property of the city of the value of the improvements made within the city. The indirect result might be the increase of the value of real estate generally through the city. And it was this indirect result to which the examination of witnesses was directed. Suppose that it were within the power of a city, as it is of a private corporation, to engage in manufacturing, and it had made a contract with an individual to build for it a factory: What, in case of a breach of such contract would be its measure of damages? Could it recover for the enhanced value of the real estate within the city which might be expected to result from the addition of such a manufacturing establishment? Clearly not. Such a result, while it might be termed the profits to flow from the enterprise, is a result too remote and uncertain to become a legitimate matter in the estimate of damages. Yet, wherein does the illustration differ from the case at bar?

Again, the theory of the law, in the matter of damages, is compensation. It aims at nothing more. Indeed, it is said by a leading writer on the subject that "the law in fact aims, not at the satisfaction, but at a division of the loss." Sedg. Dam. (3d Ed.) 35. It does not intend to so award damages that a plaintiff profits more by his adversary's breach than he would by his performance of his contract. In matters *ex delicto* the range of inquiry is wider than in actions *ex contractu*. Some reasons for this are well stated by Mr. Justice CHASTIENCY in the case of *Allison v. Chandler*, 11 Mich. 552, from whom we quote as follows: "There are some important considerations which tend to limit damages in an action upon contract which have no application to those purely of tort. Contracts are made only by the mutual consent of the respective parties; and each party, for a consideration, thereby consents that the other shall have certain rights as against him which he would not otherwise possess. In entering into the contract, the parties are supposed to understand its legal effect, and consequently the limitations which the law, for the sake of certainty, has fixed for the recovery of damages for its breach. If not satisfied with the risk which these rules impose, the parties may decline to enter into the contract, or may fix their own rule of damages when, in their nature, the amount must be uncertain. * * * Again, in the majority of cases upon contract, there is little difficulty from the nature of the subject in finding a rule by which substantial compensation may be readily estimated; and it is only in those cases where this cannot be done, and where, from the nature of the stipulations or the subject-matter, the actual damages resulting from a breach are more or less uncertain in their nature, or difficult to be shown with accuracy by the evidence, under any definite rule, that there can be any great failure of justice by adhering to such rule as will most nearly approximate the desired result. And it is precisely in these classes of cases that the parties have it in their power

to protect themselves against any loss to arise from such uncertainty, by estimating their own damages in the contract itself, and providing for themselves the rules by which the amount shall be measured, in case of a breach; and if they neglect this, they may be presumed to have assented to such damages as may be measured by the rules which the law, for the sake of certainty, has adopted."

In Sedg. Dam. (3d Ed.) 34, the rule is thus stated: "In all cases growing out of the non-performance of contracts, and in those of infringement of rights, or non-performance of the duties imposed by the law, in which there is no element of fraud, willful negligence, or malice, the *compensation* recovered in damages consists solely of the *direct pecuniary loss*, which includes, in mere money demands, interest for the detention of the amount claimed, and the costs of the suit brought for the recovery of the demand. No *indirect loss* is accounted for." Now, what was the direct pecuniary loss of the city in the case at bar? It paid \$100,000 in bonds, and some subsequent interest, for the entire agreements of the company. Does not the amount paid fairly represent the direct pecuniary loss? and if that amount was returned to the city, would she not receive compensation? So that, if it could be ascertained what amount the city paid for this particular part of the company's agreements, and that were returned, would she not receive all to which she was entitled? Would she not be compensated? Wherever, therefore, in case of a subscription upon conditions by a city to the capital stock of a railroad company there has been a failure on the part of the company to comply with one or more of the conditions, and it can be shown by the *491 contract, or *aliunde*, what amount was "paid as a consideration for the condition or conditions broken, such amount and interest is the proper measure of damages. If in this case the allegations of the petition were sustained by the evidence, and it was shown "that the sole consideration of and for the said twenty-five thousand dollars in bonds was to enable the defendant to purchase grounds for said engine-houses and machine-shops, etc.," that amount at least, with interest, would be properly recoverable from the company. Or, if there were more than this one consideration for such bonds, and the value of the other could be determined, then the difference would be properly recoverable.

Again, where the unperformed condition is the erection within the city of buildings, or other improvements, another measure of damages may be accepted. The city, by the non-performance of the condition, loses the value of the improvements for purposes of taxation, and this is a direct pecuniary loss, and one susceptible of determination worth reasonable certainty. The average rates of taxation in the past—there being no exceptional causes of temporary excessive taxation—may fairly be accepted as the rate of the future. The value of the improvements being shown, the amount of the annual tax is a simple mathematical calculation. This annual tax may be considered in the nature

of an annuity, whose present value is susceptible of exact determination by the ordinary tables. In a case like the present, where the size and value of the contemplated improvements are not fixed by the contract, the law implies that they shall be such as are reasonably suited to the purposes for which they are to be used. We suggest these measures of value as applicable, one or both, to the case at bar, though, at least for the latter, an amendment would have to be made to the petition. Cases may arise,—perhaps the case at bar (when all the facts are presented) may be found to be such an one,—in which the contract is an entirety, and there is in it no means of apportionment, and nothing can be shown *aliunde* to establish an apportionment, nor to *492 show the relative or absolute *values of the conditions performed, and those broken. In such a case the rule of law we take to be that no action can be maintained to recover the consideration, nor upon a *quantum meruit*, until all the conditions are performed; and that in case the consideration be paid in advance, and only part of the conditions are performed, the entire consideration can be recovered. Yet to this conclusion, in any given case, the law reluctantly comes, and only when it is perfectly clear that, by no construction or evidence can there be any apportionment or determination of values. With these suggestions we conclude this opinion, fully aware that there may be difficulties in the further progress of this case which we have not guarded against. We are clear that the testimony was improperly admitted, and therefore the judgment must be reversed. We are satisfied that the rules we have laid down for the measurement of damages in this class of cases are correct; but how far either one of them may be found applicable in the future trial of this case we cannot now determine, the testimony on the trial already had having been turned in an entirely different direction.

The judgment of the court below will be reversed, and a new trial ordered.

(All the justices concurring.)

HOWE MACH. CO. v. JAMES H. CLARK.

July Term, 1875.

1. **Principal and Agent: Proof of Agency: Declarations of Supposed Agent not Admissible.** While it is competent to prove a parol agency, and its nature and scope, by the testimony of the person who claims to be the agent, and to prove any parol authority by the testimony of the person who claims to possess such authority, yet it is not competent to prove the supposed authority of an agent, for the purpose of binding his principal, by proving what the supposed agent has said at some previous time. Nor is it competent to prove a supposed authority *of any kind, as against the person from whom such authority is claimed to have been received, by proving the previous statements of the person who, it is claimed, had obtained such authority.¹
2. **Witness: Impeaching: Foundation for.** It is error for the court to allow one party to attempt to impeach the testimony of a witness of the other party by reading to the jury a portion of a deposition formerly taken of the witness, without having first called the attention of the witness to any portion of the deposition, and without having first given the witness any opportunity to explain.

Error from Johnson district court.

Replevin. The property in controversy was taken on the order of delivery, and delivered to the plaintiff. Trial at the November term, 1873. Verdict and judgment for defendant, for a return of the property, or for its value if return could not be had, (the value being assessed at \$105,) and for \$33.33 damages for its caption and detention.

Devenney & Green, for plaintiff.

St. John & Parker, for defendant.

VALENTINE, J. This was an action of replevin, brought by the Howe Machine Company against James H. Clark to recover the pos-

¹ It is competent to prove a parol agency, and its nature and scope, by the testimony of the person who claims to be the agent; and the acts done by the agent may also be proved by the testimony of such person where he testifies the acts were done at the request and by the authority of the principal, *Cowles v. Burns*, 28 Kan. 32; as to how agent's knowledge affects his principal, see note to *Huff v. Farwell*, 25 N. W. Rep. 255; *Nickliss v. Holman*, 17 Kan. 22; *Roach v. Karr*, 18 Kan. 529; as to scope of employment, see *Brooke v. New York, L. E. & W. R. Co.*, 1 Atl. Rep. 206, and note; as to purchases by agent, *Savage v. Savage*, 8 Pac. Rep. 762, and note; as to agents' commissions, *Gillett v. Cormer*, 5 Kan. 370, and note; agency cannot be proved by proof of the oral declarations of the supposed agent himself, *Missouri Pac. Ry. Co. v. Stulta*, 31 Kan. 752; S. C. 8 Pac. Rep. 522; see, also, *Streeter v. Poor*, 4 Kan. 353; *Swenson v. Aultman*, 14 Kan. 278; personal liability of agents for unauthorized acts, discussed, *Abeles v. Cochran*, 22 Kan. 405; custom as to agent's commissions, *Campbell v. Fuller*, 25 Kan. 723; trust relation of, *Peak v. Ellicott*, 30 Kan. 156; S. C. 1 Pac. Rep. 499; authority to collect, what it implies, *Ryan v. Tudor*, 31 Kan. 366; S. C. 2 Pac. Rep. 797; misunderstanding of parties as to scope of agency, etc., *Turner v. Webster*, 24 Kan. 38; power to sell does not authorize agent to execute a chattel mortgage, *Switzer v. Wilvers*, 24 Kan. 384; declarations of agent, see *Greer v. Higgins*, 8 Kan. 347.

session of two horses, one set of double harness, and one set of thills. The judgment in the court below was in favor of the defendant and against the plaintiff, and the plaintiff brings the case to this court for review. The theory of the plaintiff with regard to such property is as follows: The plaintiff originally owned the property. It em-

ployed one H. E. Tracy to procure sales of its sewing-machines in Johnson county, and furnished him with an *494 "outfit"

for that purpose, consisting of said property, together with some other property. The property in controversy was hired to Tracy upon certain conditions, which conditions were immediately broken by Tracy, and the plaintiff, from that time, not only claims to have owned the property, but also claims to have had the right to the immediate possession thereof. Afterwards Tracy sold said horses and harness, and delivered the same, together with said thills, to the defendant Clark, without the knowledge or consent of the plaintiff. The petition was an ordinary petition in replevin. The answer was a general denial, without any prayer for a return of the property, or for damages, or, indeed, for anything else. The action was tried upon these pleadings; and the plaintiff claims that many errors were committed during the trial. We think there were not as many errors committed as the plaintiff claims, and yet we think there was sufficient error committed to require a reversal of the judgment.

It was error for the court to permit defendant to prove the statements of Tracy formerly made by him concerning this and other property. The defendant claimed that Tracy had authority from the Howe Machine Company to sell this identical property; and, for the purpose of proving that Tracy had such authority, introduced evidence, over the objections of the plaintiff, but with the permission of the court, showing that Tracy had at different times stated that he had such authority, and that he had authority to sell, not only this, but other property belonging to the company. Now, it is competent to prove a parol agency, and its nature and scope, by the testimony of the person who claims to be the agent. It is competent to prove a parol authority of any person to act for another, and generally to prove any parol authority of any kind, by the testimony of the person who claims to possess such authority. But it is not competent to prove the supposed authority of an agent, for the purpose of binding his principal, by proving what the supposed agent has said at some previous time. Nor is it competent to prove a supposed authority of any kind, as against the person from *495 whom such authority is claimed to have been received, by proving the previous statements of the person who it is claimed had attained such authority.

It was also error for the court to allow the defendant to attempt to impeach the testimony of the witness Blackman, by reading to the jury a portion of a deposition formerly taken of Blackman, without having first called Blackman's attention to any portion of said depo-

sition, and without having first given Blackman an opportunity to explain.

It is not necessary to consider any of the other alleged errors.

The judgment of the court below will be reversed, and cause remanded for a new trial.

(All the justices concurring.)

JAMES CARLIN v. DANIEL F. DONEGAN.

July Term, 1875.

1. **Trial: Mode of Accounting between Partners.** In an action brought by one partner against his copartner for an accounting, in which the answer, while admitting the partnership, denies the terms as alleged in the petition, and as a second defense claims damages for certain breaches by the plaintiff of the partnership contract, it is not error for the court to submit to one jury the question of the terms and duration of the partnership, then to refer to a referee to state and report the account between the partners, and finally to submit to a second jury the claims for damages.¹
2. ———: **Sufficiency of Petition: Statement of Facts: Demurrer.** A petition in an action by one partner against another, which alleges the partnership, gives a copy of the written contract therefor, alleges that the plaintiff at the outset paid in a certain specified amount, that the partnership was terminated, and that during its existence plaintiff had paid on account of debts and expenses a large sum, and that, upon a settlement of the partnership accounts which the plaintiff had vainly sought, a large sum would be found due the plaintiff, and which shows that the partnership owned a large number of chattels, and involved a *series
*496 of transactions, states a cause of action, and must be held good as against any objection that can be raised by demurrer, notwithstanding it does not in terms allege that defendant had possession of any of the partnership property, or that he had any accounts to render.
3. **Verdict: When Sufficient.** An objection that the verdict of the jury to whom certain issues were submitted is incomplete, and fails to find all the facts established by the evidence, must be in this court disregarded, when the verdict responds to the questions submitted, and no application was made in the trial court to have a fuller response, or further facts found.
4. **Partnership: Care and Diligence.** The obligation of one partner to another, in the management of the partnership business, is the exercise of good faith, and of ordinary care and prudence; and if loss happens through the ordinary negligence of a partner, he must bear the loss.²

¹In actions for an injunction, neither party is, as a matter of right, entitled to a jury. *Emporia v. Soden*, 26 Kan. 588. See, also, *Carpenter v. Carpenter*, 80 Kan. 719; S. C. 2 Pac. Rep. 122. Parties are not entitled to a jury trial, as a matter of right in equity causes. *Woodman v. Davis*, 82 Kan. 844; S. C. 4 Pac. Rep. 262.

²As to powers of partners, see note to *Williams v. Barnett*, 10 Kan. 848. As to dissolution of, and rights thereafter, etc., see *Hogendobler v. Lyon*, 12 Kan. *276,

Error from Saline district court.

Donegan, as plaintiff, had judgment, at the March term, 1874, for \$1,077.23 and costs, against Carlin, defendant.

T. F. Garver, for plaintiff in error.

Spivey & Wildman, for defendant in error.

BREWER, J. This was an action brought by the defendant in error in the district court of Saline county, to settle up a partnership between himself and Carlin. The history of the case is somewhat novel. First, a jury was impaneled to whose decision was referred the terms and duration of the partnership; then the matter was referred to a referee, to state the account between the partners; and, finally, a second jury was impaneled to pass upon certain claims of Carlin for damages resulting from breaches of the partnership contract. The novelty, or, perhaps more correctly, the rarity, of this triple proceeding, is no warrant for presuming it erroneous. Doubtless the *497 entire case might have been submitted *to a single jury, or referred to a single referee; and probably in most cases such is the better course to pursue. But still we think the course actually pursued fully warranted by the statute. Section 266 of the Code (Gen. St. 680) provides for the manner of trial of the issues in certain cases, not including, however, those like the one before us. Section 267 then declares that "all other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by a jury, or referred as provided in this Code." The court, under this section, could have tried the entire case, submitting all the issues, or any one of them, to a jury, or referred all or any one to a referee. When the case was called for trial, under the power thus granted, it submitted two of the issues to a jury, reserving the further disposition of the case for subsequent consideration. Plainly, whatever might transpire thereafter, there was no error in this. It was within the clearest letter of the statute. These issues having been settled by the verdict, there remained the accounting between the partners, and the claims for damages. The case stood for further consideration precisely as though the two issues had been settled by the pleadings, instead of by the verdict, and, thus standing, the court had power to refer any issue or issues to a referee. And the same may be said after the referee had disposed of the account between the partners.

It is insisted, however, that this case does not come within the purview of the section quoted; that, indeed, the petition fails to state facts sufficient to constitute a cause of action, and that therefore the demurrer filed to it should have been sustained. Here, too, we must differ with counsel. The petition alleged in substance the partner-

and note; also full note to *Meyer v. Krohn*, 2 N. E. Rep. 500. As to assignments and transfers, by partners for the benefit of creditors, consult the full notes of recent cases to *Wells v. Ellis*, 9 Pac. Rep. 81; *Ex parte Hopkins*, 2 N. E. Rep. 590; *Auley v. Osterman*, 25 N. W. Rep. 662.

ship, giving a copy of the written contract therefor; that the plaintiff paid in as capital a certain sum; the time of the commencement of the partnership, and of its termination; that during its existence plaintiff paid in for expenses and debts a large sum of money and property; that he had often sought a settlement with defendant,

but that defendant refused to come to any settlement; and that *498 upon such settlement a large balance would be found *due plaintiff on account of their partnership dealings. The written contract provided that the parties should enter into partnership in the stock business, to include all their property shown in their account books, and that once in three months the books should be posted, and the party having the most capital invested should receive interest on the excess at 10 per cent. The specific objection made is that "it does not appear that the defendant ever had one dollar of partnership funds, or possession of a hoof of the stock." And on the authority of *Spear v. Newell*, 2 Paine, C. C. 267, it is claimed that "the action of account does not lie in favor of one partner against another who is not shown to have received something, and have some accounts to render." It will be noticed that the objection is not that the petition is not definite and certain, which objection could only be reached by motion, but that, conceding the facts to be true, no matter how broadly and in general terms stated, no right to relief is shown. Here it appears that a partnership was formed; that the plaintiff contributed largely in money and property to it; that it was terminated; and that upon an adjustment of the partnership matters a large amount would be due the plaintiff from the defendant; and also by plain implication that the partnership was not simply a joint ownership of a single article, or a joint venture in a single transaction, but involved a number of chattels, and a series of transactions. If those be the facts, has the plaintiff no right to relief? We think the demurrer was properly overruled. It may be remarked that, when the question came before the court as to the manner of trial, it had the statements in the answer, as well as those in the petition, from which to determine the nature and extent of the issues, and from these it properly held that the case was one whose manner of trial it could order as it did.

A third matter of objection is that the verdict of the first jury was incomplete in not finding all the facts established by the evidence.

It is sufficient answer to this that it responded to the questions submitted to it by the court, and *499 that there was no application to have the jury respond more fully, or find any other or further facts.

Again, it is insisted that the court erred in its charge to the jury on the last trial. Counsel for Carlin thus state the question: "Then we have this state of facts: Donegan and Carlin were to keep 315 head of cattle on section 3, or that vicinity, in McPherson county; Donegan agreeing to furnish the means to carry on the business successfully. When the winter sets in, Donegan turns in 200 of his own

cattle, and in February the hay gives out, and no means to furnish more. The cattle are moved 20 miles by Donegan, against the wish of Carlin, and the advice of the foreman. The move results in damage." Upon this the court charged, "But if you should believe that at the time the plaintiff, Donegan, determined upon the moving, and did move them, if he did so at all, there was such a condition of things and circumstances as would reasonably raise a question as to whether they ought to be removed or not, and that Donegan used his best judgment, in good faith, in deciding such question, then he would not be responsible, though loss might occur, unless such act should show gross negligence or ignorance." Again: "It is for you to say whether or not Donegan, in determining as to whether he should move the cattle or not upon any of the times mentioned in the testimony, was guilty of ignorance, as I have above defined it, and whether in the execution of the movement he was guilty of gross negligence." The use of the adjective "gross," in the last clause of these two instructions, is claimed to be erroneous. Donegan, it is insisted, is liable for all losses resulting from ordinary negligence in the management of the business of the partnership. The court followed this charge with a definition of gross negligence, and a correct one, too, so that the jury must have gathered that if Donegan acted in good faith, and upon his best judgment, in determining upon the removal, he would not be responsible for losses resulting therefrom, although, in carrying out such removal, he omitted the care and attention which men of ordinary prudence would exercise in *500 such a *case. We do not so understand the law. Nor do we think, from other portions of the charge, the court really intended to so inform the jury. Elsewhere the law was laid down correctly, and the jury were informed that each partner would be "held responsible for fraud, negligence," etc., and that "the degree of care and diligence that partners are generally held to between themselves is such care and diligence about any transaction as men generally of common or average care and prudence would exercise." Such we suppose to be a correct statement. Each partner must not only act in good faith, but must also exercise ordinary care and prudence. Pars. Partn. 223, 224. The omission of such ordinary care and prudence is ordinary negligence; and a partner is responsible for losses resulting from ordinary negligence. For this error the judgment must be reversed. It will be unnecessary to disturb the verdict of the first jury, or the report of the referee upon the account. No error is shown as to them, and they should stand; but the case will be remanded with instructions to set aside the judgment, and the verdict of the last jury, and to proceed further in accordance with the views herein expressed.

(All the justices concurring.)

COUNTY-SEAT OF LINN Co.

July Term, 1875.

1. County-Seat Election: Powers of Commissioners: Limit to Inquiry.

Where a petition for the relocation of a county-seat has been presented to the county commissioners, and acted on by them, an election ordered, two elections had, the votes canvassed, and the place receiving the majority of the votes at the second election declared the county-seat, the courts, under the amendment of 1872 to the contest act, will not inquire into the sufficiency of the petition, and hear testimony to show that some of the names thereon were improperly there, and that therefore it did not contain the requisite number of petitioners.

***501 *2. Statutory Construction: Legislative Use of Words.** Whenever a legislature has used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject-matter, it will be understood as using it in the same sense, unless there be something in the context or the nature of things to indicate that it intended a different meaning thereby. [Prohibitory Amd. Cases, 24 Kan. 720.]

3. ———: Consent of Electors: How Ascertained. Where the legislature has provided an "election" as the means of ascertaining the wishes of the electors of a county in reference to a change of the county-seat, and this question is the only one submitted to a vote, and has made no provision for a registration, and has designated no other list or roll as the evidence of the number of electors, it may provide that the place receiving a majority of the votes cast shall become the county-seat, notwithstanding the clause in the constitution, (article 9, § 1,) which reads that "no county-seat shall be changed without the consent of a majority of the electors of the county."

4. ———. In such case the courts will not go behind the number of votes cast, and inquire whether, as a matter of fact, all legal electors voted, or whether those not voting consented to the change.¹

5. ———. While a legislature may not, by the mere machinery of rules of evidence, override and set at naught the restrictions of the constitution, or arbitrarily make conclusive evidence of a fact anything which, in the nature of things, has no connection with that fact, nor reasonably tends to prove it, yet it may make that which, according to the ordinary rules of human experience, reasonably tends to prove a fact conclusive evidence of it.²

6. County-Seat Act: Registration List: Assessment Rolls. The "assessment rolls" specified in section 4 of the county-seat act are not the registration lists of adults authorized in chapter 86 of the General Statutes.³

¹See, also, Marion Co. v. Winkley, 29 Kan. 86.

²No party has a vested right in a mere rule of evidence, and such rules, as they only affect the remedy, are within the constitutional power of the legislature to modify. *Sanders v. Greenstreet*, 28 Kan. 425. See, also, *State v. Butts*, 81 Kan. 554; *S. O. 2 Pac. Rep. 618*.

³The lists made out by the assessors under the provisions of section 65 of the tax law are the assessment rolls, referred to in section 4 of the county seat act. *State v. Phillips Co.*, 26 Kan. 419.

Original proceedings in *mandamus*.

On the seventh of September, 1875, Fred. Wagner, mayor of the city of Pleasanton, as relator, filed in this court his affidavit for a writ of *mandamus* to compel certain county officers of Linn county to remove their offices from Mound City to the city of Pleasanton. An alternative writ of *mandamus* was allowed and issued, the style of action being, "*The State of Kansas, upon the relation of Fred. Wagner, Plaintiff, against M. E. Woodford and others, Defendants.*" Said writ is as follows:

"*State of Kansas, County of Shawnee—ss.:* The State of Kansas to M. E. Woodford, William Worden, *and W. H. Shattuck, as county commissioners of the county of Linn, F. J. Weatherbie, as county clerk, Ed. R. Smith, as clerk of the district court, and A. G. Seaman, as treasurer of said county, Greeting:

"Whereas, it appears by the affidavit of Fred. Wagner, as relator, that said relator resides in and is the mayor of the city of Pleasanton, in the said county of Linn, and is the owner of real and personal property in said city, and a tax-payer and legal elector thereof; that at an election duly called and held in the several election precincts of said county of Linn, on the fourteenth of April, 1874, for the purpose of relocating the county-seat of said county,—the result of which was duly proclaimed by the board of county commissioners on the eighteenth of April, 1874,—the county-seat of said county was duly and legally located and established at said city of Pleasanton; that from that time said city of Pleasanton has been and still is the legal county-seat of said Linn county; that, upon the proclamation of said result as aforesaid, all the county offices of said county, and all the books, records, and property belonging and pertaining to said county offices, respectively, were removed to said city of Pleasanton, and there kept and maintained, and all the public business of said county required to be done and transacted at the county-seat was done and transacted at said city of Pleasanton, at which place, also, the several terms of the district court of said county were held, until about the thirteenth of March, 1875, when you, the said M. E. Woodford, Wm. Worden, and W. H. Shattuck, constituting and acting as the board of county commissioners of said Linn county, unlawfully ordered and directed the removal of said county offices, and the books, records, and property belonging and pertaining to said offices, from said city of Pleasanton to a place called Mound City, situate about seven miles from said county-seat; and that thereupon you, the said F. J. Weatherbie, county clerk, Ed. R. Smith, clerk of the district court, and A. G. Seaman, county treasurer, unlawfully and wrongfully removed your respective offices, and the books, records, and papers thereof, and property pertaining thereto, from said county-seat to said Mound City; and from that time you, the said F. J. Weatherbie, county clerk, Ed. R. Smith, clerk of the district court, and A. G. Seaman, county treasurer, have

kept and held, and still keep and hold, your respective offices as such county officers, and have been and still are transacting public and official business as such officers at said Mound City, in violation of the *statutes of this state, and of your official duty, and to the great inconvenience of said relator, and of the whole people of the county having public business to transact at the county-seat; and that you, the said M. E. Woodford, Wm. Worden, and W. H. Shattuck, county commissioners as aforesaid, have held and still hold your sessions, as the board of county commissioners of said Linn county at the place kept by said F. J. Weatherbie as the office of county clerk in said Mound City, in violation of law and your official duty, and in contempt of the wishes and interests of said relator, and of the whole people of said county.

"And whereas, it is in and by said affidavit further alleged and shown that, since the location of the county-seat of said Linn county at the city of Pleasanton as aforesaid, three-fifths of the electors of said county have not petitioned the board of county commissioners of said county for a relocation, nor for a removal of said county-seat, and that a majority of the legal electors of said county have not consented, by election, or in any other manner, to any change of said county-seat from said city of Pleasanton; that an official registration of the male adults of said county of Linn, twenty-one years of age and upwards, was made by the assessors of said county in the year 1874, as required by law, and filed in the office of the county clerk; that the whole number of such male adults, as returned by said assessors on the assessment rolls of the several townships, was 3,042; and that the whole number of legal electors in said county for all purposes connected with the ordering, holding, and determining the result of a county-seat election, in the months of January, February, and March, 1875, was 3,042.

"And whereas, it is further alleged and shown by said affidavit that the only petition presented to the board of county commissioners of said county for an election to relocate or to remove the county-seat of said county, since its location at Pleasanton as aforesaid, was presented to said board on the nineteenth of January, 1875; that said petition was not signed nor authorized by three-fifths, nor by a majority, of the legal voters of said county; that the said petition, upon which the pretended election hereinafter mentioned was held, purported to be signed by 1,964 persons, and the names subscribed thereto (numbering in all 1,964) were claimed by the persons who presented said petition to be the names of legal electors of said county; that in truth and in fact the said petition was composed of 52 separate *504 sheets of paper, part with written *and part with printed headings, fastened together with paper fasteners; that 12 of said sheets, containing 311 of said 1,964 names, were parts of an old petition circulated in the spring of 1874 by persons in favor of locating the county-seat at the center of said county, and by them abandoned

more than six months before the remaining sheets of said petition (which were circulated by the friends of Mound City) were used or circulated; that said 12 sheets were fraudulently attached to and presented with the other sheets of said petition to said board; that, in addition to said 311 names so fraudulently attached as aforesaid to said petition, 262 of the names appearing thereon were wholly fraudulent, and did not represent the name of any legal elector or electors of said county; that 82 other names appearing on said petition were the names of persons who were at the time said petition was circulated and presented, and still are, non-residents of said Linn county; that 31 other names appearing on said petition were names of persons residing in said county who did not in fact sign said petition, nor authorize any person to sign said petition for them; that 7 other names thereon were the names of persons deceased before said petition was circulated; that 6 other names thereon were the names of minors, residing in said county; that 62 names appeared on said petition in duplicate, and four in triplicate, and that all of such names were placed upon said petition by some person or persons with the intent to procure the ordering of an election and the removal of said county-seat by fraud, and to evade the statutes regulating the relocation and removal of county-seats; and that, in all, 765 names of the said 1,964 names appearing on said petition were altogether fraudulent and spurious. And the said relator, by said affidavit, further alleges and shows that the frauds contained in said petition as aforesaid were not known by him, nor by the inhabitants of said Pleasanton, until after the pretended election hereinafter mentioned had been held, nor until after the thirteenth of March, 1875; and that said relator and the people of Pleasanton could not ascertain the fraudulent character of said petition before the pretended election hereinafter mentioned was held.

"And whereas, it is by said affidavit further alleged and shown that the only election held in said county since the location of said county-seat at Pleasanton, as aforesaid, for the relocation of said county-seat, was held on the twenty-third of February and the ninth of March, 1875; that on the said twenty-third of February the *505 whole number of votes cast was 2,084, and *that of these 853 were cast in favor of Pleasanton, 873 were cast in favor of Mound City, 332 were cast in favor of Barnard, and 26 were cast in favor of La Cygne; that on said ninth of March 2,510 votes were cast, of which 1,200 were in favor of Pleasanton, and 1,310 were in favor of Mound City; that at said election held on said twenty-third of February and ninth day of March no place received votes equal in number to a majority of the whole number of legal electors of said county; and that, aside from said illegal and insufficient petition, and said inoperative and fruitless election, it is not pretended by you, or either of you, that any petition has been presented to said county board of commissioners, or filed, asking for an election, or that any election

has been held for the purpose of removing said county-seat from said city of Pleasanton, or for relocating the same; nor, in truth, has any such petition been filed or presented, or any such election been held, other than as hereinbefore stated and recited.

"And whereas, it further appears from said affidavit that the probate judge, register of deeds, and county attorney of said county still keep and hold their respective offices, and the records, books, and papers thereof, at said city of Pleasanton; and that the probate court of said county is held in said city; and that said city of Pleasanton, since the pretended election aforesaid was held, has been recognized and declared by the judge of the district court of said county to be the county-seat of said county.

"And whereas, it further appears from said affidavit that due demand has been made upon each of you to remove your respective offices to said city of Pleasanton, and there keep them, and that you neglect and refuse so to do.

"And whereas, it is further shown by said affidavit that by reason of your said unlawful and wrongful acts, in removing your respective offices, and the books and records thereof, from said city of Pleasanton, and your refusal to return them to said city, and of the transaction of the public business of said county at Mound City, the said relator, and all the other citizens, property owners, and tax-payers of said city of Pleasanton, are injured in their business and their property, and they and the whole people of said Linn county having public or private business to transact at the county-seat are greatly injured and damaged by being compelled to go such distance of seven miles from the county-seat to transact the same, and that said relator cannot have adequate relief without the aid of a writ of *mandamus*.

"And whereas, said relator prays that a writ of *mandamus* *506 . may be *awarded and issued against said defendants, commanding them to do and perform certain acts in said affidavit, and hereinafter specified:

"Now, therefore, we, being willing that due and speedy justice shall be done in the premises, do command and enjoin you, the said M. E. Woodford, Wm. Worden, and W. H. Shattuck, as county commissioners of said Linn county, that immediately after the receipt of this writ you provide suitable rooms at said city of Pleasanton, the county-seat of your said county, for county purposes; and we do command and enjoin you, the said F. J. Weatherbie, as county clerk, you, the said Ed. R. Smith, as clerk of the district court, and you, the said A. G. Seaman, as county treasurer of said county, and each of you, that, immediately after the receipt of this writ, you remove your respective offices of county clerk, clerk of the district court, and county treasurer to said city of Pleasanton, county-seat as aforesaid, and the books, papers, records, and property to said offices respectively belonging and pertaining, and that you there keep and hold your said offices as by law required; or, in default thereof, that you show cause, if any you

have, before the supreme court of the state of Kansas, at the city of Topeka, on the twenty-seventh of September, 1875, why you have not done as herein commanded and required; and have you then and there this writ, with your return thereon.

"Witness my hand, and seal of the supreme court of Kansas, at Topeka, this seventh of September, 1875.

[SEAL.]

"A. HAMMATT, Clerk Sup. Court."

Said writ is indorsed as follows:

"The within writ of *mandamus* allowed and granted by the supreme court, this seventh of September, 1875.

"SAMUEL A. KINGMAN, Ch. Justice."

Said writ being served and returned, the defendants appeared and filed a motion to quash said writ, because "(1) the relator has no capacity to sue; (2) the action is not brought in the name of the real party in interest; (3) said alternative writ does not state facts sufficient to entitle the plaintiff to the relief sought, and does not show any neglect or omission of official duty by or on the part of the defendants." This motion was set for hearing, and was argued on the nineteenth of October, 1875. A. F. Ely, Joel Moody, and McComas &

McKeighan appeared for defendants, in support of the motion *507 to quash. R. W. Blue, *S. H. Allen, W. R. Biddle, and W.

C. Webb appeared for the relator, in opposition to said motion, and in favor of the *mandamus*. The case was argued by Messrs. Ely and McComas for defendants, and by Mr. Webb for relator.

A. F. Ely, arguing that the motion to quash should be sustained, contended:

The alternative writ shows two elections, at the last of which 2,510 votes were cast: 1,200 in favor of Pleasanton, and 1,310 in favor of relocating the county-seat at Mound City. This shows the "consent of a majority of the electors of the county," within the meaning of section 1 of article 9 of the constitution. The legislation of the state shows the legislature has at all times deemed the number of votes cast at county-seat elections as conclusive of the number of electors in the county at the time of the election. See Laws 1861, p. 115, § 5, and page 117, c. 20; Laws 1863, p. 46, § 1; Laws 1864, p. 79, § 1; Laws 1865, p. 71, § 1; Laws 1867, p. 76, § 1; Gen. St. 1868, p. 297, c. 26, §§ 6, 7. In each of these enactments the legislature declares that the location of the county-seat shall be located at the place receiving "a majority of the votes cast" at the election provided or ordered for such purpose. If the legislature understood that the constitution required the consent of a majority of all the electors of the county, whether voting or not voting, it would have said so, and would have provided some mode for ascertaining the number of the electors. This has not been done; while, by repeated and continuous legislative declarations that county-seats shall be located

and relocated by "election," and the result in each case determined in accordance with the "majority of the votes cast" at such election, the legislature gives the strongest proof that the safest and most satisfactory mode of ascertaining the whole number of electors is, upon full and fair notice to all the people that an election will be held, to take the number of *votes cast* as the number of *electors of the county*.

How could the board of county commissioners know in advance
 *508 what was the number of votes in the county? It is *claimed that the "registration law," known as chapter 86, Gen. St., (p. 894,) provides an adequate mode. This act was passed in 1867, and provides for an annual registration to be made by the *county* assessor, of all "adults," males and females; while the county-seat act, Gen St. c. 26, was passed in 1868, and section 4 thereof provides that, "for the purposes" of such act, "the number of legal electors shall be ascertained from the last *assessment rolls* of the several *township* assessors in the county." But if the "registration lists" required by said chapter 86 shall be held to be the "assessment rolls" contemplated by section 4 of chapter 26, (which we deny,) then we contend that said chapter 86 is abrogated by the provisions of chapter 76 of the Laws of 1873, providing for an "enumeration of persons" to be made annually by the "township assessors," and no *such list* or enumeration is alleged or shown by the alternative writ to have been made. See cases of *State v. City of St. Joseph*, 37 Mo. 270; 38 Mo. 455; *Scott v. State*, 1 Sneed, 690.

Again, the presumption is in law that all electors *not voting* "assent" to the change or relocation of the county-seat. It is the "consent" of the electors which the constitution requires, without providing in what mode that consent must be ascertained. It is therefore for the legislature to prescribe the mode; and when the legislature provide for an "election," and declare that the result shall be determined by such election, it will be presumed, in support of such legislation, that all electors who stay away from the polls, by their absence and silence, "consent" that a "majority of the votes cast" shall determine the question for *all* "the electors of the county."

As to the petition for the election. Section 4 of the county-seat act (chapter 26) declares that "the number of legal electors," for the purposes of the petition and the election mentioned in sections 1 and 2 of that act, shall be ascertained from the "assessment rolls." The alternative writ alleges that the number of legal electors, as shown by the "registration list" made in accordance with chapter 86, was
 3,042; but it does not pretend to state the number as shown
 *509 by the "assessment rolls." But *if it did, still the determination of the board of county commissioners is conclusive.

The election petition presented to them contained 1,964 names as petitioners for a relocation of the county-seat. The county board

acted upon this petition,—*acted judicially*,—and determined that it was “the petition of three-fifths of the legal electors of the county,” and thereupon ordered the election. Their decision in this respect is final, and the court cannot now go behind their determination, and inquire into the legality or sufficiency of the petition.

Again, the alternative writ shows that *two elections* were held; one on the twenty-third of February, at which no place received a majority of the votes, and the second on the ninth of March, at which there was a majority of 110 votes cast in favor of Mound City. Now, we contend that no inquiry can be had in this case into any matter or proceeding *anterior to said second election*. And we think this question is settled in the Howard county county-seat case, recently decided by this court, in which the court say: “The amendment of 1872 to the contest act, providing that ‘in no case shall the validity of any election be inquired into beyond the one last had,’ * * * plainly indicates that a contest made *after the second election* must be limited to *that election*.” *Light v. State*, 14 Kan. *493, *494. Now, the facts in the case at bar, as shown by the alternative writ of *mandamus*, bring the case clearly within the decision quoted from; and it is too late for the relator or plaintiff to inquire into the sufficiency of the petition upon which the *first election* (that of twenty-third February) was ordered.

W. C. Webb, for the relator, submitted:

The motion of the defendants to quash the alternative writ, to be a proper proceeding under our practice, must have the force and effect of a demurrer, and as such must admit the facts alleged and stated in the writ. The real question is, Does the alternative writ state facts sufficient to entitle the relator to the relief sought?

*510 It is alleged, and is undisputed, that in April, 1874, *the county seat of Linn county was legally located at the city of Pleasanton, and that it legally remained there until the ninth of March, 1875. Then, by order of the defendant commissioners, (*illegally*, as we claim,) a part of the county officers removed to Mound City, removing also their respective offices, and the public records. The alternative writ of *mandamus* shows the facts and proceedings constituting the grounds or pretext on which the defendant commissioners made their order for such removal; and these facts and proceedings, we claim, show that the order of removal made by the defendant commissioners, and the removal made by the other defendants, were illegal, and that the county-seat still remains, in judgment of law, at Pleasanton. We assert two distinct propositions, and upon these we base our demand for the relief by *mandamus*, compelling defendants to remove their respective offices from Mound City to Pleasanton:

(1) The county board or commissioners had no jurisdiction to make the order of January 19, 1875, that the question of relocating the

county-seat be submitted to a vote at an election to be held on the twenty-third of February. The county-seat having been located at Pleasanton "by a vote of the electors of the county," the county board were powerless to act unless "upon the petition of three-fifths of the legal electors of the county." Gen. St. § 2, c. 26. The alternative writ shows and alleges that, "since the location of the county-seat of said Linn county at the city of Pleasanton as aforesaid, three-fifths of the electors of said county have not petitioned the board of county commissioners of said county for a relocation, nor for a removal of said county-seat; that a majority of the legal electors of said county have not consented, by election, or in any other manner, to any change of said county-seat from said city of Pleasanton; that an official registration of the male adults of said county of Linn, twenty-one years of age and upwards, was made by the assessors of said county in the year 1874, as required by law, and filed in the office of the county clerk; that the whole number of such male adults, as returned by said assessors on the assessment rolls of the several townships, was *511 3,042; and that the whole number of legal *electors in said county for all purposes connected with the ordering, holding, and determining the result of a county-seat election, in the months of January, February, and March, 1875, was 3,042."

These facts are admitted by defendant's motion. But it is claimed that the "registration" list referred to or stated is one made in accordance with the registration act of 1867, (Gen. St. c. 86, p. 894,) and not the one required or contemplated by section 4 of the county-seat act, (Gen. St. c. 26, p. 297.) This claim is not well founded. The statement in the writ is broad, and was made with special reference to the provisions of both the acts named, and the allegations framed so as to come within the very terms of the county-seat act. That act says: "Sec. 4. For the purposes of this act, the number of legal electors in the county shall be ascertained from the last assessment rolls of the several township assessors in the county."

Let it be first observed that there were no "township assessors" when this act was passed, (March, 1868.) The office of county assessor was not abolished, nor that of township assessor created, until March, 1869. Laws 1869, pp. 111, 113, c. 30, § 3. Said section 4 therefore means *legal assessors* for the time being, appointed and authorized by law, if it means anything. So regarding it, the alternative writ states and shows the making, returning, and filing of an "official registration" of the male adults of Linn county in the year 1874, the returning of the whole number of such adults by the assessors on the "assessment rolls of the several townships," and then avers that "the whole number of *legal electors* in said county, for all purposes connected with the ordering, holding, and determining the result of a county-seat election [in Linn county] in the months of January, February, and March, 1875, was 3,042."

This, it would seem, disposes of the technical objection, that the alternative writ counts upon and shows as the basis for the
 *512 petition a registration of adults made under the registration act alone. But it will not escape the attention of the court that the language of section 4 of the county-seat act, designating the "assessment rolls" as the basis for determining the number of "legal electors," is most bungling, and the section (if the "assessment rolls" proper were literally intended) might well be treated as void for uncertainty. Nobody having any legal sense would ever take the names of the persons assessed or taxed, as they appear on the "assessment rolls," as the list, or as determining the number, of legal electors. Nor is there anything *on or in* the "assessment rolls" by which any person assessed therein can be "ascertained" to be a "legal elector;" nothing to show whether such person is an infant or an adult, a resident or non-resident, a citizen or an alien, or, where initials only are given, whether male or female. It is *impossible*, therefore, to "ascertain from the last *assessment rolls* of the several township assessors" "the number of legal electors in the county."

The first general county-seat act can be found in the Laws of 1863, p. 46, c. 24. Said act was amended by chapter 26, Laws 1865, p. 71; and further amended by chapter 46, Laws 1867, p. 77. The present act (Gen. St. 1868, c. 26) embraces the general features of the former statutes, and contains some new provisions, most notable of which is this bungling section 4, above quoted. It is due to the revisors, however, to say that they are not responsible for the section as it stands. They reported the section (Report of Revisors, p. 420, § 3) as follows: "For the purposes of this act, the number of legal electors in the county shall be ascertained from the poll-lists of the general election next preceding the presentation of the petitions hereinbefore mentioned." With this clear, sensible, and just provision before them, it is marvelous that the legislature of 1868 should allow some ignorant meddler to substitute the almost meaningless provision now standing as section 4. But it was done; and it is proper to find, if we can, some rational construction for the section as

*513 adopted. It is not reasonable to suppose, as already *shown, that the framer or the legislature intended by the term "assessment rolls" the roll or rolls made and returned by the assessors showing the real property assessed in the county, with the names of the owners, nor the roll or rolls showing the valuation of the personal property assessed, with the names of the persons so assessed. No one could ever have supposed that such lists or rolls did or could show the "number of legal electors in the county." Then what was meant? This act was passed and approved in March, 1868. At the previous session of 1867 (Laws 1867, p. 194, c. 113) an act was passed "providing for the registration of all adult persons in each county in this state," section 1 of which provided that the assessor, "when making

the assessment of personal property," should make a list (or roll) "of all persons of both sexes, twenty-one years of age and upwards, on the first day of March of each year, and file the same in the office of the county clerk, designating the township or ward in which said person resides." Section 2 of said act provides that "whenever it is necessary to ascertain the number of adult persons twenty-one years of age or upwards in any county, township, or ward, upon which to have any action of the county commissioners, or other officers, the list on file in the county clerk's office shall be taken as conclusive on that subject."

The evident intention of this act was that the assessor should make two lists,—one of male adults and one of female adults; that, in all cases where an election or other proceeding should be called or ordered upon the petition of *electors*, the requisite number should be determined from the one list; and where any matter, as in granting licenses to sell intoxicating liquors, (section 1 of the dram-shop act,) should be determined upon the petition of the adults of *both sexes*, the requisite number of petitioners therefor should be ascertained from both such lists. Now, in the light of this registration act of 1867, then on the statute book, and the evident intent of such act, do not the words, "last assessment rolls," in section 4 of the county-seat act

of 1868, mean "assessors' lists" required by said registration *514 act? Granted *that the words are not happily or aptly chosen. But it is the duty of the court to sustain the act, by liberal interpretation, where the *intent* of the law-maker is apparent, rather than to render it wholly ineffectual by a narrow or strict construction. Giving the acts the construction suggested, and they can be upheld as prescribing a reasonable and proper rule. And so the alternative writ was framed to cover the language of both acts; the facts alleged being within the intent or scope of both. These facts, alleged in the writ, and admitted by the defendants, show that *the number* of legal electors in Linn county, when the petition was presented to the county board in January, 1875, was 3,042. Three-fifths of this number is 1,827. The petition contained 1,964 names, all told, of which 765 are admitted to be false, forged, fictitious, fraudulent, etc., leaving only 1,199 legal electors, or 626 *less* than the requisite three-fifths; and the county board had no jurisdiction to order an election, and their order therefor, and all proceedings thereunder, are void.

It is worthy of observation that the manipulators of said county-seat petition, and the county board, regarded said "assessors' lists," showing 3,042 male citizens, as the basis for determining the number of legal electors. On that basis, 1,827 were the necessary three-fifths. The petition contained 1,964 names,—only 137 more than the requisite number. The county-seat petition was filed in January, 1875. The whole number of "votes cast" at the general election in Linn county in 1874, for representatives, three districts, was 1,829;

for senator, 1,795; for associate justice of this court, 1,853. If the "votes cast" constituted the basis, 1,113 petitioners (being three-fifths of the number of legal electors at the last preceding election) would have been sufficient, and there would have been no need to add 765 false, forged, and spurious names to the 1,199 genuine names, in order to bring the case within the jurisdiction and power of the county board.

It is claimed by defendants that, the county board having passed
 *515 upon and adjudged the petition for an election sufficient, and ordered an election thereupon, which has been held, the question of its legality and sufficiency, with respect to jurisdiction, is *res adjudicata*, and that this court is concluded by their decision. It is hardly worth the while to argue against a proposition seemingly so absurd. If the proposition were correct, then no "petition"—no actual petition by any number of electors—is necessary, for a corrupt and scheming county board can forge and manufacture an entire paper, call it a petition, and affix the requisite number of false and forged names, and names of fictitious persons, and thereupon, by their order for an election, wholly override the statute, and defy the wishes and will of the people. A much stronger ground of objection is that the relator has slept upon his rights; that, if he would question the sufficiency of the petition, he should have done so before the election was held and the votes canvassed. But this objection is met and answered by the averment in the alternative writ that "the frauds contained in said petition were not known by the relator, nor by the inhabitants of said Pleasanton, until after said pretended election had been held, nor until the thirteenth of March, 1875, and that said relator, and the people of Pleasanton, could not ascertain the fraudulent character of said petition before said pretended election was held." The relator, therefore, is not estopped; the adjudication of the county board is not final; and this court, if it finds that the petition did not contain the genuine signatures of competent petitioners equal to three-fifths the number of legal electors, as shown by the "last assessment rolls," (assessors' lists,) must find that the county board had no power or authority, and must hold that said pretended election of twenty-third February and ninth March was and is utterly void, and that the county-seat still remains at Pleasanton.

Defendants contend that the amendment of 1872, to the contest act passed in 1871, precludes all inquiry as to the petition and the jurisdiction of the county board to order the election, because there
 were two elections held; one on the twenty-third February,
 *516 the other, March 9th. That amendment consists in adding to section 7 of chapter 79 of the Laws of 1871 a proviso, as follows: "Provided, however, that in no case shall the validity of any election be inquired into beyond the one last had, and upon which the proceeding is based." Laws 1872, p. 271. And counsel claim that this court in the recent Howard county case (*Light v.*

State, 14 Kan. *489) held and decided that in a case like this said proviso applies, and cuts off all inquiry. A single sentence in the opinion of the court in that case may seem to hold to that view. But such sentence is *obiter dictum*. The question was not in that case at all. The facts were most unlike the facts here; and, besides, the real question there decided was that the parties aggrieved by the action of the county board, in throwing out and refusing to canvass a part of the returns of the (so-called) first election, should have proceeded at once, and not wait (as they did) until after the (so-called) second election was had; that by so sleeping on their rights, with full knowledge of the facts, and taking the chances in a second election, they were estopped from denying the validity of the first election. And that decision was no doubt correct. But to go further, and throw in a reference to the amendment of 1872, *obiter*, was wholly unnecessary. But if the court really intended to ground its decision upon that amendment, or to fortify its decision in that case upon the construction which the court intimates, then we most respectfully submit that the proviso of 1872 was not designed or intended to have any such application, and will not bear any such construction. The words, "upon which [election] the proceeding [or action] is based," clearly indicate, not merely the isolated fact of receiving ballots on a particular day, but the entire proceedings, anterior and subsequent, necessary to constitute an "election" within the legal signification of that word. Now, in this case, upon what election does the relator base his proceedings in demanding that a peremptory *mandamus* be awarded against the defendants?

*517 Certainly not upon the vote of ninth March, *and its result, nor upon that of twenty-third February, nor upon both together. It is upon the fact that the county-seat is legally at Pleasanton, where it was located in April, 1874. The defendants base their defense upon the pretended election held twenty-third February and ninth March, 1875. So, in this respect, the proviso of 1872 has no application. But we go further, and claim that the word "election," as used in this proviso, does not mean "vote," but means decision, determination, political adjudication; and, whenever it takes two or more "votes" to secure the requisite "consent of a majority of all the legal electors," no one of such votes is properly an "election," but it takes them all, with all the necessary anterior proceedings,—petition, order, notice,—and the intermediate and subsequent proceedings,—canvass and proclamation,—to constitute an "election." It is in this sense in which the word is employed in the proviso of 1872. To illustrate: In 1870 the county-seat of Linn county was legally at Mound City. In 1871 it was relocated at La Cygne. In 1873 it was relocated at Farmer City. Conley v. Fleming, 14 Kan. *382. In 1874 it was relocated at Pleasanton. And now it is claimed that the circle is completed, and in March, 1875, it was relocated at Mound City. This action is a contest between Pleasanton and Mound City. Let us suppose that Mound City, instead of relying upon the pre-

tended election of 1875 for a *return* of the county-seat, should insist and undertake to show in this action or proceeding that the election of 1871, by which the county-seat was taken from Mound City to La Cygne, was void; that no legal removal had been effected; that all intermediate elections were therefore void; and that Mound City having again, by an accidental return of the uneasy and migratory wheelbarrow which carries the county-seat, became possessed of that unstable article, is therefore entitled to retain it. In such case the proviso of 1872 would apply, and, by its terms and evident meaning, would cut off all inquiry into the validity of the election of 1871, or either of those of 1872, 1873, and 1874. It would in effect say, what

this court in the Howard county case said, that the parties
 *518 *alleging such illegality in an election, either as a cause of action, or ground of defense, were *simply too late*; that their rights, actual or supposed, were lost by their *laches* and their delays. So, too, in regard to elections held for the purpose of voting bonds, (for the proviso of 1872 is added to a section in relation to the contest of such elections, as well as county-seat elections.) Take this case: In the city of A., in 1873, the question of voting city bonds to B. for a particular purpose was submitted to the electors. The election was held, votes cast, and canvass made. The canvassers determine the proposition lost by a trifling majority. In 1874 the same question is again submitted at an election duly called. Votes are cast and canvassed, and the canvass shows the proposition is defeated by a large majority. B. then pretends to have discovered that the canvassers of the election held in 1873 rejected the returns from one ward, which, if canvassed, would have shown a decided majority at such first election in favor of the issue of the bonds, and thereupon brings *mandamus* to compel the city council as canvassers to canvass the rejected votes, add them to those already canvassed, declare the result, and issue the bonds. Would not this court say that the proviso of 1872 applied; that such election was not "the *last one had*" upon the same question between A. and B.? Many cases might be put where the proviso of 1872 would apply as a safe rule, without perverting its language, or giving it a strained construction; both of which, it seems to us, are done in holding that the word "election" is synonymous with the word "vote." This word "election," in its broadest and best sense,—that is, in its *political* signification,—means the *act* of choosing; *choice*; determination; decision. The "act" is the necessary and continuous proceedings from the inceptive step to the end. The "choice" or "decision" is the consummation of the purpose for which the "act" was instituted and carried on. This would seem to be the obvious meaning and purport of the words of the proviso in question. To give that proviso the construction con-

tended for by defendants is to say that a corrupt county
 *519 *board and clerk may forge an entire petition, or falsely enter upon their records that a petition was presented when there was none at all; order a county-seat election; make a false canvass

of the votes cast, if necessary to their purpose; order a "second" election; and declare, *beyond the power of judicial review*, that whatever place receives a majority of the votes cast at such "second" election is the county-seat. And if a petition on which over one-third the whole number of names were forged and fraudulent, corruptly placed there in order to bring it (as to numbers) within the jurisdiction of the county board, is beyond the reach of judicial inquiry here, we may expect to see some interesting proceedings on the part of county commissioners, who in such decision will find immunity for almost every fraudulent and corrupt proceeding possible in regard to county-seat elections.

(2) But another proposition remains: If for any reason or cause this court holds against the relator upon the question of jurisdiction or authority of the county board to order an election, then we insist that the result of the election, as canvassed and proclaimed, did not remove the county-seat from Pleasanton to Mound City. We shall assume, as conclusively established by the foregoing considerations, that, at the time of said county-seat election, in February and March, 1875, the number of legal electors was, and was legally ascertained to be, 3,042. Now, the constitution provides, (article 9, § 1:) "The legislature shall provide for organizing new counties, locating county-seats, and changing county lines; and no county-seat shall be changed without the consent of a majority of the electors of the county."

The language of this section is peculiar, and the words employed show that the framers had a deliberate purpose and object in mind, and that the section was carefully framed so as to accomplish such purpose, and secure such object. Let it first be observed that the question of changing a county-seat need not necessarily be submitted to an election at all. Much less does the constitution require that such question shall be determined from the number of "*votes cast*" at an "**election*". The means or manner by which the "consent of a majority of the electors" shall be obtained, is left wholly to the discretion of the legislature. That this clause is indeed peculiar, and is greatly significant, will be seen from the pertinent language elsewhere used in the constitution:

Art. 2, § 13. "A majority of all the members elected to each house, voting in the affirmative, [and entered upon the journal,] shall be necessary to pass any bill." (See, also, section 5 of article 11.)

Art. 11, § 6. Certain laws proposing the creation of public debts must be "submitted to a direct vote of the electors of the state at some general election," and to have any effect must be "ratified by a majority of all the votes cast."

Art. 13, § 8. "No banking law shall be in force until the same shall have been submitted to a vote of the electors of the state at some general election, and approved by a majority of all the votes cast at such election."

Art. 14, § 1. Proposed amendments to the constitution must be submitted to the electors at a general election, and to be adopted must

be approved by "a majority of the electors *voting on said amendments.*"

Art. 15, § 8. The permanent location of the capital was to be submitted to a popular vote, "and a majority of all the *votes cast* at a general election shall be necessary for such location."

Sched. §§ 9, 11. The adoption of the constitution was submitted to an election to be held "on the first Tuesday in October, 1859," and to have any force or effect must receive "a majority of all the *votes cast* at such election."

Sched. § 25. The homestead clause (section 9 of article 15) was to be voted upon separately, "and if a majority of all the *votes cast* at said election shall be against such provision, then it shall be stricken from the constitution."

Now, we submit that when in every other instance the mode of submission or decision, and the rule as to sufficiency, are both succinctly set forth in the constitution, and that instrument, as to the change of county-seats, silent itself as to the *mode* of effecting the change, gives unrestricted power to the legislature in that regard, but specifically requires that, whatever the mode, *no change shall be made*

"*without the consent of a majority of the legal electors of the county,*" surely, "the peculiar form of expression must challenge the attention and careful consideration of every thoughtful man.

The language is prohibitory,—*"no county-seat shall be changed without the consent of a majority of the legal electors."* How is the number of legal electors to be ascertained? "*The legislature shall provide for locating county-seats.*" This is mandatory, and imposes upon the legislature the duty to provide by law for ascertaining the number. This duty the legislature undertook to perform by the acts of 1867 and 1868, (chapters 86 and 26, Gen. St.) It was and is within the power of the legislature to provide for changing county-seats by petition alone, or by the order of the county board, or order of the district court, or district judge, or in any other manner, provided a mode for ascertaining the number of legal electors in the county be ascertained, and a majority of such legal electors give their consent to the change. And this "consent" may be given by petition, letter, or vote, as the legislature may choose to prescribe. It is claimed by defendants that the legislature has by law said that *an election* shall be the mode for ascertaining the judgment of the electors, and that the statute says that a *majority of the votes cast* shall be sufficient. This is conceded. But the legislature has not said that the number of "*votes cast*" at such election shall be deemed and held to be the "number of legal electors in the county." They might have said so, but they did not. On the contrary, recognizing the fact that many legal voters do not vote, the legislature, in 1867, provided for a registration by the assessors of the male adults, and made such assessors' lists the guide for the county board in certain official proceedings; and in the county-seat act, in 1868, these assessors' lists were most undoubtedly intended to govern and control as to the number of "legal electors,"

for all purposes pertaining to the removal or location of county-seats. We therefore contend that the provisions of sections 6 and 7 of the county-seat act, that a majority of the "votes cast" can determine the election, must give way to the paramount command of the
 *522 constitution, which requires the consent of *a majority of all the "legal electors" in the county, whether they vote or not.

But it is urged that those who do not vote, by their absence and silence, give their consent to the change. On the other hand, it seems to us that in this case absence and silence must be held to be *non-consent*. It is like the vote of the senate or house on the passage of a bill. The constitution provides that "a majority of all the *members elected* to each house, voting in the affirmative, shall be necessary to pass any bill." Every absent member therefore counts "no," just as effectually as if he were present and voted "no." To change a county-seat the "*consent of a majority*" of *all* the legal electors is required,—not their *silence*. The people understand this; and those who are *opposed* to any change of the county-seat, and have no disposition to fool away a day or two every six months in watching the movements of that uneasy vehicle which carries the county-seat from place to place, reason thus: "I am opposed to any removal of the county-seat. If I go to the election, I shall vote *against* removal. No removal or change can be made unless a majority of all the electors in the county consent. The whole number of legal electors has been ascertained, and is known, and my vote against removal will have no greater effect than my silent dissent. *Consent* is required. To give consent requires *action*,—*affirmative* action. It will take 1,522 votes in favor of removal to change the county-seat, and it matters nothing whether the votes cast against removal be many, or few, or none. As I shall not give my consent, I shall stay at home and attend to my business." It would seem that, in view of the requirement and the prohibition of section 1 of article 9 of the constitution, above quoted, no satisfactory answer can be made to an elector who reasons in that way. When "*consent*" is *positively required*,—when it is made an indispensable condition,—the argument that the absent voter, by his absence, consents is a weak one. See cases of *Sheeley v. Wiggs*, 32 Mo. 398, and *State v. Justice's Co. Ct.*, 41 Mo. 44. What, then, is the conclusion? The number of legal electors was 3,042.

At the vote taken in March (the so-called second election) the
 *523 number of *votes cast was 2,510; 1,200 for Pleasanton, (against removal,) and 1,310 for Mound City, (for removal.) A majority of 3,042 is 1,522. The vote for Mound City is 212 short of the number requisite to show "the consent of a majority of the legal electors" to a change of the county-seat. The order of the county board, upon which the defendants rely, is void, and the relator is entitled to a peremptory *mandamus* commanding the defendants to return their offices and records to Pleasanton.

H. C. McComas, for defendants, and in reply, enlarged upon the

points submitted by his associate, (Mr. Ely,) and, in addition, he contended:

The relator is concluded by the act of 1872, limiting all inquiry to the second election. The county-seat act in very terms provides for a "first election" and a "second election;" and it would be strange if the word had a different signification in another statute upon the same subject. "Election," in its popular sense, has reference to the receiving, counting, and returning of ballots on any given question, or for the filling of a public office, or public offices, on a particular day duly designated for that purpose. In this sense it is correct to say there were *two* elections; one held on the twenty-third of February, and the second on the ninth of March. And as the rights of the defendants here are grounded upon such second election, "the one last had," no inquiry can be made, if the statute of 1872 has any force at all in regard to the validity of such *first* election, nor concerning the petition upon which such election was ordered. See Bright. Elec. Cas.

The relator has mistaken his remedy. The action of the county board in ordering the election was not void, even though the petition therefor had in fact only 1,199 genuine signatures of electors attached. At most, their action was simply erroneous, and the relator, or any party who was aggrieved by such error, might have appealed from the decision or order of the county board to the district court. Section 30, c. 25, Gen. St. Failing to appeal within the time *524 *prescribed by said section 30, the relator's right to have such order and decision of the board reviewed is gone. He cannot do indirectly in this proceeding what he has now (by reason of his omission to appeal in time) no longer a right to do directly.

The alternative writ is fatally defective. It states no cause of action. It does not allege that the 1,199 names whose genuineness is not denied, but which is admitted, did not constitute three-fifths of all the legal electors in the county at the time the petition was presented to the county board. Counsel for relator argues that such is the import of the averments. But the naked allegations of the alternative writ fall short of stating such fact, and inferences are not sufficient to sustain the writ as against our motion to quash because of the omission to state facts showing the relator to be entitled to the relief which he seeks. All the averments in the writ in relation to, or which are to be supported by, the registration act of 1867, (chapter 86, Gen. St.,) are mere surplusage, as that act cuts no figure whatever in any county-seat election, nor in any county-seat contest. The legislature having provided no other certain or satisfactory mode for ascertaining and determining "the number of legal electors in the county" for the purposes of county-seat elections, and having provided that the question of changing county-seats shall be submitted to the people at elections called specially for that purpose, the number of votes cast must be taken and held as the whole number in the

county; and a majority of those cast, in favor of a change, is sufficient proof that a majority of all the electors consent to such change.

BREWER, J. Two questions were presented and discussed by counsel in the argument of this case: *First*. Where a petition for the relocation of a county-seat has been presented to the county commissioners, and acted on by them, an election ordered, two elections had, the first not resulting in a majority for any place, the votes canvassed, and the place receiving the majority of the votes at the second election declared the county-seat, will the court inquire into the sufficiency of the *petition*, and hear testimony to show that some of the names thereon were improperly there, and that therefore it did not contain the requisite number of petitioners? *Second*. If a majority of the votes actually cast at a county-seat election are in favor of one place, and it is declared the county-seat, will the court under our statutes receive any other evidence to show that the number of legal voters in the county exceeded the number of votes cast, and inquire whether the place declared the chosen county-seat actually received the expressed consent of a majority of the electors? Both of these questions were argued with great ability by the respective counsel, and are of no little difficulty. But after a careful consideration we are constrained to answer both in the negative.

In reference to the first question it may be remarked that the manner of contesting county-seat elections, and the extent to which the courts may go in such contests, is regulated by statute. There is in the nature of things no absolute necessity for a petition of any kind. The legislature may authorize the commissioners, without any petition, and upon their own motion, to submit to the people the question of a change in the county-seat. Or, requiring a petition, it may specify the kind of petition, the number of signers, etc. It may leave the action of the commissioners open to investigation in the courts, or it may make their determination conclusive as to the sufficiency of the petition. Now, in the winter of 1871, in the case of *State v. Stockwell*, 7 Kan. *98, construing the statute of 1869, (Laws 1869, c. 27, p. 101,) we held that under the authority therein given we could inquire into any of the preliminary matters; that any matter of substance enjoined by law, and omitted, or improperly done, could be shown for the purpose of invalidating the election. There was no restriction in the statute, and the right was given to "contest the validity of the vote." And this, as we held, was broad enough to include all prior proceedings. The law of 1871, while making many changes, made in this respect only a verbal change. It provided that "the validity of the election * * * shall be tried and determined." Laws 1871, p. 193, § 7. But the subsequent legislature, that of 1872, amended by adding this proviso: "Provided, however, that in no case shall the validity of any election be inquired into beyond the one last had, and upon which the pro-

ceeding is based." Laws 1872, p. 271, § 1. Now, by this proviso the legislature plainly intended some restriction on the limits of inquiry in such contests. Coming at the session after the decision of this court construing the statute, it is not unreasonable to suppose that it was made with reference thereto, and was intended to cut off some portion of the broad field of inquiry to which that decision opened. It meant to say that, when a contest was made, some things should be considered final, and not open to attack. It says that only the validity of the *last* election, the one upon which the proceeding is based, shall be inquired into. Now, the only case in which the law contemplates two elections is in the relocation of county-seats. Does it not plainly follow that, when the two elections have been held, it means to forbid inquiry into the validity of the first; that the courts were bound to accept the prior election, and consequently the proceedings upon which it was based, as valid and regular, and could only inquire whether the last election was legally conducted, and the actual result of the voting legally ascertained and declared? Counsel, to obviate the force of this argument, contend that the term "election" does not properly apply to the separate day's voting; that there is no "election" till a result is reached, and some place has received the requisite majority; that in the word is involved the idea of *choice* and *selection*, and that there is no choice or selection until some place is chosen or selected. Counsel may be technically correct in his definition; but the legislature has in the very statute used the word in a different sense. It speaks of the first day's voting as an "election," and says that if, at that election, no place receives a majority, *a second "election" shall be had. And such is a common use of the term. Now, when the legislature has used a word in a statute in one sense, and with one meaning, when it subsequently uses the same word in legislation respecting the same subject-matter, it will be understood to have used it in the same sense, unless there be something in the context, or the nature of things, to indicate that it intended a different meaning thereby. The courts may not give it a different meaning to sustain their views of what the law ought to be. They must seek simply to ascertain the legislative intent, and then enforce it. We conclude, therefore, that we cannot now inquire into the sufficiency of the signatures to the petition. *Light v. State*, 14 Kan. *489, *493.

The second question is even more difficult. The constitution (article 9, § 1) reads: "No county-seat shall be changed without the consent of a majority of the electors of the county." If there are three thousand electors in a county, and only thirteen hundred vote in favor of the change, by what right can the legislature override the constitution, and say that the change may be made without the express consent of the majority? We do not doubt the restricting power of the constitutional provision; and whenever, by any of the ordinary or prescribed means of ascertaining the fact, it appears that a major-

ity of the electors have not consented to the change, no change can be had. The question is not as to the effect of a fact, but the means of ascertaining it,—the evidence to be received. Within certain limits the legislature has power to prescribe what shall be evidence, *prima facie* or conclusive, of any fact. It may say that a tax deed shall be *prima facie* evidence of the regularity of all the prior proceedings; that a judgment or an award shall be conclusive evidence of the amount due from the defendant. And when this evidence, which the legislature has prescribed, is produced, the courts must accept the fact as established. In this case, the legislature has said that the place receiving the majority of *the votes cast*, shall become the county-seat, thus making the number of votes cast the evidence of the number of electors. Doubtless the legislature might make other things evidence of this fact. It might require, as preliminary to every election, a registration, and make that registration the evidence. We do not mean that it may, by the mere machinery of rules of evidence, override or set at naught the restrictions of the constitution, or that it could arbitrarily make conclusive evidence of the number of voters any list or roll which, in the nature of things, has no connection with that fact, and does not reasonably tend to prove it. But when it adopts as conclusive evidence of the fact anything which, according to the ordinary rules of human experience, reasonably tends to prove the fact, the courts are not at liberty to ignore or go behind such evidence.

Now, it is not merely the privilege, but it is the duty, of every elector to vote. It is one of the obligations of citizenship. True, as a matter of fact, every elector may not vote. So, too, every elector may not be registered. Yet there is a reasonable connection between either the number of votes cast, or the registration list, and the number of electors, sufficient to justify the legislature in declaring that either of the former shall be deemed conclusive evidence of the latter. If it were not so, then that finality which, in the best interests of society, is often as important as mere certainty, might be fearfully endangered. If the legislature could not establish any such easily ascertainable and convenient evidence of the fact,—but the inquiry must always go to the actual number of persons in the county on the day of election having the legal qualification of electors, it is patent that, at least in the larger and more densely populated counties, an investigation might be opened, the cost and time of which would be simply immense. The injury which would result to the community from the suspense and delay of such an investigation far exceeds that which flows from the possibility that there were enough voters who did not vote, or were not registered, to have changed the result. While the constitution must be accepted as the binding law, yet it must be construed in the light of common customs and accepted facts. And the three ordinary and recognized modes of ascertaining the number of electors are the census, a registration, and the actual voting. Neither of them may, in any given case, be exactly correct.

Yet how little of testimony points with unerring certainty to the ultimate fact! Almost every kind of evidence is liable to come short of absolute exactness. Yet with these as the ordinary evidences of the number of electors, if the constitution sought to compel a resort to other and more difficult, if more accurate, evidence, it would seem as though such testimony ought to have been indicated. It provided for both a census and a registration. Const. art. 2, § 26; art. 5, § 4.

Is it unreasonable to suppose that it contemplated thereby all the uses to which they were ordinarily and might reasonably be put, and among them that of furnishing the evidence of the number of electors? True, the legislature has in this respect failed to avail itself of either of these two kinds of testimony. But is it thereby restricted from falling back upon that testimony which, in the absence of census and registration, is the ordinarily accepted evidence of the number of electors, to-wit, the number of votes cast? It is a general rule, in respect to elections, that where the number of the electoral body is fixed, as in case of the directors or members of a corporation, or a legislature, there a majority means a majority of the whole body. But where the electoral body is indefinite in numbers, as in ordinary popular elections, there a majority means a majority of the votes actually cast. But it is said that the framers of the constitution evidently had this general rule in mind, and made special provisions for the several elections. Thus, for the passage of any bill or joint resolution, "a majority of all the members elected to each house voting in the affirmative" is necessary. Const. art. 2, § 13. To authorize the contraction of certain indebtedness, the proposed law must "be ratified by a majority of all the votes cast at such general election." Article 11, § 6. To adopt amendments to the constitution requires only "a majority of the electors voting on said amendments." Article

14, § 1. Having been so precise in these matters, must it not
 *530 be held that they intended to be equally precise in forbidding the change of a county-seat without the consent of a majority of the electors? There is doubtless great force in this argument. But the objection to it is that it simply brings us to the point of greatest difficulty, and that is the determination of *what evidence* shall be accepted as conclusive of the fact. It must be noticed that *the vote* of a majority is not necessary, nor even the formality of *an election*. The consent of a majority of the electors, in whatever form expressed, whether in election or by petition or otherwise, is sufficient. May it not be said, with great force, as it is often said in reference to ordinary popular elections, that those not voting consent to the action of those voting? Suppose that the matter was thrown open to full investigation, and an inquiry made as to the actual number of electors present in the county on the day of elections, would it be other than carrying out the strict letter of the constitution to inquire as to each elector not voting whether he consented to the change, and, if the same proportion ran through the non-voting as the voting electors, to uphold and enforce the already declared result? And

yet the mere statement of such a range of inquiry carries its own refutation.

It seems to us, therefore, that where the legislature has provided *an election* as the means of ascertaining the wishes of the electors of a county in reference to a change of the county-seat, and has made no provision for a registration, and has designated no other list or roll as the evidence of the number of electors, it may, under the constitutional provision quoted, declare that the place receiving a majority of *the votes cast* shall be the county-seat. As these county-seat elections cannot be held on the days of general elections, these considerations do not apply to cases where two or more questions are submitted at the same election, and more votes are cast upon one question than upon another; for there the highest number of votes cast upon any one question is clear evidence of the number of voters, which may not, in view of any such constitutional restriction as above quoted, be disregarded in any contest arising as to the decision

*531 of the other questions. *Nor, perhaps, do they apply to cases where two elections are held so near together in time that the courts may fairly say that the difference between the number of votes cast upon the two elections cannot reasonably be accounted for upon the theory of a change in the number of electors. In the consideration of this question we have examined carefully the following cases, some suggested by counsel in this case, others cited by counsel in a case of contested county-seat election, from Osage county, and others not cited by either: *Taylor v. Taylor*, 10 Minn. 107, (Gil. 81;); *People v. Warfield*, 20 Ill. 159; *Louisville & N. R. Co. v. Davidson Co. Ct.*, 1 Sneed, 691; *State v. Winkelmeier*, 35 Mo. 103; *State v. City of St. Joseph*, 37 Mo. 270; *State v. Binder*, 38 Mo. 450; *State v. Sutterfield*, 54 Mo. 391; *Gillespie v. Palmer*, 20 Wis. 544; *Chesster & L. N. G. R. Co. v. County of Caldwell*, 72 N. C. 486; *Hawkins v. County of Carroll*, 50 Miss. 735.

But it is said by counsel that, in the fourth section of the act relating to the removal of county-seats, (chapter 26, Gen. St. 247,) the legislature has provided that, "for the purpose of this act, the number of legal electors in the county shall be ascertained from the last assessment rolls of the several township assessors in the county;" and that this makes another list the evidence of the number of electors, and that, as alleged, according to such list, the requisite majority was not obtained. The only "assessment roll" prepared by township assessors required or authorized at the time of the passage of this county-seat act was that of personal property, on which the assessor was required to place a list of the persons, companies, or corporations in whose names the personal property was listed. Gen. St. 1040, § 61. Now, it was not claimed by counsel that according to *this roll* the number of votes cast was less than the number of voters; but the roll to which he refers was that required by chapter 86 of the General Statutes, "An act for the registration of adults." But the objection

to that is that that registration list is in no particular within the description of the roll specified in said section 4. It is not, or at least was not at the time of the passage of the county-seat act, *532 "a roll prepared by the township assessors, but one prepared by the county assessor. It is in no sense an "assessment roll," but a *registration list*. It is not, therefore, within the letter of the statute; and there was at the time an assessment roll prepared by the township assessors, as above indicated, which was within the letter. Nor is it within the spirit; for this registration list is not of *electors*, but of "adults, over twenty-one years of age." It includes both sexes, aliens, convicts, and other non-electors, as well as the electors, and no discrimination or distinction is called for; so that there is no means of ascertaining from this list the exact number of electors, and no greater probability of exactness than is furnished by the returns of votes cast. And to make such registration list conclusive in the matter of the voting, as well as to the number of petitioners, is in plain disregard of the express direction of the legislature that a majority of the votes cast shall decide.

These questions arise on a motion to quash an alternative writ of *mandamus*, and the motion to quash must be sustained.

(All the justices concurring.)

ISABEL JOHNSON v. E. D. CAIN.

July Term, 1875.

Equity: Claim for Improvements on Lands: Death of Debtor. Where A. employs C. to make improvements on land occupied by A. as a homestead, and gives to C. his promissory note therefor, and A. afterwards dies intestate, and an administrator is appointed, and C. presents his claim against the estate, which is allowed by the probate court, and there is no personal property with which to pay the debts, *held*, that a showing by the plaintiff, C., of the foregoing facts, is not sufficient to entitle him to maintain an action in the district court against the administrator and two out of five of the heirs for the purpose of obtaining judgment *538 against the said two heirs to sell their interest *in said land for the purpose of satisfying the plaintiff's claim. Whatever remedy the plaintiff may have in such a case, where he has no specific lien on the particular piece of land in question, where the estate is still unsettled, where the administrator is still acting, and where the probate court is still exercising jurisdiction over the estate, is in the probate court.¹

¹As to jurisdiction of probate court to order sale of homestead, see *Fudge v. Fudge*, 28 Kan. 419; as to jurisdiction of probate and district courts, respectively, see *Klemp v. Winter*, 28 Kan. 705, and cases there cited. Where probate court has jurisdiction, and is still acting, actions in other courts in reference to the same subject-matter should not be encouraged. *Stratton v. McCandless*, 27 Kan. 296.

Error from Neosho district court.

The case is stated in the opinion.

C. O. French, for plaintiff in error.

Cain's action cannot be maintained. The petition does not show a final settlement of the estate of Daniel Campbell. An averment "that there is no personal property belonging to said estate" is not equivalent to an averment that the estate is insolvent. There must be an averment of final settlement and insolvency of the estate before Cain can proceed against the heirs in equity.

The petition shows a valid and subsisting cause of action against the estate of Campbell, which claim was duly allowed in the probate court. The petition demands no relief against the heirs named as defendants. It simply asks a judgment against the administrator. The judgment of the probate court gives Cain all that he asks in the district court.

The facts alleged in the petition do not entitle Cain to the relief granted by the district court. At the time of the making of the contract for digging the well, after settlement of the contract price by notes, and at the time of the death of Daniel Campbell, said Campbell had only a possessory right in the described real estate. His equity in the land was not a subject of lien,—was not a subject of execution. When the widow and the heirs took said land *534 they took it *free from any lien,—if such there could be. This is the proper construction of section 2, c. 33, Gen. St., when construed in connection with section 1, c. 38. The exemption from sale is only between the immediate parties to the contract. The lien for the erection of improvements (chapter 33) must be in the nature of an incumbrance, like a mechanic's lien. The taking of the individual notes of Campbell by Cain for the work, and the putting of them into judgment in a court of record, was a waiver of any lien upon the real estate. Cain could not have filed the notes for even a mechanic's lien. The legislature first conferred this right in 1871. The notes were executed in 1870. A judgment against an administrator, as such, cannot be a lien on the real estate of the decedent. This is too self-evident for argument. How, then, can the court *declare* it a lien, and incumber the homestead? It is manifestly inequitable to declare the judgment a lien on the real estate, dismiss the suit as to three of the five heirs, and order the right, title, and interest of two only of the heirs to be sold upon execution to pay the whole debt.

Stillwell & Baylies and *B. W. Lemert*, for defendant in error.

Plaintiff in error can only complain of the judgment against herself, and we urge that the petition, as to the administrator, was sufficient to sustain the judgment against him. *Burnes v. Simpson*, 9 Kan. *658; *Simpson v. Cochran*, 23 Iowa, 81; *Ames v. Hoy*, 12 Cal. 11. The objection to the sufficiency of the petition is made for the first time in this court, and it is well settled that such objection will

be regarded with disfavor. The interest of plaintiff in error in the lands described in the petition is only such as she derived by inheritance from Daniel Campbell. Said premises, in his life-time, were subject to the payment of the debt due Cain, the debt being an obligation contracted for the erection of improvements on said premises. Const. art. 15, § 9. It can make no difference, therefore, that the premises were a homestead, excepting for the purpose of determining whether plaintiff in error was a proper party defendant, and whether it be a proper practice to make all parties defendants who are interested in the property sought to be subjected to the payment of the judgment, in a case like the present. The heirs of Campbell could take no greater estate, nor more superior right in the premises, than the party possessed from whom they inherit. 4 Kent, Comm. 419; *Watkins v. Holman*, 16 Pet. 25. If Cain could enforce payment out of said premises while Campbell was alive, it will hardly be contended that his death worked an extinguishment of the right of lien, or to enforce payment out of the said premises, in the hands of the heirs as against innocent purchasers from Campbell; and it is immaterial to this case what the rights of plaintiff in error would be if she held title by purchase instead of by descent. But, claiming by descent, we conclude she received the estate subject to its liability to be sold to pay the debts of the defendant in error.

On the direct question of the power of the court to declare the judgment a lien on the premises, we submit that, if there be error in this, it is error without prejudice to plaintiff in error, and the judgment will not be reversed on that ground. Civil Code, §§ 140, 304; *Kansas Pac. Ry. Co. v. Pointer*, 9 Kan. *620. It cannot matter, in legal effect, if the premises are subject to sale to satisfy the money judgment against the administrator,—and the court has a right to determine that question in this action,—whether the land be simply declared subject to sale to satisfy the debt, or the debt be declared a lien on the premises, or that the premises be ordered sold, and the proceeds be applied to the payment of the money due on the judgment. Certainly, if the premises can be sold at all to satisfy the judgment, plaintiff in error ought not to complain that the judgment is too strong. If, without being declared a lien, the purchaser could obtain a good title, as to her, the only effect of this provision would seem to be to more fully assure the purchaser that his title will be perfect, and thus insure competition at the sale.

*536 *VALENTINE, J. This was an action brought by Cain against the administrator and heirs of the estate of Daniel Campbell, deceased. The facts of the case seem to be about as follows: During the year 1870, Campbell, with his wife and family, resided upon and occupied said land, although the title thereto was in the United States. Campbell employed Cain to dig a well on the premises, which Cain did, and, in consideration therefor, Campbell gave to Cain

his promissory notes. Afterwards, Campbell died intestate, and his widow, (Anna Campbell,) who had been appointed administratrix of his estate, then procured (by entry) the title to said land from the United States for said heirs. Afterwards, Cain presented his claim against the estate for the amount due on said notes, which claim was allowed by the probate court. Mrs. Campbell then died intestate. No administrator was appointed for her estate, but Thomas Leahy was afterwards appointed administrator *de bonis non* of said Daniel Campbell's estate. Cain then commenced this action in the district court against said Leahy, as administrator, and against all the heirs—five in number—of said Daniel Campbell and Mrs. Anna Campbell. The object of the action was to recover a money judgment against the administrator for the said amount allowed by the probate court, and to have said land sold to satisfy said judgment. Afterwards, Cain dismissed his action as against three of the heirs, and then took judgment by default against the administrator and the other two heirs, one of whom was the present plaintiff in error, Mrs. Isabel Johnson.

The judgment rendered against Mrs. Johnson was that her interest in said land should be sold to satisfy said money judgment rendered against the administrator. The only question for this court to consider is whether this judgment rendered against Mrs. Johnson is correct or not. No other person is complaining in this court. We

hardly think such judgment is correct. It will be noticed *537 from the record that *the estate of Daniel Campbell had not been settled when this action was commenced. The administrator was still acting, and, of course, the probate court was still exercising jurisdiction over the estate. There may have been a vast number and amount of other debts against the estate yet unsettled and unpaid. And Mr. Cain had no specific lien upon this particular piece of land in controversy. That the district court has jurisdiction, as against heirs, to hear and determine all the rights of such heirs in and to any specific piece of land, in any suit appertaining to the title to such land, or to some specific lien or incumbrance thereon, although the land may belong to a decedent's unsettled estate, and although the probate court may still be exercising jurisdiction over such estate, we suppose will not be questioned. And that specific liens may generally be ascertained and foreclosed in the district court, although an administrator and heirs may be necessary parties to the action, we suppose will also be admitted. *Shoemaker v. Brown*, 10 Kan. *383. And we also suppose that it will be admitted that in many cases where an estate has already been settled, and the administrator discharged, courts of equity (such as the district courts are) will exercise jurisdiction over the heirs, and over any matter pertaining to such estate, so as to do justice to any person holding a claim against such estate. *Shoemaker v. Brown, supra*. And, generally, courts of equity will exercise jurisdiction over estates, and

over heirs, executors, administrators, devisees, legatees, and creditors of such estates, whenever it is equitable and right that they should do so. *Thompson v. Brown*, 4 Johns. Ch. 619. But courts of equity never exercise jurisdiction where it would be inequitable to do so, and in many cases do not exercise jurisdiction where the plaintiff has another plain and adequate remedy by an ordinary legal proceeding, or where an adequate remedy is specifically given to him by statute. Before proceeding further, however, we would say that we shall decide this case upon the theory that Daniel Campbell owned said land when he died, (although this might be questioned as a fact,) and that he left it subject to the payment of all his debts, or, at *538 *least, to all debts contracted for improvements on the land.

And, upon this theory or assumption, may this action against Mrs. Johnson be maintained? We think not. It lacks equity in several particulars. Now, as we have before stated, there may be a vast number of other claims, equal, or even prior, in law and equity, to the plaintiff's claims, still outstanding against said estate. And there may or may not be a vast number of other pieces of land belonging to the estate with which such claims may be paid. Now, would it be equitable to allow each holder of a claim to select his own piece of land from which to pay his debt? If such were allowed, the rights of many innocent third parties might unnecessarily be disturbed; and there might, indeed, be numerous, unavoidable, and inextricable conflicts between even the claimholders themselves. But, even if everything else were fair and equitable, it would certainly seem to be unfair and inequitable to allow separate actions to be prosecuted, separate orders for the sale of the different pieces of land to be entered, separate advertisements of sales to be published, and separate sales to be made, when the probate court, which has a list of all claims presented against the estate, might, by one order, cause a sufficient amount of the lands belonging to the estate to be sold to satisfy all the debts, and when such land might all be advertised and sold at one time, and thereby save all the costs and great inconvenience of separate orders, separate advertisements, separate sales, and separate adjustments of the proceeds of such sales. But suppose that, instead of there being several pieces of land belonging to the estate, there were only one, would it be equitable in that case for one claimholder to have that land sold to pay his claim, when many of the other claims might be prior to or of a higher class than his? Suppose the estate were insolvent, must his claim be paid in full, or as far as the property will go, at the expense of all the others? And, taking the present case, is it equitable that the interest of two of the heirs in said land should be taken to pay the plaintiff's claim, when there are three other heirs,—five in all? Indeed, what *539 is *there equitable about the plaintiff's claim? The plaintiff originally had a claim against the estate on said notes; but such claim was purely of a legal character. He had it established

in the probate court against the administrator, thereby converting it into a judgment. But that did not convert it into an equitable demand against either the heirs or the administrator; and nothing has since transpired to give it the character of an equitable demand.

For the purpose of this case, we shall assume that said land is still a homestead, (though this is not shown by the record,) and therefore that it is not subject to any of the ordinary debts against the estate, but that it is subject to such of the debts only as are specific liens upon the land, or to such as have been contracted for the purchase money, or for improvements made on the land, and that the plaintiff's debt is one of those contracted for improvements made on the land; and therefore that while this land is exempt, under the homestead exemption laws, from being applied in payment of any of the ordinary debts of the estate, yet that it is no more exempt from being applied in payment of the plaintiff's debt than any other lands belonging to the estate. And still we do not think that all these facts, taken together, but without the aid of other facts, are sufficient to authorize the plaintiff to seek the equitable jurisdiction of the district court for the purpose of collecting his claim. If Mr. Campbell were still living, the plaintiff could sue either in the district or in a justice's court, and, after obtaining judgment, (his claim being for improvements on lands,) could reach Mr. Campbell's homestead with an execution, without any aid from a court of equity. An execution for that purpose could be issued direct from a judgment in the district court, and could be issued from a transcript of a justice's judgment filed in the office of the clerk of the district court. In either case the judgment would be a legal judgment, in contradistinction to an equitable judgment. But, Mr. Campbell having died, the plaintiff properly obtained a judgment on his claim in the probate court; and, having

*540 done so, he might then have obtained an order from *the probate court authorizing the administrator to sell this land, or any other land belonging to the estate, for the purpose of paying the plaintiff's debt. But of course the plaintiff would have no right to dictate as to which parcel of the lands belonging to the estate should be sold to satisfy his claim, for it would all be equally liable to be sold for that purpose; and it might be more to the interest of the estate to have some other piece of land sold. And the plaintiff would have no more right to have this land sold than any other creditor of the estate having a claim of equal dignity and rank in law and equity.

The judgment of the district court will be reversed, and cause remanded for further and proper proceedings.

(All the justices concurring.)

ETTA JONES and others v. AMOS S. LAPHAM.

July Term, 1875.

1. **Parties: Foreclosure of Mortgage: Decree.** A mortgagor who, subsequently to the execution of the mortgage, has conveyed away all his interest in the mortgaged premises, is not a necessary party to the foreclosure of such mortgage; and, in such case, a decree may be entered which, after finding the amount due on the note, and without any personal judgment for the money, directs a sale of the mortgaged premises in satisfaction of the amount due.
2. **Mortgage: By Equitable Owner.** A party who holds real estate under a bond for a deed from the owner of the legal title, is in possession thereof, and has made valuable improvements thereon, has such an interest as he can convey by mortgage. [Seaman v. Huffaker, 21 Kan. 262; Laughlin v. Braley, 25 Kan. 147.]
3. **—: Foreclosure: Form of Decree: Sale: Interest Acquired.** Where a mortgage appears upon its face to be a mortgage of the entire estate, the decree and order of sale may properly follow the mortgage, but the purchaser will take only the interest of the mortgagor in the premises. In such a case it is no ground for reversal that it appeared on the trial that the mortgagor had only an equitable interest instead *541 of the full legal title, and that the decree did not *direct that proceedings subsequent to the decree should be in accordance with the provisions of sections 481 and following of the Code of Civil Procedure.
4. **Liens: Priority of Legal and Equitable.** While, in a contest between a lien upon an equitable interest and one upon a full legal title, the latter, though subsequent in time, may be preferred to the former, if the holder thereof be an innocent and *bona fide* holder without notice, yet it will not be so preferred if he, at the time of obtaining his lien, had full knowledge of the outstanding equity and the prior lien.
5. **Notice: Actual and Constructive.** A party purchasing a legal estate, having knowledge of an outstanding equitable interest, is chargeable, under our registry statute, with notice of any recorded conveyance or mortgage of such equitable interest.

Error from Allen district court.

The case is stated in the opinion.

H. W. Talcott, for plaintiff in error.

If Hull had only an equitable title, he could by his mortgage convey no greater interest. His mortgagee has no greater rights—certainly not as to the legal owner of the property sought to be appropriated—than would a judgment creditor; and yet a judgment creditor cannot subject his debtor's equitable interest to sale except in particular instances, as prescribed by sections 481 to 504 of the Code. See, also, *Kiser v. Sawyer*, 4 Kan. *503. As neither of the steps required by the statutes was complied with, the equitable interest of Hull could not be sold as prayed for by Lapham, or in the proceedings commenced by him.

Hull did not have a mortgageable interest. William C. Jones, the legal owner, never parted with his title to Hull. Hull had *542 no title, and could convey none, until he paid the *purchase money and got his deed. *Stevens v. Chadwick*, 10 Kan. *406. Jones had all the rights of a vendor, and could sell to whom he pleased. See *Kirkwood v. Koester*, 11 Kan. *471. This last case is certainly decisive. It is parallel with the one at bar. The only difference in fact is that *Kirkwood's* claim was through a judgment and execution lien, while *Lapham's* is through a mortgage from a man who had no title. If *Kirkwood's* was worthless as to *Koester*, so was *Lapham's* as to plaintiffs in error. If Hull *did* have an interest that could be mortgaged, he could not convey to *Lapham* more rights than he had himself. All that *Lapham* could do on such a mortgage would be to fulfill Hull's contract, and sue Jones for specific performance. 1 Washb. Real Prop. 501; *Dressler v. Davis*, 7 Wis. 449. But, if Hull had such an interest, it was not that interest that he mortgaged, or attempted to mortgage. There was no attempt to mortgage any particular interest in the property, but it was of the premises itself; it was of something he did not own, and was therefore void as to those who did own.

Allen & Allen and L. W. Keplinger, for defendant in error.

In general, any interest that is tangible may be mortgaged. A person holding land under a contract for a deed may mortgage his interest. *Neligh v. Michenor*, 11 N. J. Eq. 539; *Alderson v. Ames*, 6 Md. 52.

Was the record of Hull's mortgage notice thereof to subsequent purchasers having notice of Hull's interest? A purchaser of land in the actual possession of a third party is chargeable with notice of any equitable title of such party, whatever the same may prove to be. *McKinzie v. Perrill*, 15 Ohio St. 162; *Williams v. Sprigg*, 6 Ohio St. 594; *Brice v. Brice*, 5 Barb. 534; *Lyons v. Bodenhamer*, 7 Kan. *455. The registry of a mortgage is, of itself, notice in law to all subsequent purchasers. *Alderson v. Ames*, 6 Md. 52; *Simpson v. Mundee*, 8 Kan. *185; *Broun v. Simpson*, 4 Kan. *76. And it seems the registry of a mere equitable mortgage or incumbrance is notice to the subsequent purchaser of the legal estate, so as to entitle such mortgage to a preference. 1 Johns. Ch. 394. That this is *543 true, in case purchaser of legal estate is aware of *the equitable mortgagor's interest, see *White v. Butt*, 32 Iowa, 335. In the case at bar the jury found that *Maggie Murray*, at the time of receiving her conveyance, had knowledge of the interest of Hull. Having this, we hold that, under the decisions above quoted, and our statutes, she was bound to take notice of everything relating to Hull's title. Gen. St. c. 22, §§ 19, 20; definition of "real estate," Id. 999; *Kirkwood v. Koester*, 11 Kan. *474. So far as *Etta Jones* is concerned, she certainly can claim no rights, as against defendant in error, as the jury both found that she knew nothing about the con-

veyance to her, and that her husband, W. C. Jones, acting as her agent, who held part of the legal title, had full knowledge of the rights of Lapham and Hull.

BREWER, J. The facts in this case are as follows: On October 28, 1871, one W. H. Hull was in possession of two lots in the city of Iola, under a bond for a deed from the holders of the legal title. He had paid part of the purchase money, and the time for the payment of the residue had not yet expired. Upon these lots he had made improvements to the amount of \$800. On that date he executed a note to defendant in error, and to secure the same gave a mortgage upon these lots. This was recorded November 8, 1871. Subsequently, the holders of the legal title conveyed the property to Maggie Murray, one of the plaintiffs in error, and she conveyed an interest to Etta Jones, the other plaintiff in error. These conveyances were subsequent to the expiration of the time for Hull to complete his payments. Maggie Murray paid \$40 to the holders of the legal title for the conveyance, but Etta Jones paid nothing to Maggie Murray for her deed. They paid Hull, however, \$220 for his improvements. Maggie Murray had knowledge at the time of her conveyance of Hull's interest and possession, but not of Lapham's mortgage. Etta Jones knew nothing of the conveyance to herself, or anything about the matter, until suit was commenced to foreclose the mortgage.

*544 Her husband, however, who acted as her agent in the matter, had full knowledge of Hull's interest and possession, and of Lapham's mortgage. In fact, he was one of the holders of the legal title who had executed to Hull the bond for a deed. The deeds to Maggie Murray, and from her to Etta Jones, and the payments of money, were a continuous and simple transaction. Upon these facts the district court rendered a decree of foreclosure and sale of the property. Two or three questions are presented for decision.

It is insisted that no decree of foreclosure could be entered because no legal service was made upon Hull, the mortgagor. Service was attempted by publication, but it is insisted that this was fatally defective. Conceding this to be so, (though we express no opinion as to whether it was so or not,) yet these plaintiffs in error are not in a position to take advantage of any such defect. The petition alleges the execution of the note and mortgage, and that so much remains due on the note. These plaintiffs in error in their answer make no denial of this. As between Lapham and them, it is an admitted fact. It also appears that they are the present holders of the legal title. Hence, though the mortgagor was never in court, was never even made a party to the action, the court might find the amount of the lien, and direct the sale of the property to satisfy that lien. It often happens that the title to property subject to a lien passes through several parties subsequent to the date of the lien. Now, if no personal judgment is sought, but only the subjection of the property to

the payment of the incumbrance, it is enough to bring the present holders of the title into court, and, the amount of the lien being admitted or established, a valid decree of foreclosure may be entered, and the defendants cannot disturb the decree on the ground that the party who originally created the lien was not made a defendant.

Again, it is said that Hull had no mortgageable interest in the land. This is a mistake. True, he did not hold the legal title, but he had an interest in the property. A bond for a deed is often in equity declared to be equivalent to a conveyance of the property with *545 a mortgage *back. His was an interest which was the subject of sale, and would pass by a deed of the property. Gen. St. 999, § 1, cl. 8; page 185, § 2. It was an interest which he could use as security for a loan, and could pass for that purpose by an ordinary real-estate mortgage.

Again, it is insisted that as Hull only had an equitable interest in the property it could not be sold under an ordinary foreclosure proceeding, but could be reached only in the manner indicated in sections 481 to 504 of the Civil Code, providing for "proceedings in aid of execution." Here, too, we must differ from counsel. If the mortgage had been of a specific interest, the decree could have been to sell that interest; and, under the order of sale, the sheriff could have sold that interest. Being a mortgage of apparently the entire title, the decree properly followed the mortgage, and the officer must proceed to sell the entire estate; but the purchaser takes only "as good and as perfect an estate in the premises therein mentioned as was vested" in the mortgagor. It is unnecessary to decide whether, upon an ordinary execution, an equitable interest could be seized and sold. All we decide is that when a mortgage appears upon its face to convey the entire estate, the decree may follow the mortgage, and the purchaser at the sale will get whatever estate or interest the mortgagor had, and that it is no ground of error that the mortgagor had only an equitable interest in the land.

Finally, it is insisted that, notwithstanding the mortgage, the conveyances to the plaintiffs in error passed a good title, free from any incumbrance of the mortgage. *Kirkwood v. Koester*, 11 Kan. *471, is cited as authority upon this. There is this manifest difference between the cases: In that, the parties who claimed adversely to the lien upon the equitable interest were innocent and *bona fide* incumbrancers of the legal title, without any notice of either the equity or the lien thereon. Here, the purchasers of the legal title had full knowledge of the equitable interest,—in fact purchased it,—and one *546 of them, Etta *Jones, through her agent, had full knowledge of the mortgage upon such interest. Now, while it may be true that in a contest between a lien upon an equitable interest, and a lien upon the legal title, the latter, though subsequent in time, will be preferred to the former, if the holder thereof be an innocent and *bona fide* holder without notice, yet the reverse will be true, if he, at the

time of obtaining his lien, had full knowledge of the outstanding equity, and the prior lien thereon. As to Etta Jones, it appears that she, through her agent, had, as stated, full knowledge of both the equitable interest and Lapham's mortgage thereon. As to Maggie Murray, it appears that she had knowledge of the equitable interest, but not of the mortgage. Hull, however, was in possession of the lots, and had made valuable improvements on them. These improvements she bought. Now, section 20 of the conveyance act (Gen. St. 187) provides that "every such instrument in writing [and this, by prior description, includes mortgages, and mortgages upon equitable interests] shall, from the time of filing the same with the register of deeds for record, impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed to purchase with notice." While this general provision, as respects notice, may be limited, so far as relates to conveyances or mortgages of equitable interests, by the condition of the legal title, and the knowledge which the holders thereof have of the existence of the equity, as indicated in *Kirkwood v. Koester*, yet, aside from that limitation, it is of controlling force. Whoever buys a legal estate, having knowledge of an outstanding equitable interest, is chargeable with notice of any record of conveyance or incumbrance thereof. Whoever buys an equitable interest in land is also chargeable with like notice. In fact, knowledge of an equitable interest carries with it notice of the condition of such interest as is apparent from the public records.

We see no error in the record, and the judgment must be affirmed.
(All the justices concurring.)

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*MARY A. SHELLABARGER v. JOHN H. NAUFUS.

July Term, 1875.

1. **Married Woman: Separate Property: Real Party in Interest.** Where the main question in a case is whether a wife (who is the plaintiff) or her husband is the owner of certain personal property, and the court instructs the jury that "if they believe from the evidence that the plaintiff in this case is a married woman, and was at the time of bringing this suit, and for some time prior thereto, then the jury must be satisfied from the evidence that the property in controversy in this case was owned by her at the time of her marriage, or is the proceeds or fruit of property so owned, or has come to her by descent, devise, or bequest, from some person other than her husband, or was the fruit of her earnings from her separate trade or business;" and "if the jury should not be satisfied from the evidence of the existence of any of the foregoing propositions, then the jury should find for the defendant;" and, from the evidence in the case, said property may have been the proceeds from a gift to the plaintiff from some person other than her husband: *held*, that said instruction was erroneous.¹

¹ See *Going v. Orus*, 8 Kan. 65, and note; *Dickson v. Randal*, 19 Kan. *212.

2. **Witness: Credibility of.** The court below instructed the jury as follows: "If you should be satisfied that any witness in this case has willfully and corruptly testified falsely to any material fact, then it is your duty to disregard the whole of the testimony of such witness." *Held*, that such instruction is erroneous. [Overruling *Campbell v. State*, 3 Kan. *488, and other cases following that case.]¹
3. ———: **Province of Jury.** It is the province of the jury to determine the credibility of witnesses, and the weight of their testimony; and, where any witness has testified willfully, corruptly, and falsely to any material fact, it is the province of the jury to determine how much, or whether the whole, of his testimony should be disregarded. No inflexible rule of law should be interposed between the witness and the jury, commanding the jury to take all, or exclude all, of his testimony.

Error from Neosho district court.

Replevin for 2,120 feet of lumber, brought before a justice of the peace by Mary A. Shellabarger, a married woman. Nafus, defendant, as constable, had taken the property upon process against plaintiff's husband. The case was appealed to the district court, *548 and was there tried at the December *term, 1871. Verdict and judgment for defendant.

C. F. Hutchings, for plaintiff.

The paper produced by defendant, if it really was an execution, was not produced by the justice; nor was the justice produced as a witness; nor was the record of any judgment produced; nor was the signature of the justice proved; nor was any evidence whatever introduced to show that the husband of plaintiff had ever been indebted to any person; nor was any other foundation whatever laid. Counsel hand a paper to defendant, and ask him what it is, and he is allowed to pronounce it "an execution," and the court thereafter recognizes the paper in that character, and in its instructions calls it an "execution," and says it was issued by a justice of the peace; and without any further proof it is used in evidence, against our objection. Upon what theory could the defendant, in an action between himself and a third party, introduce in evidence his own indorsement, made on a writ as an officer, and made after the commencement of the action? The statement of the defendant in the certificate indorsed on that paper was no evidence to show whether this property belonged to the plaintiff or not, and was utterly incompetent to prove anything in this action. If a constable can seize property of A., and then, after suit brought by A. to recover it, write on a piece of paper that it is the property of B., and introduce his paper to prove it, there is very little security for private property. If the doctrine ruled by the district court be correct, then any person claiming to be a constable

¹ See *State v. Kellerman*, 14 Kan. *185, and note. The above case followed and applied, *State v. Potter*, 16 Kan. 99; *Kansas Pac. Ry. Co. v. Kunkel*, 17 Kan. 168; *Higbee v. McMillan*, 18 Kan. 188; *Atchison, T. & S. F. R. Co. v. Retford*, 18 Kan. 350; *Garvin v. Jennerson*, 20 Kan. 373.

may confiscate property found in the possession of a married woman, unless she is the absolute owner, and his justification is complete by showing her coverture, though his writ may be forged, or based upon a void judgment, and she a stranger even to that. It is the settled rule that a plaintiff who attempts to justify the taking of goods

*549 on an execution set in motion by him *must show a valid judgment. *Allen v. Corlew*, 10 Kan. *70; *Kerr v. Mount*, 28 N. Y. 659. The same rule is as invariably applied to an officer in an action brought against him by a stranger for taking the goods on an execution issued against another. 2 Greenl. Ev. § 629. In this case no attempt, even, was made to show either a judgment, the genuineness of the pretended execution, or its return. On the contrary, the fact that it was not in the custody of the justice, that the justice was not brought as a witness, that it was in the possession of the constable, that no attempt was made to explain how he obtained possession of it, certainly rebuts the presumption (if any) that the officer had done his duty by returning the execution, and forces the conclusion that he had never returned the execution, but had kept it in his own possession nearly two years after the return-day.

If said pretended execution was competent evidence, still it certainly will not be contended that it was conclusive, nor did its introduction authorize the court to take any question of fact from the jury. It will be observed that the defendant offered no proof to rebut the plaintiff's claim of ownership except this paper, and indorsement thereon. The plaintiff certainly made a *prima facie* case, and the jury must have found for the plaintiff, unless the defendant had overcome her *prima facie* case. It was a question for the jury whether the execution and indorsement were genuine, and whether the defendant did in fact take the property *by virtue* of the same; yet the court in all of its instructions treats the defendant's defense as established, and tells the jury in the first instruction that the only question is whether the plaintiff has a certain ownership, and if she has not, then they must find for defendant; and the court reiterates the same thing in his general instructions. These instructions are glaringly fallacious. Suppose the jury believed that the property was not plaintiff's, but was her husband's, and was in her possession; and they further believed that the defendant did not take it by virtue of the execution, as he claims; that there was no judgment

*550 against the husband; that the *husband owed no debts; that the pretended execution was fictitious; and that the defendant took the property forcibly, without any right so to do,—would not the plaintiff be entitled to a return of the property, though she had no title, except the possession, when it was taken from her? The court instructed the jury that the plaintiff could only recover by showing herself to be the owner of the property. Now, if the property was in the possession of the plaintiff when defendant took it, then she was entitled to a return of the property, unless the defendant had

some lawful right to take it; and it is only necessary for the plaintiff in any case to show a right of *possession*. Code, subd. 2, §§ 177, 185.

The instruction that the jury must reject the whole testimony of a witness, if they should find the witness had willfully testified falsely and corruptly, may be warranted by former decisions of this court. But it is clearly wrong in principle. To say to a jury that they are the judges of all the facts, and in the same breath to say that under certain circumstances it is their *duty to disregard* the whole testimony of a witness, and not to use their judgment at all concerning it, and then to tell them (as was done in a subsequent instruction) that under their oaths they cannot ignore any testimony, but can only determine the measure of credit to be given it, is so grossly illogical and inconsistent that it is idle to say that courts which administer the science of law can tolerate it.

Stillwell & Baylies, for defendant.

So far as the judgment and execution mentioned in the answer of defendant are concerned, they stood admitted for want of a reply, and the only question to be determined was in regard to the ownership and right of possession of the property in controversy. We believe the instructions given to be correct, and they do not require any argument from us to uphold them.

The record shows that the property was not in the possession *551 of plaintiff at the time the defendant levied thereon, *but was in possession of the husband of plaintiff. That being the case, it was absolutely necessary for plaintiff to have *demand*ed of the defendant the return of the property before bringing suit. *Killey v. Scannell*, 12 Cal. 73. It nowhere appears from the record that such a demand was ever made, which omission in proof is certainly fatal.

The plaintiff being a married woman, and claiming to be owner of the property in her own right, and the evidence showing it was in a foreign jurisdiction that she became possessed (if at all) of the property by virtue of which she claimed to be the owner of the lumber sued for, did it not then devolve upon her to show that, by the laws of such foreign jurisdiction, she became the owner of said property there, freed from the claim of her husband? By the common law the husband, by virtue of the marriage, became the owner of the goods and chattels of the wife, and was entitled to the rents and profits of her realty. The married woman's act of our own state, of course, has no extraterritorial force, and unless the plaintiff became the owner by the laws of Michigan of the property she claimed to have purchased there, and which furnished the means by which she claimed to have acquired the lumber in dispute, then she could not have subsequently acquired a title, and thereby defeat the vested title of her husband by the mere act of removing to this state. It was therefore necessary for her to prove and establish as a fact the laws of the state of Michigan in force at the time of her alleged original acquisitions, and thereby

show, if she could, that under said laws she acquired a valid title notwithstanding her coverture. 2 Kent, Comm. 93.

VALENTINE, J. This was an action of replevin, brought by Mary A. Shellabarger against John H. Nafus. It appears from the record that the defendant was a constable; that he held an execution against the property of the plaintiff's husband, one Solomon Shellabarger; that the constable levied said execution upon the property in *552 controversy as the prop*erty of the plaintiff's husband; that the plaintiff then replevied the property, claiming the same as hers, and claiming that it never did belong to her husband. When the constable levied on said property he found it on land occupied by the plaintiff and her husband as their homestead, the title to which land was in her husband. But the property was not in the actual possession of either. It had been in the actual custody of the husband, but it does not appear from the record that it was ever in the actual custody of the plaintiff. The whole case in the court below depended entirely upon who owned the property. All other questions were merely incidental or subsidiary to that. If the plaintiff owned the property, she had a right to recover, however good the execution may have been. But if her husband owned it, then she had no right to recover, however worthless the execution may have been. If her husband owned the property, and the constable, for any cause, obtained it wrongfully from him, then no person but her husband had any right to sue. A wife has never been recognized as the legal guardian of her husband to such an unlimited extent that she may protect his legal rights by herself becoming the plaintiff, and prosecuting the action for him in her own name. We mention this merely because it seems to be claimed that if the defendant failed to prove that the execution was founded on a valid judgment, by the introduction in evidence of the record of such judgment, that the plaintiff must then recover, although the property might at the time the execution was levied have belonged to her husband, and not to herself. A vast number of objections were made, and a vast number of exceptions taken, by the plaintiff in the court below, and a large number of questions have been raised and discussed in this court; but, with the exception of the errors hereinafter mentioned, we think the court below committed no substantial error.

As before stated, the main question in the case in the court below was, who owned the property in controversy? With reference to ownership, the court below instructed the jury as follows:

*558 *"The court instructs the jury that if they believe from the evidence that the plaintiff in this case was a married woman, and was at the time of bringing this suit, and for some time prior thereto, then the jury must be satisfied from the evidence that the property in controversy in this case was owned by her at the time of her marriage, or is the proceeds or fruit of property so owned, or

has come to her by descent, devise, or bequest from some person other than her husband, or was the fruit of her earnings from her separate trade or business. If the jury should not be satisfied from the evidence of the existence of any of the foregoing propositions, then you should find for the defendant."

Now, the foregoing instruction is not correct, as an abstract proposition of law, nor is it correct as applied to this case. If the property in controversy was a gift to the plaintiff from any person except her husband, or if it was the proceeds, issues, or profits of any such gift, or if it was the proceeds, issues, or profits of any property which had previously come to her by descent, devise, or bequest, it would certainly be her own separate property, and be exempt from any execution issued against her husband's property. Indeed, if she had stolen it, and then claimed it as her own, we think she would have been the owner thereof as against all the world except the real owner. According to the plaintiff's testimony, she has owned property, and been buying, selling, and trafficking in property, for several years. Some of her property came to her from her father's estate, some from her own earnings, some from the proceeds, issues, and profits of other property, and the source of some of it was not shown. The property in controversy was purchased, as the plaintiff testifies, with her own money; but where she got the money is not very definitely shown. From anything that appears in the record, the greater portion of it may have been a gift, or the proceeds of a gift, from some person other than her husband. But, however it may have come, she testifies positively that the money was hers. Whether it was hers or not was a fact for

the jury; and, if the case had been submitted to the jury on *554 proper instructions, we think the verdict would have been conclusive. But as the foregoing instruction was erroneous and prejudicial to the rights of the plaintiff, and as the verdict and judgment were against the plaintiff, we think the judgment of the court below must be reversed, and a new trial granted.

There is another question raised in this case; and, as the case must be sent back to the court below for a new trial upon the grounds heretofore mentioned, we think this is as good a time as we shall ever have to present our views upon this other question. The court below also instructed the jury as follows: "If you should be satisfied that any witness in this case has willfully and corruptly testified falsely to any material fact, then it is your duty to disregard the whole of the testimony of such witness." Under this instruction the jury evidently disregarded the testimony of the plaintiff. This instruction is fully warranted by the decisions of this court. See *Campbell v. State*, 3 Kan. *488; *Hale v. Rawallie*, 8 Kan. *136; *State v. Horne*, 9 Kan. *131; *Russell v. State*, 11 Kan. *322, *323; *Gannon v. Stevens*, 13 Kan. *461. And yet we think the instruction is erroneous. *Mead v. McGraw*, 19 Ohio St. 55, 64; *State v. Williams*, 2 Jones, (N. C.) 257, 262; *Mercer v. Wright*, 3 Wis. 568, 570; *Knowles v. People*, 15

Mich. 408; Fisher v. People, 20 Mich. 147; Lewis v. Hodgdon, 17 Me. 267, 273; Blanchard v. Pratt, 37 Ill. 243, 246; State v. Stout, 31 Mo. 406; Callahan v. Shaw, 24 Iowa, 441. Whether the jury should disregard the whole of the testimony of a witness in such a case is a matter resting entirely with them. They are the exclusive judges of the credibility of the witnesses, and the weight of their testimony. They may wholly disregard the testimony of any witness if, from the evidence before them, they consider such witness as wholly unworthy of credit. Or they may disregard a portion of the testimony of any witness, and give to every other portion full faith, credit, and consideration. Or they may give to one portion of the testimony of any witness greater weight and credit than they may to some other *555 portion of such testimony. The jury ought to be allowed to weigh every portion of the testimony of every witness, and to give to each portion of the testimony just such consideration as it is entitled to, considering all the facts and circumstances of the case. It is within the common experience of all men that the different portions of the testimony of the same witness may differ vastly in value. A witness may, under great temptations, and in some isolated case, swear falsely; and yet, where the temptation is removed, where there is nothing to operate on his hopes and fears, his passions and prejudices, where he has no interest in the matter except to tell the truth, his testimony may be of great value. And, this being so, no inflexible rule of law should be interposed between the witness and the jury, commanding the jury to take all, or to exclude all, of his testimony. So far as the decision made by this court in case of Campbell v. State, 3 Kan. *488, and the decisions in such other cases as follow that case, are in conflict with the foregoing views, said cases are overruled.

The judgment of the court below will be reversed, and cause remanded for a new trial.

(All the justices concurring.)

EPHRAIM KENNEDY v. SAMUEL BECK.

July Term, 1875.

1. **Præcipe: Form and Sufficiency.** A *præcipe* filed with the petition in an action of replevin, directing that "the clerk of the district court will please issue process in the above-entitled action, returnable according to law," is sufficient to require the issuing of a summons, as well as the issuing of an order of delivery.
2. **Replevin: Order of Delivery: Order to Vacate or Set Aside, Reviewable.** In an action of replevin the order for the delivery of the property issued at the commencement of the action, together with the

necessary incidental proceedings, is a provisional remedy; and therefore, under the statute which provides that the supreme court may reverse, vacate, or modify an order of the district court that "discharges, vacates, or modifies a provisional remedy," an order of *the district court that vacates and sets aside such an order of delivery, with all the incidental proceedings connected therewith, is immediately reviewable by the supreme court, and it is not necessary, in such a case, for the aggrieved party to wait until the final termination of the action in the district court before bringing the question to this court.

3. ———: **Order Irregularly Issued: Waiver.** It is a great irregularity for the clerk of the district court to issue an order of delivery in replevin several days before he issues the summons; but where the irregularity is purely the mistake of the clerk, and where the defendant, after the service of the order of delivery and the summons, answers to the merits of the action, without raising any question concerning such irregularity, he thereby so waives the irregularity that he cannot afterwards raise any question concerning it.

Error from Smith district court.

Replevin brought by Kennedy against A. W. Green, Nicholas Clemens, Judson McNall, Charles McNall, Samuel Beck, C. P. Newell, and Webster McNall, to recover possession of a portable steam saw-mill, valued at \$2,000. An order of delivery was issued and executed, which was afterwards, at the May term, 1874, and on motion of defendant Beck, vacated and set aside on the ground that said order of delivery was issued, not at or after the commencement of the action, but some eighteen days previously to the issuing of the summons.

A. J. Banta and J. A. Linville, for plaintiff.

Section 176 of the Civil Code provides that in an action to recover possession of specific personal property the plaintiff may, at the commencement of the suit, or at any time before answer, claim the immediate delivery of such property. Section 57 provides that a civil action may be commenced in a court of record, by filing in the office of the clerk of the proper court a petition, and causing a summons to issue thereon. Defendant Beck says in his motion that "the plaintiff did not commence said action by causing a summons to be issued on the petition by him filed;" and claims that the *557 order of *delivery was issued without power by the clerk to issue it, because the suit was not commenced until the summons is sued; that the order could not issue, under said section 176, until the suit was commenced; and that, the summons not having been issued before the order, the order of delivery is absolutely void, and all proceedings thereunder a nullity. No objection is made to the affidavit and undertaking, and the court was not asked to set aside the order because the affidavit and undertaking were void by reason of having been filed before the summons issued. We submit that the order of delivery cannot be set aside unless the affidavit and undertaking are void; for, if good, they support the order, and the defendant is safe. He will get the property, or its value, if the court adjudges that it be

returned to him. No objection is made to the sufficiency of the sureties. But if the order of the district court is carried out, and the property delivered to Beck, what security has the plaintiff? The defendant making this motion has answered. An issue is made for trial. Under the said section 176 the plaintiff cannot now have an order of delivery, because defendants have answered. The result is that, if the district court is correct, the plaintiff must at once dismiss his suit, if that is possible, and then the defendant Beck, under his answer, would ask to have his right to the property inquired into. And all the while defendant Beck has possession of the property, and can dispose of it, and the plaintiff has no redress. The order vacating said order of delivery, therefore, practically defeats the action, for it would be folly to proceed with no security for the delivery of the property in case the court adjudges that the plaintiff is the owner of it. So it is evident that substantial rights of the plaintiff are affected by this order.

There is no doubt an irregularity, in this: that the summons should have gone out when the order did. But the plaintiff is not at fault. He did all the law required him to do. He filed his petition, *præcipe*, affidavit, and undertaking *regularly*. "The clerk *shall* issue a summons on a written *præcipe*." Code, § 59. This is nothing more than *558 an irregularity arising from the neglect of the clerk, and does not affect in the least the power of the clerk to issue the order of delivery. Because the clerk did not do all of his duty, does that take away his power to do a part? The theory that the clerk had no power to issue the order till he issued the summons is untenable. It is the constant practice to issue both together, and when the undertaking and affidavit are filed regularly, as in this case, the order is not void simply because the clerk failed to issue the summons with it. The action is *commenced*, for all the purposes of this controversy, when the petition is filed. There are no set series of acts that must *all* be performed before the suit is commenced. It is commenced when the *first* step is taken so as to allow the filing of the affidavit and undertaking, and the issuing of the order of delivery to follow immediately. The action is pending so as to charge third persons with notice of its pendency when the petition is filed. Code, § 81. Suppose a defective service is set aside: another summons issues on the same petition. It is evident that the filing of the petition is the initiatory step which gives foundation for what follows. If the issuing of the order in this case was a void act, so was the filing of the affidavit and undertaking. The truth is, to set aside the order of delivery in this case is an absurdity. If the bond and affidavit were void absolutely, then the clerk would have issued without authority, and the order could be set aside, and the reason would be plain enough. Code, § 189. But setting aside the order of delivery when the affidavit and undertaking are without question good, is incomprehensible. If the order was defective, or served defectively,

those things would be amendable. But no questions of that kind are raised. The only objection is that the order is *void* because issued too soon. It seems to us that the irregularity complained of does not affect any rights of defendant Beck, or of any of the defendants; much less does it affect *substantial* rights. Besides, the defendant making this motion having answered, he is certainly not in position to complain for that reason.

*559 *L. C. Uhl, G. W. White, and H. Cooper, for defendants.

The order complained of was not a final order, such as can be made the subject of review in this court by this proceeding. It did not involve the merits of the action, or prevent a judgment, or affect the substantial rights of either party. This court cannot, before the merits of the action have been reached in the district court, consider the alleged error.

The record shows that plaintiff filed his petition on the twenty-seventh of January, and on the same day caused an order of delivery to issue, returnable in ten days; that the property was taken on the following day, and delivered to plaintiff; that on the sixteenth of February the clerk issued summons. No written *præcipe* for summons was on file. Section 57 of the Code defines when an action is commenced. Said order of delivery was issued and returned eighteen days before plaintiff had any case in court. Section 176 of the Code defines when an order of delivery for property can be had. There is no provision in our statute whereby plaintiff can take property, or have an order of delivery therefor, before the commencement of an action or issuing summons. The property in question was taken from defendant, under cloak of legal process, by the issuing of an order of delivery, and his motion to set aside all the proceedings had prior to summons issued was properly sustained.

VALENTINE J. This was an action of replevin brought by Kennedy against Samuel Beck and six others. The only rulings of the court below of which the plaintiff now complains, are such as were made in favor of the defendant Beck, and against the plaintiff. The facts of the case necessary to be known, in order to have a correct understanding of said rulings, are as follows: On January 27, 1874, the plaintiff filed in the office of the clerk of the district court of Smith county his petition, affidavit, undertaking, *præcipe*, and some

*560 *other papers, for the purpose of commencing this action of replevin. No question is now raised with regard to the sufficiency of any of the papers except the *præcipe*; and we may as well consider the question of its sufficiency here as in any other place. The defendant claims that there was "no written *præcipe* for summons on file." The body of the *præcipe* filed reads as follows: "The clerk of the district court will please issue process in the above-entitled action, returnable according to law." We suppose the only objection to this *præcipe* is that it says "process," and does not say "summons."

We think the *præcipe* was sufficient both for the summons and for the order of delivery.

The order of delivery was issued on the same day said papers were filed, and was duly served and returned within two days thereafter. The summons was not issued, however, until February 16th next following. It was served on all the defendants, and returned within nine days after it was issued. Afterwards, all the defendants answered. Beck answered on March 16th. He set forth in his answer that he was the owner of the property, and claimed a return thereof and damages. On May 5th "the said defendant Beck moves the court to set aside said order for the delivery of said property to the plaintiff, and declare all proceedings thereunder null and void, and to award to said defendant the right to the possession of said property." On May 7th the court below sustained this motion, and the plaintiff excepted; and this is the ruling of which the plaintiff now complains. On May 9th the case was continued by the court below until the next term of that court. Whether the case has yet been disposed of in the district court we have no knowledge. The defendant claims that this court cannot review said rulings of the district court until the case is finally disposed of in that court. We think, however, the defendant is mistaken. The statute provides that "the

supreme court may also reverse, vacate, or modify any of the *561 following orders of the district court, or a judge thereof:

First, a final order; *second*, an order that grants or refuses a continuance,—discharges, vacates, or modifies a provisional remedy," etc. Civil Code, § 542. Now, the action of replevin in this state is both provisional and final. The disposition of the property in controversy pending the litigation is provisional. The disposition of the property by judgment at the termination of the action is final. We suppose there can be no question about this. The order for the delivery of the property issued at the commencement of the action, together with the necessary incidental proceedings, is purely a provisional remedy; and hence, under our Code, an order of the district court that vacates and sets aside said order of delivery, and the incidental proceedings connected therewith, is immediately reviewable by this court; and it is not necessary, in such a case, for the aggrieved party to wait till the final termination of the action in the district court before bringing the question to this court. Besides, the action of replevin is peculiar. The provisional portion thereof is so intimately connected with the ultimate remedy of the litigating parties that the whole proceeding is generally classed among the provisional remedies. And, this being so, it would almost seem that, under another provision of the statute, an order of the district court involving the merits of the provisional portion of the action might be immediately reviewable by the supreme court as "an order that involves the merits of an action, or some part thereof," without waiting for the final termination of the action. Code, § 543; last clause.

We do not decide this question, however, now. But did the district court err in setting aside the order of replevin, with the proceedings connected therewith, and in giving the custody of the property to Beck? Now, if the plaintiff was not entitled to the custody of the property, perhaps he has no right to complain that the court erred in giving the property to Beck, instead of giving it to some one or more of the other defendants, or to a stranger; and hence we pass over this question without further consideration thereof. We sha'll

consider Beck, however, for this purpose as representing
 *562 *the interests of each and all of the other defendants; and then, did the court below err? We think it did. It was undoubtedly a great irregularity in issuing the order of replevin before issuing the summons; and, if the defendant had made his motion in time, his motion should undoubtedly have been sustained. But, still, it was not the fault of the plaintiff that the irregularity occurred. It was merely the mistake of the clerk; and we do not think it was one of those fatal irregularities that cannot be cured or waived by subsequent proceedings. If the defendant had moved to set aside the order of replevin, and all the proceedings thereunder, before he answered, the motion should have been sustained. In that case the defendant would have got the possession of the property for the time being; and if the plaintiff had then desired to get possession of the property, or to prosecute his action further, he could have got another order of replevin. But the defendant did not make his motion before he answered. He answered first, and made his motion afterwards, and thereby put it beyond the power of the plaintiff to obtain another order of replevin. A plaintiff is entitled, under the statute, to obtain an order of replevin only "at the commencement of the suit, or at any time before answer." Code, § 176. Now, can it be possible that by the mistake of the clerk, and the defendant's answering before he made his motion, that the plaintiff can be virtually and substantially deprived of his action of replevin? We think not. We think the defendant waived the irregularity of issuing the order of replevin before the summons when he answered to the merits of the action. In the interest of justice this ought to be so. When a supposed action is commenced, the defendant, unless he desires to answer to the merits at once, should examine all the proceedings carefully, and see whether he cannot defeat the action for irregularities or defects in the proceedings, and upon motion. If he should think he could not defeat the action in that way, then he should see whether

he could not defeat it by plea in abatement or by demurrer.
 *563 But if he *thinks he cannot defeat it in any of these ways, then he should finally and lastly plead to the merits of the action; and, when he does so plead, it should generally be regarded that he waives all mere irregularities preceding his plea. Of course, this is not so where the statute provides otherwise; of course, it is not so where justice would be as well or better subserved by a different rule;

and, of course, it need not necessarily be so where any of the provisional remedies, other than replevin, are resorted to in connection with the principal or main remedy; for any of the other provisional remedies may be had at any time before or after answer filed, and some of them even after judgment; and, hence, to dissolve or vacate any of the other provisional remedies after answer filed, can do the plaintiff but very little harm, for he can immediately commence again to get another such remedy. Besides, no other provisional remedy is so intimately connected with the main action as the provisional portion of replevin. The provisional remedy in replevin is in fact a part of the main remedy; and to defeat it, may substantially defeat the whole action.

The judgment of the court below is reversed, and cause remanded for further proceedings in accordance with this opinion.

(All the justices concurring.)

S. J. WILLIAMS and others v. LAWRENCE TOWNSEND.¹

July Term, 1875.

1. **Evidence: Competency to prove Joint Trespass.** In an action brought by T. against S., W., and P., the petition alleged, among other things, that "the said defendants did unlawfully and with force assault the said plaintiff, and there shoot and wound with shot from and out of a shotgun held in the hands of the said defendant S." The answer was a general denial. W. and P. had a separate trial, and on such trial the plaintiff introduced evidence, over the objections of the defendants, but with the permission of the court, to prove that S., with the co-operation of
 *564 W. and P., was illegally, and in *violation of a certain statute, hunting on the inclosed lands of another, without the consent of the owner, and that, while so hunting, S., in the absence of W. and P., and without their knowledge, shot with a shotgun at a prairie chicken, and in doing so accidentally shot the plaintiff, and injured him. *Held*, that the evidence was admissible, and that the court below did not err in allowing it to be introduced.
2. **Verdicts not Warranted by the Evidence: Powers of Supreme Court.** There was only slight evidence to prove that W. and P. co-operated with S. in his illegal hunting, and the supreme court thinks that the jury erred in finding such co-operation. But still, as there was some evidence to prove co-operation, and as the question of co-operation is one of fact, and comes clearly within the province of the jury to determine, and as the district court approved the verdict of the jury, and rendered judgment thereon, the supreme court cannot now, in contravention of the many decisions previously rendered by this court, reverse the judgment of the district court merely because the verdict is not sustained by sufficient evidence.

¹This case followed, *Merriman v. Blanton*, 25 Kan. 573; *Allison v. Ahlers*, 26 Kan. 583; *Atchison, T. & S. F. R. Co. v. Keller*, 31 Kan. 439; S. C. 2 Pac. Rep. 771.

3. ———: Powers and Duty of District Court. It is unquestionably the duty of the district court to set aside a verdict and grant a new trial whenever the jury have manifestly mistaken the evidence. And the district courts cannot shirk their responsibility by saying that the jury are the exclusive judges of all questions of fact; for, while this is true as long as the jury have the case under their consideration, yet, when the jury have rendered their verdict, then the judge himself becomes the exclusive judge of all questions of fact; and, while he cannot reform the verdict, nor modify it in any particular, nor set it aside if it is sustained by sufficient evidence, yet, if the verdict is manifestly erroneous, he should always set it aside, and grant a new trial; and he should be controlled by his own judgment in the case, and not by that of the jury.¹

Error from Allen district court.

Townsend brought his action to recover damages sustained by him by reason of an alleged trespass to his person. The injury was actually committed by one of three, all of whom were sued jointly. A separate trial was had as to two, Williams and Parsons, plaintiffs in error. The transcript contains the following as the "special verdict" returned by the jury:

"(1) Defendants, Williams, Parsons, and Spahr, went hunting as one party, and hunted as one party upon the hunting-grounds.

*565 *(2) Defendants Parsons and Williams were in Hecox's field, south-east from the wagon, at the time plaintiff was injured; and Spahr was in the field of Townsend, (plaintiff's father,) southwest from the wagon.

"(3) All the defendants, Parsons, Williams, and Spahr, were upon the premises of Townsend before the shooting, and at the time thereof Parsons and Williams were upon the premises of Hecox, while Spahr was upon the premises of Townsend.

"(4) Spahr was seventy yards from plaintiff; Williams and Parsons were between twenty-five and thirty yards from plaintiff.

"(5) Plaintiff was standing with one foot on the front wheel, and one on the slide of the wagon, and on the west side of said wagon.

"(6) There was no express authority given to the defendants by said plaintiff's father to hunt upon his premises.

"(7) The boys Thomas and Lawrence Townsend gave express orders to all three defendants not to hunt upon their father's premises or lands."

¹ But where the testimony is very conflicting, and presents a doubtful question of fact,—one upon which different minds, justly and carefully weighing the testimony, may be expected to arrive at different conclusions,—then the trial court should not disturb the verdict, although its judgment may incline to a different conclusion than that reached by the jury. *Johnson v. Leggett*, 28 Kan. 591. It is the duty of a trial court, whenever the verdict is clearly against the weight or preponderance of the evidence, to set it aside and grant a new trial. Where the evidence is all in parol, and where there is some evidence sustaining every fact necessarily included in the verdict,—but a bare *scintilla*, but enough evidence, if not contradicted, to prove every such fact,—and where the trial court has approved the verdict by refusing to set it aside, and by rendering a judgment thereon, the supreme court cannot disturb it, although a preponderance of the evidence may seem to be against it. *Union Pac. Ry. Co. v. Diehl*, 38 Kan. 423. S. C. 6 Pac. Rep. 566.

"(11) The defendants had no authority, either express or implied, to hunt upon the premises upon which they did hunt prior to and at the time the plaintiff was injured.

"(12) Defendants were not guilty of aggravated misconduct, but were guilty of being engaged in a lawless act at the time plaintiff sustained the injury.

"(13) The plaintiff lost the sight of the left eye, and is entitled to \$1,500 damages.

"(14) Neither Williams nor Parsons assisted the principal party in the act of shooting the plaintiff, nor protected him after the act of shooting.

"(15) The immediate act of the shooting whereby plaintiff was injured, was by the joint conduct or co-operation of all the defendants.

"(16) The jury do not believe that the plaintiff is entitled to exemplary damages.

"(17) Parsons and Williams were forty rods from Spahr when the shooting took place that injured the plaintiff."

The district court, at the November term, 1873, overruled a motion for a new trial, and gave judgment in favor of Townsend, and W. and P. bring the case here on error.

*566 **Thurston & Keplinger*, for plaintiffs in error.

The court erred in permitting plaintiff to introduce evidence to show defendants were hunting upon the premises of Townsend and Hecox without permission. The evidence offered did not tend to support the issues joined. The question before the court was not as to whether or not plaintiffs in error were liable for the injury sustained by the plaintiff below. The ultimate fact constituting Townsend's cause of action is set forth in the allegation that the "defendants shot the plaintiff." Parsons and Williams denied this allegation, and the evidence should have been confined to the issue thus joined. The only evidence admissible under this issue would have been evidence tending to show that P. and W. directly did the immediate act charged, or that they did it indirectly by doing some other act or acts from which the act charged resulted as an ordinary or natural consequence. Proof that, at the time plaintiff sustained the injury complained of, defendants were engaged in the performance of an illegal act, might establish the liability of the defendants for the act charged; but it would be proof of a fact wholly foreign to the issues joined, and which would not tend to establish the fact alleged in plaintiff's petition. *Chalker v. Dickinson*, 1 Conn. 515; *Bolling v. Doneghy*, 1 Duv. 220; *Finley v. Quirk*, 9 Minn. 194, (Gil. 179); *Eilert v. City of Oshkosh*, 14 Wis. 586. The evidence does not tend to show that defendants were engaged in an illegal act, since it does not show they were hunting upon "inclosed lands." *Laws* 1872, p. 339.

The court erred in overruling the motion of defendants P. and W. for judgment in their favor upon the special verdict. The twelfth finding, that "defendants were engaged in a lawless act in hunting

upon premises without the owner's permission," is untrue, because hunting upon "premises" is not unlawful. The "premises" must be "the inclosed grounds or lands of another," to be unlawful. Laws 1873, p. 839. This finding is based upon incompetent and irrelevant evidence, and is no part of the verdict, because it is not a finding of any fact involved in the issues joined, and because it is not
 *567 *a finding of any fact at all. It is a mere conclusion of law.

The fifteenth finding, that the immediate act of shooting whereby plaintiff was injured, was by the *joint act* or *co-operation* of all the defendants, is expressly contradicted by the fourteenth finding, that neither Williams nor Parsons assisted the principal party (Spahr) in the act of shooting. This fifteenth finding is shown to be impossible, from the relative situations of the parties at the time the shooting occurred, as shown by the fourth and seventeenth findings. The first finding, that defendants were all hunting "as one party," is not sufficient to render defendants Parsons and Williams liable. 2 Hil. Torts. The mere act of hunting is not illegal. There is nothing in the verdict to show the act of defendants to have been illegal, nor was evidence admissible under the pleadings to show such illegality. In the absence of proof to the contrary, it will be presumed the act of the defendants was legal. When two or more persons are co-operating together, and acting in concert in the performance of a *legal act*, and one of such persons commits a trespass in furtherance of such purpose, the others are not liable. *Richardson v. Emerson*, 8 Wis. 319.

H. W. Talcott, for defendant in error.

The only question in the case is as to whether or not plaintiffs in error co-operated with Spahr in the trespass complained of. That there was such co-operation, attention is called to the evidence. All three defendants went together on a hunting excursion for pleasure and recreation, and not for profit. All went together in one wagon, with one driver. Parsons and Williams had one dog, owned by Parsons; Spahr had one dog owned by himself. The defendants got out of the wagon together, and commenced hunting. The scent of the dogs governed the hunting and the relative course pursued by the defendants; Spahr following his, and the other two following Parson's, dog. All continued hunting in that manner until they all reached the field of plaintiff's father. After all had reached that field, Spahr climbed over the fence, and, his dog having scented a covey of
 *568 chickens, "Parsons *and Williams followed up rapidly, their dog joining Spahr's, and they entered said field close to where Spahr crossed, and at nearly the same time, when all three moved forward towards the spot indicated by the dogs." The hunters separated; the dog of Parsons leading him and Williams to the Hecox field, and the dog of Spahr still leading him in the Townsend field. Parsons and Williams, while thus hunting, occasionally heard shooting in the direction where Spahr was hunting, and turned their heads

in the direction of the sound, and on one occasion one or both of them fired at a chicken which came from that direction. After the shooting by Spahr, only a moment elapsed until P. and W. shot at the same chicken; and after hearing the first shot, and at about the moment of hearing the second shot, the plaintiff below received the injury. No other persons were hunting or shooting in that vicinity. All three defendants came to the wagon at time of injury, assisted in removing shot, and, at request of P. and W., Spahr took Townsend to his father's residence. The defendants threw their game all into one wagon promiscuously, without reference to who killed it. All rode home together. The testimony also shows that all three defendants were hunting on the "inclosed lands of another," the owner of which had "neither given, nor been asked for, leave to hunt thereon." All the testimony tends to show co-operation on the part of all the defendants. They were all engaged in one common pursuit, associated together for the same purpose, acting in concert, and each acting in the "pleasure and recreation" of all. They were, also, each engaged in an unlawful enterprise at the time of the injury,—they were hunting "upon the inclosed grounds or lands of another, without first obtaining leave of the owner so to do." Laws 1872, p. 339. The question of joint liability is for the jury. Where an immediate act is done by the co-operation or joint act of two or more, all are trespassers, may be sued jointly, and each is liable for the injury done by all. 2 Hil. Torts, 293, 294; Guille v. Swan, 19 Johns. 381; Vosburgh v. Moak, 1 Cush. 453. The jury found that the defendants below were jointly liable.

*569 *Where the jury has found a special verdict, and the court below refuses to set it aside, and renders judgment thereon, it is not sufficient, because the verdict is not sustained by sufficient evidence, to authorize the supreme court to reverse the judgment, when, upon some essential fact in the case, the weight of evidence may seem to be against the verdict. Kansas Pac. Ry. Co. v. Montelle, 10 Kan. *119, *126; St. Joseph & D. C. Ry. Co. v. Chase, 11 Kan. *47, *58. The petition alleges that "the said defendants did unlawfully and with force assault the said plaintiff." Any evidence that would tend to show that all the defendants were liable, was competent. All were hunting upon the "inclosed grounds or lands of another without first obtaining leave of the owner so to do." All were acting unlawfully,—were engaged in committing a crime,—for which they were liable to criminal prosecution. Laws 1872, p. 339. If they were engaged together in doing an unlawful act at the time of the injury, their joint liability is established.

VALENTINE, J. This was an action in the nature of an action of trespass, brought by Lawrence Townsend against Marion Spahr, S. J. Williams, and W. L. Parsons, for an alleged assault and battery. The petition alleged, among other things, that "the said defendants

did unlawfully and with force assault the said plaintiff, and there shoot and wound with shot from and out of a shotgun held in the hands of the said defendant Marion Spahr." The answer was a general denial. Williams and Parsons had a separate trial, and on such trial the plaintiff introduced evidence, over the objections of the defendants, but with the permission of the court, to prove that Spahr, with the co-operation of Williams and Parsons, was illegally, and in violation of a certain statute, (Laws 1872, p. 339,) hunting on the inclosed lands of another, without the consent of the owner, and that, while so hunting, Spahr, in the absence of Williams and Parsons, and without their knowledge, shot, with a shotgun, at a prairie *570 chicken, and in doing so accidentally shot the *plaintiff and injured him. We think this evidence was admissible, and that the court below did not err in allowing it to be introduced.

The jury made special findings; and the findings of the jury and the judgment of the court were in favor of the plaintiff, and against the defendants. The defendants (plaintiffs in error) now claim that the findings of the jury are not sustained by sufficient evidence, and that the findings themselves are not sufficient to sustain the judgment of the court below. That the evidence sufficiently shows that Spahr is liable, we suppose will be admitted. But it is claimed that the evidence does not sufficiently show that Williams and Parsons co-operated with Spahr in his illegal hunting. It is true, the evidence is aught, and we think the jury erred in their findings. But still the question of co-operation is one of fact, and comes clearly within the province of the jury to determine; and, unless there was almost a total absence of evidence to prove co-operation, their verdict upon the question must, after its approval by the court below, be considered conclusive. This comes from an unbroken current of decisions previously rendered in this court upon the question whether this court will reverse the judgment of the district court because the verdict of the jury may seem to be against the evidence, or not sustained by sufficient evidence. We have sustained many judgments where the verdicts upon which they were founded were sustained by but very slight evidence, or were against the weight of the evidence. There was some evidence in this case to prove co-operation. It is unquestionably the duty of the district court to set aside a verdict and grant a new trial wherever the jury have manifestly mistaken the evidence. And the district courts cannot shirk their responsibility by saying that the jury are the exclusive judges of all questions of fact; for, while this is true as long as the jury have the case under their consideration, yet, when the jury have rendered their verdict, then the judge himself becomes the exclusive judge of all questions of fact; and, while he cannot reform the verdict, nor modify it in any *571 particular, *nor set it aside if it is sustained by sufficient evidence, and by a preponderance of the evidence, yet, if the verdict is manifestly erroneous, he should always set it aside, and grant

a new trial. And he must be controlled by his own judgment in the case, and not by that of the jury. Now, the supreme court, under the decisions of this court, has no such authority. When the supreme court sets aside a verdict, it must also set aside the judgment. It must say that the judge of the district court, as well as the jury, committed an error. It must say that the judge of the district court manifestly abused his discretion by not setting aside the verdict of the jury. And the supreme court can seldom say this; and hence the supreme court can reverse a judgment because the verdict is not sustained by sufficient evidence only where there is substantially a total lack of evidence to prove some material fact necessary to be found, and necessarily found by the verdict. The findings of the jury in the case at bar seem to sustain the judgment of the court below; but they have not all been brought to this court, and hence we cannot tell to a certainty. The eighth and ninth and tenth findings are not contained in the verdict.

The judgment of the court below must be affirmed.

KINGMAN, C. J., concurs.

BREWER, J. I am unable to concur with my brethren in the conclusion they have reached in this case. It does not seem to me that the testimony shows that the plaintiffs in error had such a common purpose with Spahr to do an illegal act, or such a co-operation with him, as to render them responsible for the unintentional and purely accidental injury resulting from the act of Spahr. I think the judgment ought to be reversed.

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*C. & G. COOPER v. O. H. CONDON and others.

July Term, 1875.

1. **Default: Judgment upon Immaterial Error:** Where an application of the plaintiff is pending in a district court of the state to remove the action into the United States circuit court, and the hearing of the application is set by the court for a particular day in the future, it is error for the court to allow the defendant, before that day arrives, and in the absence of the plaintiff and his attorneys, and without any notice to them, to take judgment against the plaintiff, although upon the pleadings the defendant is entitled to just such a judgment as he obtained. But where said application is defective and ought to be overruled, and is eventually overruled, and where the plaintiff, who is in default for want of a reply, afterwards moves the court to vacate said judgment, but does not offer to file a reply, and makes no such showing as would entitle him to file a reply, and where the judgment is correct upon the pleadings, in the absence of a reply, and the court overrules the motion to vacate the

judgment, *held*, that the error of the court in rendering the judgment is now immaterial, and therefore the judgment will not be disturbed. [Lanoue v. McKinnon, 19 Kan. 411.]

2. **Removal of Causes: Affidavit for Removal.** Where an application, under the act of congress of May 2, 1867, is made by the plaintiff to remove an action from a district court of the state to the United States circuit court, and the plaintiff does not personally "make and file" any affidavit, nor is there any reason given why he does not do so, but his attorney and agent makes and files the affidavit to sustain said application, and states therein that the attorney and agent, and not the plaintiff, "has reason to and does believe" that the plaintiff cannot obtain justice in such state court, *held*, that the application is not founded upon a sufficient affidavit. The plaintiff himself should make the affidavit.
3. **Liens, Priority of: Surrender of Secured Notes: Subsequent Mortgage.** M. & K. own certain real estate, and give a trust deed therefor to D. to secure two notes held by C. & Co. against M. & K. Afterwards M. & K. sell and convey said premises to W., and C. & Co. then surrender said notes to W. and take in their stead three notes from W. & E. to themselves, and then take a mortgage on said premises from W. to themselves, to secure said last-mentioned notes. *Held*, that C. & Co.'s lien on said premises, held under said trust deed, was surrendered by them when they surrendered said notes, and took the new notes and mortgage, and that the lien of third persons, obtained on said premises after the execution of said trust deed, but before the execution of said mortgage, is prior to the lien of said C. & Co. on said premises.¹

***573 *Error from Labette district court.**

The district court, at the March term, 1874, rendered judgment in favor of Condon and others, defendants in error, in certain foreclosure proceedings involving the rights of plaintiffs in error and defendants in error, where the principal questions between the parties was as to the priority of their respective liens on the same real property. The lien of Cooper & Co. was adjudged to be subsequent to the liens of Condon and two others of the defendants in error, and from such decision Cooper & Co. appeal.

Thurston & Keplinger for plaintiffs in error.

F. A. Bettis, for defendants in error.

VALENTINE, J. This was an action brought by C. & G. Cooper & Co., against C. M. Condon and various other persons, for the purpose of recovering a personal judgment against D. S. Wood and B. Edwards, for the amount of three promissory notes given by Wood and Edwards to the plaintiffs, and for the purpose of foreclosing a mortgage on certain real estate given by Wood and wife to the plaintiffs to secure the payment of said notes, and of having their (the plaintiffs') lien on said real estate declared prior to Condon's lien, and to the liens of all the other defendants. The action was commenced in the district court of Labette county on August 27, 1873. On Novem-

¹See *Shepard v. Allen*, 16 Kan. 184; *Medberry v. Soper*, 17 Kan. 375. See, generally, as to payment by checks or notes, *Kermeyer v. Newby*, 14 Kan. *164, and note.

ber 7th following, the plaintiffs filed in said court a petition, affidavit, and a paper in the form of a bond, for the purpose of removing the case from the district court of Labette county to the United States circuit court. The application was informal and insufficient, for reasons not necessary now to state. Even the plaintiffs themselves seem to have treated the application as insufficient; for afterwards they filed a supplemental petition in the case, changing

*574 very much their original cause of action, making two new parties, asked for and obtained a temporary injunction against one of these new parties, made motions in the case with regard to a certain fund which had just been created, filed a reply to an answer of one of said new parties, and on March 7, 1874, filed a new affidavit and a new bond for the removal of the case to the United States circuit court. The hearing of the application for said removal was then postponed until the twentieth of said March. Before that day, and on the ninth of said March, the defendant Condon took judgment against the plaintiffs in their absence, and without any notice to them or their attorneys. Of course, the court below erred in permitting Condon to do this; and it now remains to be seen whether the error was material and substantial. Said judgment in effect was that Condon's lien on said real estate was prior to that of the plaintiffs. On March 20th said application for removal was overruled, and we think rightly so. There were several irregularities in the application; for instance, the plaintiffs did not "make and file" the kind of affidavit required by law. They made the application under the act of congress of May 2, 1867, (14 U. S. St. at Large, 559.) That act authorizes the removal of a case by the plaintiff from a state court into the United States circuit court only where "*he will make and file, in such state court, an affidavit stating that he has reason to and does believe that, from prejudice or local interest, he will not be able to obtain justice in such state court.*" In the present case the affidavit was made and filed by one L. W. K., who says in his affidavit that he is "*the attorney and agent of the plaintiffs;*" *that he himself* (not the plaintiffs, nor either of them) "*has reason to and does believe that, from prejudice and local influence, the said plaintiffs will not be able to obtain justice in the state court.*" He does not state, nor is it anywhere shown, why the plaintiffs, or some one of them, did not make the affidavit; nor is it shown whether *they* have any reason to believe or do believe that they could not obtain justice in such state court. The affidavit shows that it is the attorney and

*575 agent of the plaintiffs who has reason to and does believe this. There is no authority given in the statute for a plaintiff to swear by his attorney or agent; nor is there any authority given for his attorney or agent to "make and file" the affidavit; nor, under the statute, is the attorney's or agent's belief material. We do not know that there ever has been any direct adjudication upon this exact question now under consideration by any court of last resort. It

was once, however, decided by Judges DILLON and DUNDY, of the United States circuit court, that the plaintiff's attorney could not make the affidavit. *Sands v. Smith*, 1 Dill. 298, note. See, also, *Dodge v. Northwestern U. P. Co.*, 13 Minn. 458, (Gil. 427.) We do not think that the affidavit in this case was sufficient; and we do not think that the state courts are bound to resort to extraordinarily liberal construction for the purpose of ousting themselves of the jurisdiction of cases.

After said application for removal was overruled, the plaintiffs moved the court to vacate and set aside the judgment rendered on March 9th in favor of Condon. This motion was overruled on April 4th. Said judgment, as we have already stated, was merely that Condon's lien on the premises in controversy was prior to the plaintiffs' lien. No other or different judgment could have been rendered upon the pleadings in the case. Condon set up in his answer new matter, showing that his lien was prior to that of the plaintiffs; and the plaintiffs did not file any reply thereto, controverting the allegations of said answer. Hence the answer setting up new matter must be taken as true. Civil Code, § 128. And hence, if the plaintiffs' motion had been sustained, and the judgment set aside and vacated, the court would have been bound to again render the same judgment upon the pleadings, unless the plaintiffs could have got leave to file a reply. The plaintiffs were in default for want of a reply when the judgment was rendered, and they gave no reason to the court for their default, except that they had thought that they

had filed a reply. They did not, when they made their motion, *576 nor at any other time, offer to file a *reply, or ask leave of the court to file a reply. They stated that they had a defense to Condon's answer, and that the answer was a sham; but they did not state what their defense was, nor why nor how Condon's answer was a sham. They did not deny the truth of the facts alleged in the answer; and a great many of them were unquestionably true. If said judgment had never been rendered, if the application of the plaintiffs had been made for leave to file a reply, instead of to vacate said judgment, and if they had made no further or better showing than they did on this application, the court would not have erred in refusing to grant them leave to file a reply; or at most it would not have committed an error sufficient to authorize a reversal of its rulings. When the plaintiffs moved to set aside said judgment, they should have shown what their defense to said answer was, what portions (if any) of the answer they controverted, why they were in default, and should have offered to file a reply upon the condition that the judgment was set aside. For, as the pleadings then were, if the court had granted their motion to vacate the judgment, the court would then immediately have rendered the same judgment upon the pleadings.

On the same day that this motion was overruled, (but whether before or after is not shown,) the action as between the plaintiffs and

the other defendants was tried. And on this trial it was shown that, even if the plaintiffs had filed a reply, and tried their case as between themselves and Condon, the same judgment should have been rendered. In any manner in which we may view the case, we do not think that the error of the district court in rendering the Condon judgment at the time it did was, or is now, such a material error as will require a reversal of the judgment. On the said trial between the plaintiffs and the other defendants the plaintiffs obtained the personal judgment against Wood and Edwards which they prayed for in their petition. They also obtained judgment against all the defendants, except Condon, Doty, and Avise & Co., that their lien was the prior lien on the premises. They in fact obtained everything *577 they asked *for, except that the court rendered judgment that the liens of Condon, Doty, and Avise & Co., were prior to theirs, and of this last ruling they now complain.

The facts of the case were substantially as follows: Originally Macon, Krell, and Conwell owned Block No. 13 in Oswego, Labette county. On January 10, 1870, Macon and Krell gave to Cooper & Co. their two promissory notes, for \$740.25 and \$775.50, due in six and nine months, respectively. On March 1, 1870, Macon and Krell executed a trust deed for said premises to one C. F. Drake, for the purpose of securing the payment of *said notes*. The trust-deed does not purport to secure *the debt* evidenced by the notes. On January 10, 1871, Macon, Krell, and Conwell mortgaged said property to Condon to secure the payment of three promissory notes held by Condon against themselves for the aggregate amount of \$1,809.41. On March 14, 1871, Macon and Krell mortgaged said property to Emmert Doty to secure the payment of a certain note for \$350 held by Doty against themselves. Afterwards, probably about December 26, 1871, Macon, Krell, and Conwell sold and conveyed said property to David S. Wood, and Cooper & Co. surrendered to Wood the said notes of Macon and Krell to themselves, and took in their stead three other notes executed by Wood and one B. Edwards to themselves, dated December 26, 1871, one for \$300, and the other two each for \$713.63, and due in substantially eight, twelve, and eighteen months; and Wood and wife executed a mortgage on said property to Cooper & Co., dated December 26, 1871, acknowledged April 27, 1872, and recorded August 27, 1873, "to secure the payment of the sum of \$1,727.27, * * * according to the terms of" said three promissory notes. On February 3, 1872, Wood mortgaged said property to Avise & Co. to secure the payment of a debt evidenced by a certain note held by Avise & Co. against Wood. Said mortgage was recorded February 17, 1872. It is unnecessary for us to mention the claims of the other defendants, for, as against them, the court found *578 and rendered judgment in favor of Cooper & Co. We think that the judgment of the court below, that the liens of Condon, Doty, and Avise & Co. are prior to that of Cooper & Co., is correct.

The only ground upon which Cooper & Co. claim that their lien is prior to those of Condon, Doty, and Avise & Co. is that they have a right to date the origin of their lien back to the execution of the trust deed from Macon and Krell to Drake, which is prior to the existence of all the other liens. But, as we have said before, that trust deed was executed merely to secure the payment of two certain promissory notes, and Cooper & Co. had no possible interest in said notes when they commenced this suit. They had surrendered them long before the commencement of this action. The notes were probably canceled and extinguished when they were surrendered; but if not, still the plaintiffs had no interest in them. The trust deed was merely an incident to the notes, and followed them. Whoever at any time owned the notes, owned the trust deed; and if the notes were at any time extinguished, the trust deed was also and necessarily extinguished. We suppose that where a mortgage is given to secure the payment of a particular debt, the mortgage is not exhausted until the debt is paid or canceled, although the debt may in the mean time be evidenced by several different promissory notes. In fact, wherever a mortgage is given to secure the performance of any particular act, the mortgage will not be exhausted until that particular act is performed, or until the performance thereof is excused by some subsequent transaction. But that is not this case. It was not *the debt*, aside from *the notes*, that was secured by said trust deed; but it was merely the debt as evidenced by said promissory notes that was secured. The intention of the parties must always govern in transactions of this kind; and, evidently, the intention of the parties, from the language of the trust deed, was merely to secure those notes; and then, afterwards, it was clearly the intention of the parties to divest Cooper & Co. of all property or interest in the notes. And clearly, when *579 Cooper & Co. parted with their interest in the *notes, they parted with the auxiliary security connected with the notes. The lien of the trust deed followed the notes, and did not remain with Cooper & Co.

The judgment of the court below must be affirmed.
(All the justices concurring.)

JAMES M. YOUNG v. ELIHU WHITTENHALL.

July Term, 1875.

1. **Limitations: Fraud, Action for.** Section 18 of the Code, which provides, among other things, that "an action for relief on the ground of fraud" can only be brought within two years after the cause of action shall have accrued, and that "the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud," applies to actions for *damages* founded upon fraud, as well as to actions for *equitable relief* founded upon fraud.
2. ———: **What must be Alleged in Petition.** Where the petition in such a case shows upon its face that the fraud upon which the cause of action is founded was consummated more than two years before the commencement of the action, the plaintiff must further set forth in his petition that he did not discover the fraud until within less than two years before the commencement of the action, or his petition will be held defective on demurrer.¹

Error from Nemaha district court.

The case is stated in the opinion.

Nathan Price and *W. D. Webb*, for plaintiff.

W. W. Guthrie, for defendant.

VALENTINE, J. The plaintiff in error, who was also plaintiff *580 below, set forth in his petition below, in two separate *counts, two supposed causes of action: The defendant demurred to said petition, and to each count thereof, on the ground that neither of them stated facts sufficient to constitute a cause of action. The court below sustained the demurrer. Said supposed causes of action are founded upon certain alleged false and fraudulent representations made by the defendant for the purpose of inducing the plaintiff to purchase certain real estate from the defendant, and which did so induce the plaintiff so to purchase said real estate. The plaintiff still

¹ Where A. purchases real estate as the agent of another, and pays for the same out of the funds of his principal; and, without the knowledge and consent of his principal, takes the deeds to the lands in his own name as the grantee, and thereafter retains the title to the property in himself to his death, and more than nine years after the purchase, and an action is brought after the decease of A. by his principal against the heirs at law of A., to have the heirs decreed trustees for the plaintiff's use and benefit, of the legal title of such real estate, and to have them compelled to convey the legal title to the plaintiff, who is the equitable owner of the land, held, that such action comes within the provisions of subdivision 3 of section 18 of the Code, as the action is for relief on the ground of fraud; that the statute excepts the principal from the limitation until a discovery of the fraud. *Main v. Payne*, 17 Kan. 608. See *Sweet v. Hentig*, 24 Kan. 497, where facts of case were held to be a bar to relief. Fraudulent failure of agent to pay taxes, *Woodman v. Davis*, 32 Kan. 344, 8 C. 4 Pac. Rep. 262; of occupant to pay taxes, *Doyle v. Doyle*, 33 Kan. 721; 8 C. 7 Pac. Rep. 615. See the very full notes of recent cases on questions of limitations of actions to *Bradley v. Cole*, 25 N. W. Rep. 531; *German S. & L. Soc. v. Hutchinson*, 8 Pac. Rep. 628; *Perry Co. v. Railroad Co.*, 2 N. E. Rep. 857. Pleading statute, *Zane v. Zane*, 5 Kan. 78, and note.

retains the land purchased, and now sues for the damages claimed to have resulted from said alleged false and fraudulent representations. Said alleged false and fraudulent representations were made, and the land purchased, on May 22, 1871. This suit was commenced September 5, 1873.

The first question raised and to be considered by this court is whether said supposed causes of action are not barred by the statute of limitations. Subdivision 3 of section 18 of the Civil Code provides, among other things, that "an action for relief on the ground of fraud" can only be brought within two years after the cause of action shall have accrued, and "the cause of action in such case shall not be deemed to have accrued until after the discovery of the fraud." It is contended by plaintiff that this statute does not apply to the case at bar, because this statute applies only to actions for "relief," while the plaintiff claims that this action is not for "relief," but for *damages*. The claim of the plaintiff is not tenable. This is an action for relief, in the nature of damages, and for such relief as comes within such statute. If this action is not for relief, and such an action as may be barred by such statute of limitations, then there is no statute of limitations for this class of actions. The claim of the plaintiff is substantially this: An action for equitable relief founded on fraud comes within the statute, and is barred in two years; but an action for legal relief founded on fraud does not come within the statute, and is therefore never barred. In other words, all the entrances to a court of equity are closed in two years for all actions founded *581 on fraud; but *courts of law are kept open for such actions forever. This claim is not tenable.

The second count of the petition shows, beyond all doubt, that the cause of action set forth in that count is barred. The alleged fraud was consummated on May 22, 1871. The plaintiff knew of it at least as early as August 1, 1871; for on that day he bought in the adverse claims which he now contends the defendant fraudulently represented that he had obtained and conveyed to the plaintiff, and this suit was not commenced until September 5, 1873.

But with respect to the first count of the petition a much more difficult question arises. That count does not show affirmatively when the plaintiff first obtained knowledge of the fraud alleged to have been perpetrated upon him; and therefore it does not show affirmatively, unless by presumption or implication, when the statute of limitations commenced to run against the cause of action stated in such count. The cause of action stated therein was, of course, complete on the very day that the alleged fraudulent transaction was finally consummated; but, for the purpose of the statute of limitations, the cause of action is not to be deemed to have accrued until the discovery of the fraud by the party aggrieved. That is, in such actions, although the cause of action is perfect on the very day that the fraud is consummated, yet the statute of limitations does not

begin to operate upon such cause of action until the fraud is discovered. Or, in other words, the want of a discovery or knowledge of the fraud constitutes one of the exceptions which take the case out of the operation of the statute. Now, whose duty is it to plead this exception? and in what pleading must it be stated? It has always been the duty of the plaintiff, both in courts of law and in courts of equity, to plead the exceptions, where the question of the statute of limitations has been properly raised by the defendant. And it never was the duty of the defendant in such a case to negative the exceptions. *Zane v.*

Zane, 5 Kan. *137. The most that has ever been required of *582 *a defendant has been to require him to plead the statute, and even then, as in all other cases, it devolved upon the plaintiff to plead the exceptions which he believed would take the case out of the operation of the statute. And in equity practice, and under the various codes, where the bill or petition shows that the claim of the plaintiff is barred by the statute, it always devolves upon the plaintiff to plead the exceptions in his bill or petition, or the same will be considered defective on demurrer. The exact question we are now discussing has been decided in California. *Sublette v. Tinney*, 9 Cal. 423; *Boyd v. Blankman*, 29 Cal. 20, 44; *Carpentier v. City of Oakland*, 30 Cal. 444. In the first case the court say: "The seventeenth section of the statute of limitations provides that certain actions must be commenced within three years, and, among others, an action for relief on the ground of fraud; the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the fact constituting the fraud. The cause of action cannot be deemed to accrue upon the discovery of the fraud in any other sense than that the statute will not be deemed to commence running until such period. Fraud is the substantive cause of action. Upon its commission the right of action arises; not upon its discovery. The policy of the law is that actions on this ground should be commenced within three years, but, that innocent parties may not suffer while in ignorance of their rights, the statute excepts them from the limitation until a discovery of the fraud. The latter clause of the section must therefore be considered as an exception merely to the general provision, and be pleaded as such. In the present case, then, the cause of action accrued upon the execution of the contract. As this was more than three years previous to the commencement of the suit, the cause of action was barred, and the objection, being apparent upon the face of the complaint, could be taken advantage of by demurrer. If the plaintiff was within the exceptions of the statute, it was incumbent upon him to state it in his complaint." *Sublette v. Tinney*, *supra*.

*583 *We do not think the court below erred in sustaining said demurrer. The petition showed upon its face that the fraud upon which the cause of action is founded was consummated more than two years before the commencement of this action, and the pe-

tion did not show that the plaintiff did not discover said fraud until within less than two years before the commencement of this action. The only allegation of the petition that has the slightest reference to such a showing is as hereafter stated. The alleged fraud was concerning the boundary lines of the land purchased by the plaintiff, and the said allegation is as follows: "On said day [when said land was purchased] the plaintiff was, always before had been, and for a long time thereafter remained, ignorant of the boundary lines of said land, except as hereinafter stated, to-wit, that all knowledge he had in regard to the boundary lines of said land, before the sale was negotiated, he obtained from the defendant at the time he purchased said land." This allegation does not pretend to show when the plaintiff discovered that the boundary lines were different from what he had previously believed them to be, and it does not pretend to show that such discovery was made within less than two years before the commencement of this action. We therefore think the petition is defective in stating a cause of action which appears to be barred by the statute of limitations.

The judgment of the court below must therefore be affirmed.

KINGMAN, C. J., concurring.

*584

*A. L. STEVENS v. THOMAS ABLE.

July Term, 1875.

Counter-Claim and Set-Off: Unliquidated Demands. In this state any cause of action arising from contract, whether it be for a liquidated demand or for unliquidated damages, may constitute a set-off, and be pleaded as such in any action founded upon contract, whether such action be for a liquidated demand or for unliquidated damages.¹

Error from Jackson district court.

Action by Able to recover a balance of \$100 due him upon the sale of certain cattle. Stevens filed a bill of particulars, alleging as a defense, by way of set-off, "that on or about the twenty-fourth of February, 1873, he purchased of Able a certain lot of hogs, to be not less than fifty nor more than fifty-five; that said contract was in writing.

¹A judgment can be pleaded as a set-off in an action founded upon contract and although such action be for unliquidated damages. *Read v. Jeffries*, 16 Kr. 584.

signed by Able; that, at the same time, Stevens paid to Able upon that said contract and purchase \$25; that the hogs were to be delivered by Able to Stevens in May, 1873, at such time as Stevens might deem proper to receive them, at the weighing-scales of A. G. Campbell, near Circleville; that Stevens was to pay Able for the said hogs, upon delivery, three cents per pound gross; that, on or about the twenty-seventh of said May, Stevens demanded the hogs of Able, and requested him to deliver them as per contract, which Able refused to do," for which Stevens claimed \$150 damages. The district court, at the April term, 1874, refused to hear any testimony in support of this claim, and gave judgment in favor of Able.

J. H. Keller, for plaintiff in error.

The Code permits a cause of action arising on contract to be set off, without distinguishing between the kind or nature of such cause of action. It cannot be the intention of the Code to allow a plaintiff to set up two or more causes of action in his petition, and then confine a set-off to a limited class of contracts. Code, §§ 94, 96, 98. The language of the Code includes, as matters of set-off, every kind *585 of cause of action, liquidated and unliquidated, which can arise upon contract; and there seems to be no good reason for limiting its operation to liquidated damages so long as the statute does not so provide. 1 Nash, Pl. & Pr. 720; *Wagner v. Stocking*, 22 Ohio St. 297. The manifest policy of the Code is to obviate such circuity of actions, for it provides, (section 96,) if the defendant omit to set up a counter-claim or set-off, he cannot recover costs against the plaintiff in any subsequent action therein. It is the only manner in which the spirit of the statute can be made available without another action. *Morgan v. Spangler*, 20 Ohio St. 38, 54.

W. H. Dodge, for defendant in error.

Plaintiff in error does not seem to discriminate between a counter-claim and a set-off. In his bill of particulars he calls the matters which he sets up as a defense a "set-off or counter-claim." A counter-claim is defined by section 95, and a set-off by section 98, of the Code. The mere calling of the facts set up as a defense one or the other, will not make them so. The pleading filed by Stevens was not a counter-claim, because it did not arise out of the contract or transaction set forth in the petition as a foundation of plaintiff's claim, or connected with the subject of the action. If it had, it would have been good, whether the damages claimed were liquidated or unliquidated. But plaintiff in error now claims that it is purely a "set-off" which he pleads. A set-off is allowed only when the demand to be set off is liquidated, or capable of being ascertained by calculation. *Sedg. Dam.* 502; *Wat. Set-off*, 328, 333; *Barb. Set-off*, 76; *Batterman v. Pierce*, 3 Hill, 171.

Unliquidated damages claimed have never been permitted to be set off, unless expressly allowed by statute. *Sedg. Dam.* 488; *Butts v. Collins*, 13 Wend. 139, 156; *McDonald v. Neilson*, 2 Cow. 140; *Cor-*

nell v. Green, 10 Serg. & R. 14; U. S. v. Robeson, 9 Pet. 319; Hepburn v. Hoag, 6 Cow. 613; Wat. Set-off, 147, 383. "It is now believed that set-off must be limited as *heretofore*, when the sum claimed constitutes a *liquidated demand*." 1 Nash, Pl. 721.

*586 *VALENTINE, J. This action was commenced originally in a justice's court by Able against Stevens. Each party filed a bill of particulars in the justice's court. Each set forth in his bill of particulars a cause of action in favor of himself, and against his adversary, and arising out of and founded upon contract. Able, however, claims that the cause of action set forth in his bill of particulars was for a liquidated demand, and that the cause of action set forth in Stevens' bill of particulars was for unliquidated damages. We shall decide the case upon the theory that this claim of Able is correct. Able further claims that, because Stevens' cause of action is for unliquidated damages, it is therefore not the subject of set-off in this action. The case was tried before the justice, judgment rendered therein, and then appealed to the district court. The case was again tried in the district court. There the court refused to permit the defendant, Stevens, to prove his cause of action, on the ground that it was not the subject of set-off. We think the court erred. In this state any cause of action arising from contract, whether it be for a liquidated demand or for unliquidated damages, may constitute a set-off, and may be pleaded as such in any action founded on contract, whether such action be for liquidated demand or for unliquidated damages. Civil Code, §§ 94, 98. While it is not clear beyond all possible doubt that this is the meaning of our statutes, yet we think that this is the clear import of the same. They provide that "the defendant may set forth, in his answer, as many grounds of defense, counter-claim, set-off, and for relief as he may have, whether they be such as have been heretofore denominated legal or equitable, or both," (Code, § 94;) and "a set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of a court," (Code, § 98.) We suppose that there can be no question as to the applicability to this

case of these provisions of the Code, although the action was *587 commenced in a justice's court. Justices' Act, § 185. The construction that we have given these statutes is in accordance with the entire spirit of the Code, which attempts as far as possible to have all matters of controversy between the litigating parties determined in one action. A plaintiff may now join in one action as many causes of action as he may have, whether legal or equitable, or both, where they all arise out of contracts, either express or implied, and whether they are for liquidated claims or unliquidated damages, or for something else. Code, § 83. We suppose that every lawyer knows that there was no such thing as set-off at common law, and the whole subject is now governed by statute.

The judgment of the court below will be reversed, and cause remanded for further proceedings in accordance with this opinion.
(All the justices concurring.)

MARSHALL BARRY v. MARY ELLEN BARRY.

July Term, 1875.

Descents and Distributions: Rights of Widow, where the Husband Dies without Issue. A widow whose husband died without issue will take the whole of her husband's estate in the following cases: *First*, where he died without making a will; *second*, where he made a will, but she elects to take under the law; *third*, where he made a will, and she fails to elect to take under the will.

Error from Davis district court.

Action by plaintiff for partition of certain real property. All the estate for which partition was asked was the property of one Abraham Barry at the time of his marriage with the defendant. Said Abraham died without issue, in October, 1873. By the last will and testament of said Abraham he devised all of his estate, real and personal, to the defendant, *(his widow,) and the plaintiff, (his nephew,) each to receive one-half, after payment of his debts. A part of the real property in question was a homestead, on which said testator and defendant resided at time of testator's death. The defendant duly appeared before the probate court of Davis county, and refused to accept under the provisions of the will, and elected to take the portion allowed her under the law of descents. The district court, at the May term, 1874, sustained the claim of defendant to the whole estate, and gave judgment accordingly.

McClure & Humphrey, for plaintiff.

N. C. McFarland, for defendant.

VALENTINE, J. The only question in this case is, who owns the land in controversy,—Marshall Barry or Mary Ellen Barry? Originally, Abraham Barry owned it, and while so owning it he married Mary Ellen Barry. Afterwards, and on March 7, 1873, Abraham Barry made a will, and by said will devised one-half of all his real estate to his nephew, Marshall Barry. His wife, said Mary Ellen, neither assented nor dissented as to this will. On October 11, 1873, said Abraham died without issue. Said will was duly probated. The widow, Mary Ellen, then refused to accept under the will, and elected to take under the statutes. She now claims to own all the land which belonged to her husband, Abraham Barry, at the date of his death, and Marshall Barry claims to own one-half of the same. The court

below decided in favor of said Mary Ellen. We think the court below decided correctly. Marshall Barry has no interest in the land except what he gets under the will. Hence we must look to the law of wills to see what he does get. We would first say, however, that if Abraham Barry had died intestate, his widow would have taken (under the law of descents and distributions) the whole of his *589 estate not necessary *to pay debts, and no part of it would have gone to Marshall Barry, or to any one else, (Gen. St. 392, 394, §§ 4, 20;) and, if she does not now get the whole of said estate, it is because of said will. Section 17 of the law of descents and distributions (Gen. St. 394) reads as follows: "The widow's portion cannot be affected by any will of her husband, if she object thereto, and relinquishes all rights conferred upon her by the will."

Turning, now, to the law concerning wills, (Gen. St. 1107 *et seq.*) the first section of said act concerning wills provides that "any person of full age and sound mind and memory, having an interest in real or personal property of any description whatever, may give and devise the same to any person by last will and testament lawfully executed, *subject, nevertheless*, to the rights of creditors, and to the *provisions of this act.*" Section 35 provides that "no man, while married, shall bequeath away from his wife more than one-half of his property, nor shall any woman, while married, bequeath away from her husband more than one-half of her property. But either may consent, in writing executed in the presence of two witnesses, that the other may bequeath more than one-half of his or her property from the one so consenting." Section 41 provides that, where the widow has not consented to the will, she shall be cited to appear before the probate court "and make her election, whether she will accept" under the will, "*or take what she is entitled to under the provisions of the law concerning descents and distributions.*" Section 42 provides that "the election of the widow to take under the will shall be made by her in person in the probate court of the proper county, except as hereinafter provided; and, on the application by her to take under the will, it shall be the duty of the court to explain to her the provisions of the will, her rights under it, and *also her rights under the law*, in the event of her refusal to take under the will. The election of the widow to take under the will shall be entered upon the minutes of the court; and, *if the widow shall fail to make such election, she shall retain her share of the real and personal estate* *590 **of her husband as she would be entitled to by law in case her husband had died intestate.*"

It will be seen that the first section of the act concerning wills is comprehensive, giving to a man the power to devise and bequeath his whole estate, *subject, however, to the other provisions of the act.* The thirty-fifth section is a limitation of that power, putting one-half of his estate beyond his reach to bequeath, where he is a married man, except by the written consent of his wife. The word "bequeath"

in that section probably means "devise and bequeath." But it is not necessary now to so decide. Sections 41 and 42 create a further limitation of the power granted by section 1. The first section can operate to its full extent where a man has no wife, or where he gets her written consent. The thirty-fifth section can operate where a man has a wife and children. In such a case he can bequeath one-half of his property absolutely, and the other half with the written consent of his wife. The forty-first and forty-second sections operate where a man has a wife and no child. In such a case he cannot devise or bequeath any portion of his estate except with the consent of his wife. The meaning of these two sections seems very plain. Under the provisions of the law of descents and distributions a widow, whose husband died without issue and intestate, is entitled to the whole of her deceased husband's estate. Gen. St. 292, 294, §§ 4, 20. If, instead of dying intestate, her husband had, previous to his death, made a will, then, under said section 41, the widow may elect whether she will take under the will "or take what she is entitled to under the provisions of the law concerning descents and distributions;" which, as we have seen, is the whole of the estate. Under section 42 the probate court is required to explain to the widow her rights under the will, "and also her rights under the law;" which, in such a case, is to take the whole estate; and then, "if the widow shall fail to make such election, she shall retain her share of the real and personal estate of her husband as she would be entitled to by law in case her husband had died intestate." It will therefore be seen that a

*591 widow, whose husband died without issue *will take the whole of his estate in the following cases: *First*, where he died without making a will; *second*, where he made a will, but she elects to take under the law; *third*, where he made a will, but she fails to elect to take under the will. We do not say that this law is right. We express no opinion upon the subject. We do not make the laws, and are not responsible for them, whether they are good or bad.

The judgment of the court below must be affirmed.

(All the justices concurring.)

THOMAS ROYAL and others v. ANNIE L. LINDSAY.

July Term, 1875.

1. **Bills and Notes: Consideration: Extending Time of Payment.**
When after the maturing of a note running one year, and bearing interest at the rate of 12 per cent. per annum until paid, the payee agrees to extend the note for another year upon the promise of the payor to pay interest at the rate of 15 per cent. per annum, payable monthly, *held*, that such promise was sufficient consideration to sustain the agreement.
2. ———: **Insufficient Consideration.** A payment of a part of an amount due is not sufficient consideration to sustain an agreement to extend the time of payment of the residue.¹

Error from Sedgwick district court.

The district court, at the June term, 1874, gave judgment in favor of Lindsay against Royal and wife and another, defendants. The defendants bring the case here for review.

John Guthrie and Geo. S. Brown, for plaintiffs in error.

The answer clearly sets up a valid agreement for an extension *592 for one year of the time for the payment of the note in *suit.

A payment of interest in advance, or an agreement to pay interest in a manner different from that provided for in the contract, or, after a note becomes due, an agreement to pay interest for a definite time not provided for in the original contract, constitutes a sufficient consideration for an extension of time. *Rose v. Williams*, 5 Kan. *483; *Jarvis v. Hyatt*, 43 Ind. 163; *Hamilton v. Winterrowd*, Id. 393; *Bailey v. Adams*, 10 N. H. 162; *Crosby v. Wyatt*, Id. 318; *Wheat v. Kendall*, 6 N. H. 504. The court below certainly erred in refusing to admit the evidence offered by plaintiffs in error in support of their answer.

J. M. Balderston, for defendant in error.

The alleged oral agreement to forbear was a *nudum pactum*. In paying the \$150, Royal did no more than he was legally bound to do. The debt was due and undisputed. The promise of Lindsay was without any benefit to her, and occasioned no loss to Royal. 2 Pars. Notes & Bills, 528, and note *h*; *Kellogg v. Olmsted*, 28 Barb. 96. Payment of part of a debt is not a consideration which will support a promise to forbear to sue or press the collection of the balance. *State v. City of Davenport*, 12 Iowa, 336; *Pabodie v. King*, 12 Johns. 426.

It is difficult to determine which clause of his second defense plaintiff in error relies upon to show payment of interest in advance. In neither does he claim that interest was in fact paid in advance, as it

¹The payment and acceptance of part payment of a debt from the principal does not discharge or release the surety; such a payment does not impliedly extend the time of payment of the balance overdue, *Halderman v. Woodward*, 22 Kan. 734; payment of interest in advance, as an extension of time of payment, *Hubbard v. Ogden*, 22 Kan. 363; as to principal and surety, and discharge of surety, consult notes to *Rose v. Williams*, 5 Kan. 398; *Turner v. Hale*, 8 Kan. 86; *Ray v. Brenner*, 12 Kan. *108.

appears by the modified agreement they treat the payment of the \$150 as a payment on the note; and on the twenty-fourth of February he claims to pay \$18, the interest on \$1,000 for one month to that date at the rate of 15 per cent. per annum. This amount was paid as interest already earned, not for the use of money for a future time, as they now claim.

BREWER, J. This was an action brought by defendant in error to foreclose a note and mortgage. The answer alleged an agreement to extend the time of payment of the note, and that under such agreement the note was not yet due. Upon the trial the district *593 court excluded all testimony under the answer, so the only question now is whether the answer set up a valid agreement for the extension of time of payment. It unquestionably alleges an agreement on the part of the payee to extend. Does it disclose a consideration for such agreement, or does it appear as a mere *nudum pactum*? The note sued upon was dated January 20, 1873, was for \$1,030, and drew interest from date until paid at 12 per cent. per annum. The answer, after alleging that the agreement on the part of the payee to extend was made on the twenty-third of January, 1874, the day of the maturity of the note, alleges the payment in pursuance of the agreement of \$150, "which was indorsed on said note, and that said sum was paid as the consideration for the forbearance and extending the time of payment of said note." The copy of the note attached to the petition shows this indorsement: "Rec'd on the within, \$150, interest to date. January 23, 1874." It seems clear that all that is intended by this allegation is that a payment of \$150 was made, which was understood by both parties as a payment on the note, and so indorsed, and that as such payment it was claimed as sufficient consideration for the promise to extend. That this is not the law is abundantly established. A payment of that which is already due is no consideration for a new promise by the payee. But the answer goes further, and alleges that this agreement for extension "was modified on the twenty-fourth of February, 1874, by the said Thomas Royal agreeing to pay the interest on said sum of money each month to the said plaintiff at the rate of 15 per cent. per annum; that, as a part performance of said modified agreement, said Royal paid the said plaintiff the sum of \$18." As, under the law then in force respecting interest, (Laws 1872, p. 284,) only 12 per cent. could be recovered, and any payment in excess of that per cent. was to be taken as a payment of the principal, and as by its terms this note drew interest until paid at the rate of 12 per cent. per annum, it does not seem that the promise to pay 15 per cent. presented any new consideration; though it was said by the court in *Bank v. Woodward*, 5 N. H. 99, that "a *promise to give day of payment, founded upon a usurious consideration, is certainly not void." To the same effect are *Kelley v. Gillespie*, 12 Iowa, 55; *Cor-*

ielle v. Allen, 13 Iowa, 289. But *contra*, see Payne v. Powell, 14 Tex. 600. There remains, therefore, the single fact that the payor, in consideration of the extension, promised to pay interest, and promised to pay it in a manner different from that prescribed in the note; i. e., monthly instead of annually. That a promise to pay interest for a definite period of time is a sufficient consideration for an agreement to extend for a like period the day of payment, is affirmed by these authorities: Wheat v. Kendall, 6 N. H. 504; Bailey v. Adams, 10 N. H. 162; Chute v. Pattee, 37 Me. 102; McComb v. Kittridge, 14 Ohio, 348; 2 Amer. Lead. Cas. (5th Ed.) 469. It is denied in Reynolds v. Ward, 5 Wend. 502; Kellogg v. Olmsted, 25 N. Y. 189; Parmalle v. Thompson, 45 N. Y. 58; Gibson v. Irby, 17 Tex. 173; 2 Pars. Notes & Bills, 528.

It is perhaps not necessary that this question shall in this case be definitely decided, though we may say that the suggestions made in favor of the proposition by the court in the case from 14 Ohio seem to us of great force. We prefer to rest our decision upon what seems less doubtful ground, viz., the promise to pay interest in a different manner from that prescribed in the note. The note calls for interest at the rate of 12 per cent. per annum. True, it bears this rate after maturity and until payment. And after maturity, in the absence of any new agreement, the note is due each day, with the accumulation of interest to that day. But, in the absence of such new agreement, there is no rest in the computation of interest except at the end of each year, while by the agreement there would be such rest every month. A promise to pay a greater interest, not usurious, would unquestionably be a sufficient consideration, and this for the reason that a higher and different obligation was assumed by the promisor. Upon the same principle, though perhaps not presenting so clear a case, we think the promise before us can be sustained as a sufficient consideration. This is the assumption of a new, different, and slightly more onerous obligation. We think, therefore, the district court erred in its ruling, and the judgment must be reversed, and the case remanded for a new trial.

KINGMAN, C. J., concurs.

FRANK J. ROBINSON and another v. HERRO T. WILSON.

July Term, 1875.

1. **Bankruptcy: Effect of Discharge: Judgments in State Courts.** While section 8 of chapter 12 of the General Statutes is general in its terms, and directs the court, on production of a certificate of discharge in bankruptcy, to enter a discharge upon the record of any judgment against such bankrupt, it cannot and does not apply to any other judgments than such as are legally discharged by the proceedings in bankruptcy.¹
2. **Homestead: When Subject to Attachment Lien.** When premises which have been seized under a valid order of attachment become thereafter the homestead of the defendant in the attachment, the homestead right is subject and subordinate to the attachment lien.²
3. **Bankruptcy: Exempt Property does not Pass to Assignee.** Property exempt by the laws of the state from seizure on attachment or execution does not pass by the assignment to the assignee in bankruptcy, but remains the absolute property of the bankrupt, unaffected by the bankrupt proceedings, and subject to any specific liens created by the voluntary act of the bankrupt, or through legal proceedings.
4. **Courts: Jurisdiction.** The state courts have jurisdiction to enforce any specific lien upon such exempt property.
5. **Bankruptcy: Operation of Assignment in: Attachment Liens: Exempt Property.** The assignment in bankruptcy operates to dissolve only such attachments as were made within four months prior to the commencement of the bankruptcy proceedings, and only such as were levied upon property passing to the assignee, and does not dissolve attachments levied upon property remaining the bankrupt's.

*596 *Error from Bourbon district court.

At the June term, 1874, of the district court, W. C. S., judge *pro tem.*, presiding, defendants, Frank J. and William R. Robinson, applied for an order that a certain judgment theretofore recovered in said court against them, in favor of Wilson, be discharged, and satisfied of record. This application was refused, and the Robinsons bring the case here for review.

Hulett & McCleverty, for plaintiffs in error.

McComas & McKeighan, for defendant in error.

¹ Application of said section, *Tefft v. Ferry*, 23 Kan. 753. See, also, *Herman v. Lynch*, 26 Kan. 435; *Wilkins v. Tourtellott*, 28 Kan. 835; *Noyes v. Dobson*, 30 Kan. 861; S. C. 2 Pac. Rep. 515; *Widner v. Yeast*, 33 Kan. 400; S. C. 4 Pac. Rep. 838.

² The commencement of proceedings in bankruptcy does not divest the state courts of jurisdiction to enforce an attachment lien on realty created more than four months next preceding the commencement of such proceedings; nor does a discharge in bankruptcy release an attachment lien not created within four months before the filing of the petition. The lien, however, cannot be enforced against the person of the defendant, or any other than the attached property. *Gillett v. McCarthy*, 23 Kan. 671.

BREWER, J. This is a proceeding to review the action of the district court overruling a motion of plaintiffs in error (defendants below) to have satisfaction of a judgment entered of record because of the fact that, after the rendition of the judgment, they had each received a discharge in bankruptcy. The motion was made under section 3 of chapter 12 of the General Statutes. Looking simply at the letter of that section, and it would seem as though the motion ought to have been sustained; for the language is general, and provides that "in any case in which any person has been or may hereafter be discharged, * * * and shall produce a certificate of discharge * * * to the court in which any judgment is of record, it shall be the duty of any such court to enter a discharge; * * * and thereafter any such judgment shall be deemed fully discharged and satisfied." But this whole statute is based upon and in recognition of the United States bankrupt law. It does not intend, even if it were possible so to do, to release parties from debts not discharged under that law. It aims simply to enable a party to obtain in the state courts the benefit of the rights granted to him by the federal law. So, though it declares that "in any case," upon the production of the discharge, it is the duty of the court, etc., it applies only to those cases *597 in which the bankrupt's discharge does, as a matter of fact, under the federal law, operate to release and discharge the judgment debt. Any other construction would expose the statute to grave constitutional objections. The question, therefore, is whether this judgment was one which, by the proceedings in bankruptcy, was released and discharged. If it was, the motion ought to have been sustained; if not, the motion was properly overruled.

What are the facts concerning the judgment, and the debt upon which it was based? The action in the state court was upon a promissory note, was commenced June 11, 1873, and was accompanied by the issue of an attachment. On the same day this attachment was levied upon three lots in Fort Scott. A motion was subsequently made to discharge the levy of the attachment, on the ground that the property attached was the homestead of one of the defendants, and therefore not subject to seizure under either an attachment or execution. But, as it appeared upon the hearing that the property did not become a homestead until about the first of July, and after the levy of the attachment, the motion was properly overruled. *Bullene v. Hiatt*, 12 Kan. *98. On the ninth of January, 1874, judgment was rendered, and an order made for the sale of the attached property. On the twenty-fifth of August, 1873, after the commencement of the action in the state court, and after the property had become a homestead, a creditors' petition in bankruptcy was filed against the plaintiffs in error, and on June 2, 1874, discharges in bankruptcy were granted. During the pendency of the action in the state court, no application was made for a stay of proceedings on account of the proceedings in the bankrupt court. The plaintiff below never proved

his debt in the bankrupt court. Was the attachment dissolved, and the judgment debt discharged, by the proceedings in bankruptcy? The property attached being the homestead, and exempt under the state law at the time of the commencement of the proceedings in bankruptcy, did not pass to the assignee in bankruptcy. It remained the property of the bankrupt, free from any control or interference on the part of the assignee. Nor does it seem to us, notwithstanding some decisions in the federal courts to that effect, that the bankrupt took the property as a purchaser from the assignee. The property never passed away from the bankrupt. It remained his, to all intents and purposes, the same as though no bankrupt proceedings had been instituted. Rev. St. U. S. §§ 5044, 5045; *Rix v. Capital Bank*, 2 Dill. 367; *Bump, Bankr.* (7th Ed.) 144. We think, too, that, as this property remains with the bankrupt, jurisdiction to enforce any liens thereon remains with the state court. Whether the bankrupt court has jurisdiction also, and whether it can stay any proceedings in the state court, we are not to inquire, for those questions are not in the case. *Rix v. Capital Bank*, *supra*; *In re Everitt*, 9 N. B. R. 90; *Bump, Bankr.* 146, 461, and cases cited.

But it is said that the only lien the plaintiff had was one of attachment, created less than four months prior to the commencement of the bankruptcy proceedings, and that the assignment to the assignee dissolved all such attachments, and consequently destroyed any lien. The language of the act is, "and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings." Section 5044. The subsequent section describes the kinds of property exempt from this assignment. The two sections are, of course, to be construed together, and the section quoted, therefore, should be construed as though it said expressly, "shall vest the title to all such property and estate, both real and personal," *as is not exempt from the operation of the bankrupt act*, "although the same" (that is, the *unexempt* property,—the property conveyed) "is then attached, * * * and shall dissolve any such attachment;" that is, any attachment on the property not exempt,—the property transferred by the assignment to the assignee. We are aware of decisions in the federal courts contrary to these views, and holding that the assignment dissolves all attachments within four months, whether upon exempt property or otherwise. *In re Ellis*, 1 N. B. R. 555; *In re Hambricht*, 2 N. B. R. 498; *In re Stevens*, 5 N. B. R. 298. We think, however, that the just and fair construction of the act is as we have given it. As the bankrupt court gets no jurisdiction of the exempt property, it would seem that it should take none over any

specific liens upon such property. It may be remarked that the exempt property in this case is exempt, not as among the articles named in the bankrupt act, but as exempt from seizure under attachment and execution by the state law, and therefore permitted by the bankrupt act to be exempt from its operation. *Bump, Bankr.* (7th Ed.) 142-147. That which makes this case one *sui generis* is the fact that at the date of the attachment the property was not exempt from seizure, but was at the time of the commencement of the bankrupt proceedings. The attachment, therefore, was good, and created a specific lien upon the property attached. *Bullene v. Hiatt*, 12 Kan. *98. It remained the property of the bankrupt; and the bankrupt court not taking the property did not disturb the specific lien. Whether, if after the sale of the attached property there should remain a balance on the judgment, this balance would be beyond the reach of the bankrupt's discharge, is a matter we need not now inquire into. The question may never arise. As the case now stands, we think there was no error in overruling the motion to enter a discharge of the judgment.

The decision of the district court will be affirmed.

(All the justices concurring.)

*600

*A. SUMNER v. J. J. McFARLAN.

July Term, 1875.

1. **Sale: Conditional: Agreement to Sell: Possession.** Where property is delivered by the owner to a party seeking to purchase, upon the express agreement that no title shall pass until the price thereof is fully paid, and the price is not paid, the title does not pass; and such party cannot, by a sale to one ignorant of the terms of such contract, transfer a good title as against the original owner.¹
- [2. **Possession.** Possession, though *prima facie* evidence of title, is only *prima facie*, and subject to be overthrown by other testimony; and, to acquire title, purchase must be made from the owner, or one authorized to sell. *Branson v. Heckler*, 22 Kan. 610.]²

Error from Cloud district court.

¹See *Moore v. Reaves*, *ante*, *150, and note; *Hallowell v. Milne*, 16 Kan. 65; as to implied warranties in sales, see notes to *Downing v. Dearborn*, 1 Atl. Rep. 408; *Cunningham v. Judson*, 2 N. E. Rep. 921; *Hoult v. Baldwin*, 8 Pac. Rep. 448; misrepresentations, *Hunter v. Lee*, 11 Kan. 225, and note; fraudulent representations, *Taylor v. Saurman*, 1 Atl. Rep. 44, and note; delivery to satisfy statute of frauds, *Jamison v. Simon*, 8 Pac. Rep. 502.

²The possession of goods by a bailee or agent gives him no power to pledge them for a debt of his own, except by virtue of actual authority received from the owner. *Branson v. Heckler*, 22 Kan. 610.

Replevin for an "American organ," brought by Sumner. Trial and verdict and judgment for defendant, McFarlan, at the April term, 1874.

C. W. McDonald, for plaintiff.

The sale by Sumner to McNulty was a conditional sale only, or a contract of lease. The notes were given for use of the organ, and their payment was a condition precedent to the transfer of the title. Until the title had passed to McNulty he could not sell and convey any title; he could convey no greater title than he had himself. By the contract itself it was expressly agreed that the title should not pass until full payment was made. This contract is not a mortgage, because the mortgagor must have title before he can execute a mortgage. Sumner has the right to retake the organ when payment fails, even out of the hands of a third party who has innocently and in good faith come in possession of the property. *Herring v. Hoppock*, 15 N. Y. 409; *Price v. Jones*, 3 Head, 84; *Bradshaw v. Thomas*, 7 Yerg. 497; *Baker v. Hall*, 15 Iowa, 277; *Fawcett v. Adams*, 32 Ill. 411; *Ballard v. Burgett*, 40 N. Y. 314; *Coggill v. Hartford & N. H. R. Co.*, 3 Gray, 545; *Dunbar v. Rawles*, 28 Ind. 225.

L. J. Crans, for defendant.

In this state the policy of the law is to protect *bona fide* purchasers in the possession of personal property purchased from a party who had the possession thereof. Gen. St. 583, art. 2; Id. 504, §§ 3, 4; *Martin v. Mathiot*, 14 Serg. & R. 214; *Rose v. Story*, 1 Pa. St. 190; *Davis v. Bradley*, 24 Vt. 55; *Smith v. Lynes*, 5 N. Y. 41.

*601 *BREWSTER, J. This was an action of replevin to recover possession of an organ, and the principal question was as to the title to the property. The testimony of the plaintiff showed that the organ had belonged to him, and had been placed in the possession of one McNulty under and by virtue of a conditional sale. The terms of this contract were as follows: McNulty paid \$25 down, and gave seven notes of \$25 each. On the margin of each note was written an agreement as follows: "It is hereby agreed between the maker of this note and A. Sumner that the organ, No. 42,914, for the use of which to the maturity thereof this note is given, is and shall remain the property of A. Sumner, and that in default of payment thereof said organ shall be returned to said Sumner, his agent or attorney." It appeared that the \$25 cash was paid upon the same agreement, and that none of the notes had been paid. Demand was duly proved. On the part of the defendant it was shown that he bought the organ of McNulty, and knew nothing of the agreement between McNulty and plaintiff. All the testimony is preserved in the bill of exceptions.

Upon this testimony the court charged as follows: "The question for you to decide is whether McFarlan knew of the contract between McNulty and Sumner. If you believe that McFarlan did know of

such contract, you must find for the plaintiff. If he did not, you must find for the defendant." In this instruction the court erred. The contract between Sumner and McNulty was a valid one, and by it no title passed to the latter until the payment of these notes. Having no title, he could convey none; and the mere fact of his possession gave him no power to pass title as against plaintiff. See 1 Pars. Cont. 449, and cases cited in notes. The fact that McFarlan was ignorant of Sumner's title will not defeat it; for possession, though *prima facie* evidence of title, is *only prima facie*, and subject to *602 be overthrown by *other testimony; and, to acquire title, purchase must be made from the owner, or one authorized to sell.

Neither the statute of frauds, (Gen. St. 504, §§ 3, 4,) nor the chattel mortgage act, (Gen. St. 584, § 9,) helps the defendant; for section 3 refers to a sale unaccompanied by possession, and section 4 to a loan with possession continued for five years; and there was no transfer of title, with chattel mortgage to secure the price, but simply a conditional sale, with the condition unperformed.

The judgment must be reversed, and the case remanded, with instructions to grant a new trial.

(All the justices concurring.)

JAMES A. HEADLEY and others v. LUTHER C. CHALLISS.

July Term, 1875.

1. **Supreme Court: Motion for Rehearing: Questions Considered.** Where a case has once been submitted and decided, this court will not, as a rule, upon a motion for a rehearing, consider any question not presented upon the original hearing.
2. **Stare Decisis: Extent of Rule.** Where a case is brought a second time on error to this court, the first decision will be deemed the settled law of the case, and will not be made a subject of re-examination.¹
3. ———. This rule extends, not merely to all questions actually presented by counsel, but to all questions existing in the record, and necessarily involved in the decision.

¹ While this rule may not be a cast-iron rule, incapable of relaxation under any circumstances, yet it must be adhered to where the question is one of great doubt, has been thoroughly considered, and is one whose decision involves no serious injury to general rights. *Central Branch U. P. R. Co. v. Shoup*, 28 Kan. 394. Where a case is decided by the supreme court on proceedings in error from the district court, that decision becomes the law of the case for all subsequent proceedings; and this rule covers, not merely the points expressly considered and decided, but all questions necessarily involved in the decision. *Crockett v. Gray*, 31 Kan. 346; 8 C. 2 Pac. Rep. 809. Where a case has once been submitted and decided, the supreme court will not, as a rule, upon a motion for rehearing, consider any question not presented upon the original hearing. *Western News Co. v. Wilmarth*, 8 Pac. Rep. 104.

4. ———. Hence where a defendant in a judgment, upon whom the only service had been by publication, made a motion to set aside the judgment as void, because rendered without any legal service or any jurisdiction over the defendant, and upon the hearing of such motion the plaintiff asked leave to correct the notice and proof of publication, which leave was refused, and the motion of the defendant to set aside the judgment sustained, and thereupon the plaintiff prosecuted a proceeding in error to reverse such ruling, upon consideration whereof this court decided that *603 leave ought to have been *given, and remanded the case, with instructions to grant leave to the plaintiff as asked, and thereafter the defendant moved for a rehearing, on the ground, then first presented to this court, that the affidavit for publication was totally defective, and hence that the ruling of the district court was correct and should be sustained, whether the notice and proof of publication were corrected or not, and such motion was overruled for the reason given in the first paragraph of this syllabus, *held*, that the defendant was, as to the matter of the affidavit, concluded by such decision, and the question is not open to re-examination in a second proceeding in error upon the same record, with the corrected notice and proof of publication.

Error from Atchison district court.

This case was here before, and is reported in 9 Kan. *684. It was brought here then by Challiss, who complained of the order of the district court overruling his motion for leave to correct a record by supplying a certain "proof of publication," which should have been filed in 1862. This court reversed the order and decision of the district court, and sent the case back, with instructions to the district court "to permit the amendments to be made; the motions [of Headley and others to set aside the original judgment] afterwards to be decided according to the principles" laid down in such decision in 9 Kan. *686, *687. The case being remanded, the district court, at the June term, 1873, allowed the record to be amended in accordance with Challiss' motion; and thereafter, at the June term, 1874, the motions of Headley and others to set aside said judgment of September 27, 1862, again came on for hearing, and were overruled and denied. From this last decision Headley and others now appeal, and bring the case here for review.

A. H. Horton and B. P. Waggener, for plaintiffs in error.

We now bring said proceedings of the court below here for review, and ask this court to reverse the action and decision of the district court, and to instruct the said court to vacate and set aside the said judgment of September 27, 1862, as the same is void. Said *604 judgment was obtained *without any affidavit being filed before service was commenced or had by publication, stating "that service of summons cannot be made within this state on the defendants to be served." Code 1859, § 79; Code 1868, § 73. The defect in the affidavit is fatal. The law is explicit and peremptory, and there is no way of evading it. Without the affidavit, the attempted service by publication is a nullity. *Shields v. Miller*, 9 Kan. *390, *398.

When the case was in this court at the January term, 1872, it was here at the instance of Challiss *only*, and the court merely passed upon the error of the district court in refusing to permit the said Challiss to file proper notice in the foreclosure suit, and to supply proof of publication in same case. At the July term, 1873, we made a motion to reargue the cause, but this court then refused, and such refusal did not go to the merits of the motion. We then understood that, as the motions could be heard *de novo* in the district court on the remanding of the case to that court, and the filing of the amendments and corrections of the record, that we would have full opportunity to present to the district court the matters now suggested; and, if then overruled, we could bring the case to this court for review. This we have done. We never have had a decision of this court upon the matters and record now presented, and we do not think we are to be denied a hearing now. This is the first opportunity we have had to present the fatal defects in the affidavit for publication to this court, and we have a right to a decision thereon.

Again, we also claim that the district court erred in permitting the pretended amendments and corrections to the original record in this case. Instead of filing the right notice in the suit, and of supplying the proper notice with proof of its publication, the court permitted the affidavits of Mr. Glick and Mr. Cochran to take the place of the "publication notice" and of the *proof* of its publication. These affidavits are made *ten years* after the original papers and affidavits (if any there were) were made and filed; and *is it possible that service by publication is to be upheld and sustained in this way? The record shows that only publication and proof thereof was had in the attachment case of Challiss v. Headley & Carr, and now the record is contradicted by affidavits made ten years after the entry of the case. A void judgment may be vacated and set aside at any time on motion of the defendant. *Foreman v. Carter*, 9 Kan. *674.

W. W. Guthrie, for defendant in error.

We insist that no question is presented in this record not previously decided in some stage of this case by this court adversely to reversal of this last decision.

It is now claimed that the affidavit for publication of July 24, 1862, in the original record, is fatally defective. So counsel complained in his original case, and again made this objection the special ground for reconsideration on his motion for reargument in July, 1873. This affidavit stands now as it stood then, and has been *twice sustained* in this court. For, certainly, if this affidavit is a nullity, and as such makes the judgment and proceedings void, then the decision of the district court in 1871, in deciding the judgment void, was clearly right; and the proceedings thereon held erroneous, being subsequent in order to this affidavit, could not be erroneous if the entire proceeding was a nullity *for want of jurisdiction*. Hence, when the district

court overruled this motion at June term, 1874, it did just what this court had advised. The case at bar is unlike that of *Shields v. Miller*. Here there was jurisdiction by the commencement of the action, and the service of a summons on three of the six defendants, before attempted service by publication. An action was then duly pending. Code 1859, § 62. In *Shields v. Miller* the action rested alone on the proceeding for constructive service.

BREWER, J. This is a proceeding in error to review the decision of the district court overruling a motion to set aside a judgment. The judgment was rendered in an action to *foreclose a mortgage, and upon service only by publication. This case has been once before to this court. *Challis v. Headley*, 9 Kan. *684. Upon abundant authority and well-settled principles the decision at that time has become the established law of the case. *Phelan v. City of San Francisco*, 20 Cal. 40; *Polack v. McGrath*, 38 Cal. 666; *Yates v. Smith*, 40 Cal. 662; *McKinlay v. Tuttle*, 42 Cal. 570; *Washington B. Co. v. Stewart*, 3 How. 413; *Booth v. Com.*, 7 Metc. 286; *Hosack's Ex'rs v. Rogers*, 25 Wend. 313; *Mason v. Mason*, 5 Bush, 187. Whatever, therefore, was at that time decided, is not now a matter for re-examination. Nor is this limited to the mere questions noticed in the opinion, nor, indeed, to the actual matters presented by the respective counsel, and considered by the court. It extends to all matters actually existing in the record, and necessarily involved in the decision. Thus, in the case from 3 How., cited above, a question was raised as to the jurisdiction of the court; but as the case had once before been taken to the court, and a decision rendered upon the merits, the question of the jurisdiction was held to be also settled, although, as a matter of fact, it had not been considered; and this, because jurisdiction is involved and assumed in an inquiry into and a decision upon the merits. See, also, the cases above cited from 7 Metc., 25 Wend., 5 Bush., and 38 Cal.

The motion in the district court was to set aside the judgment for want of service. The question presented to the court, and passed upon when the record was brought here before, was as to the right to amend the record by supplying the correct notice and proof of publication. There had been two cases between the same parties, and in the record of this case had been introduced the notice and proof belonging to the other. The district court held that this amendment could not be made. This court reversed such ruling, and decided that the amendment ought to be permitted. Now, while the motion filed was broad enough to include and did specifically mention the insufficiency of the affidavit,—the principal matter now presented,—yet the attention of this court was not called *to it, and the case was decided upon the points just noticed. Subsequently the learned counsel for the *Headleys* moved for a rehearing upon the ground specifically that the affidavit was fatally defect-

ive, and that hence the decision of the district court ought to be sustained, whether there was error or not in refusing leave to amend; for, though the notice and proof of publication were beyond exception, if the affidavit therefor was fatally defective the service was bad, jurisdiction was not acquired, and the motion to set aside ought to have been sustained. This motion was overruled upon the ground, as counsel correctly suppose, that the question raised was a new question, not presented by brief or argument of counsel at the first hearing; for while this court may in its discretion, and in furtherance of justice, upon a motion for a rehearing, examine into new questions, and upon them modify or revise its rulings, yet it is purely a matter of discretion, and not of legal right; and the court will seldom examine beyond the questions already presented. A party may not settle the law of his case by piecemeal before this court, any more than he may settle the facts in that way before the district court. When the case is tried, he must be prepared to present his entire claim, or his entire defense. Now, the sufficiency of the affidavit was a question actually existing, and apparent upon the record, and really involved in the decision; for an error in refusing leave to amend a record works no substantial injury to a party when the record as amended would be equally void. Upon these considerations, and upon these alone, we hold that the record of the case and judgment, as presented, must be sustained, and the ruling of the district court affirmed. As to the nature of the amendments made, and proof offered in support of the record, we think it unnecessary to more than refer to the opinions in this case when here before, and the similar case of *Foreman v. Carter*, 9 Kan. *674.

The judgment will be affirmed.

(All the justices concurring.)

*608

*A. BALLINGER v. LIZZIE LANTIER.

July Term, 1875.

1. **Attachment: Order of: When Bond must be Given.** In all cases where an order of attachment is issued, except where the defendant is a non-resident of the state, or a foreign corporation, an attachment bond must be given by the plaintiff. And where the defendant is not a non-resident of the state, nor a foreign corporation, and no such bond is given, the attachment should be dissolved on motion of the defendant.¹

¹ Where an order of attachment is obtained against a defendant who is a non-resident of the state, no attachment bond or undertaking is required, although the action is commenced, under section 280 of the Code, on a claim before it is one. *Simon v. Stetter*, 25 Kan. 155.

2. **Residence: Removal from State: Non-Resident.** A resident of the state of Kansas can become a non-resident only by leaving the state with the intention of becoming a non-resident; hence where a person leaves his former home in this state, and starts for another state, with the intention of becoming a non-resident of this state, and a resident of said other state, he does not become a non-resident of this state until he gets outside of the state.¹
3. **Pleading: Petition: Answer: When Reply Necessary.** Where a plaintiff sets forth in his petition a cause of action for goods sold and delivered, and does not mention that any promissory note or notes were given for the price of the goods, and the defendant afterwards sets forth in his answer that the goods were sold on credit, and that three promissory notes were given for the price thereof, and that neither of said notes is yet due, *held*, that this answer of the defendant sets forth new matter constituting a defense to the plaintiff's action, and that it requires a reply from the plaintiff to put it in issue.

Error from Greenwood district court.

Lantier recovered a judgment against Ballinger, at the April term, 1874, of the district court, for \$837, and costs, and Ballinger brings the record here for review.

Ruggles & Sterry, for plaintiff in error.

The court erred in overruling the motion of the plaintiff in error to dissolve the attachment. Under every ground of attachment stated in the affidavit upon which said order was issued except one, viz., "that the defendant below was, at the time of the commencement of the action, a non-resident of this state," it was absolutely necessary

that the plaintiff below should file a bond or undertaking before the issuance of the order. Code, § 192; Laws 1870, p.

172, § 5. No undertaking having been filed, and the defendant below having moved to dissolve said attachment on the ground that he was not a non-resident at the commencement of the action, and having denied under oath that he was such non-resident, said motion should have been sustained, unless, upon the issue thus found, the charge made is satisfactorily sustained by the evidence introduced on the hearing of this motion. *Chauncey v. Paige*, 9 Ohio St. 397; *Fulton v. Mehrenfield*, 1 Cin. Rep. 154. The evidence discloses, beyond a doubt, that up to the tenth of November (the day before the affidavit for attachment was filed) said defendant had been a resident of and doing business in Eureka, in said state, and that he was still in the state at the time of the filing of this affidavit for the order of attachment and the issuing of said order. This evidence shows that Ballinger was then, as he had been, a resident of the state. *Story*, Conf. Laws, § 41; *Fulton v. Mehrenfield*, 1 Cin. Rep. 154; *Jennison v. Hapgood*, 10 Pick. 97; *Kugler v. Shreve*, 28 N. J. Law, 129.

¹ In order to effect a change of residence, there must exist both the intention to change and the fact of removal. *Adams v. Evans*, 19 Kan. 174. See, in this connection, *Amsbaugh v. Exchange Bank*, 33 Kan. 100; S. C. 5 Pac. Rep. 884.

Said district court erred in overruling the motion made by plaintiff in error for judgment on the pleadings. That this motion should have been granted seems clearly manifest from a mere inspection of the pleadings and issues before the court at the time the motion was made. The answer contained new matter showing a perfect defense, and no reply had been filed.

VALENTINE, J. This was an action brought by Lizzie Lantier, administratrix of the estate of H. Lantier, deceased, for goods sold and delivered. An order of attachment was issued in the case at the commencement of the action. The final judgment of the court below was that the plaintiff recover of the defendant for the goods sold and delivered, and that the goods attached be sold to satisfy such judgment. The defendant below now complains in this court.

On November 10, 1873, and previous thereto, the defendant *610 was a resident of Eureka, Greenwood county. On the *night of that day he left Eureka, intending to become a non-resident of the state of Kansas, and a resident of the state of Iowa. On the next day the plaintiff commenced this action. She also at the same time obtained an order of attachment, which was served on the same day. The affidavit upon which the attachment was issued set forth as grounds therefor the first, second, third, and eighth statutory grounds for attachment. Code, § 190; Laws 1870, pp. 171, 172. The affidavit was sufficient. But no bond or undertaking in attachment was ever executed or filed. Afterwards the defendant moved the court to dissolve the attachment on various grounds, among which was that "the defendant was not, at the time said order of attachment was issued and served, 'a non-resident of the state of Kansas,' as the plaintiff alleged in her affidavit, nor was any attachment bond ever filed in the case." On the hearing of the motion both of these grounds were shown to be true, and yet the court overruled the defendant's motion. The court probably believed that, in law, the defendant was a non-resident. In this we think the court erred. In all cases of attachment, except where the defendant is a non-resident, or a foreign corporation, an attachment bond must be given by the plaintiff, (Code, § 192; Laws 1870, p. 172; § 5;) and the defendant in this case was neither. It is true, he had determined to become a non-resident of the state; but still he was still in the state when the order of attachment was issued and served, and was therefore not a non-resident. A resident of the state can become a non-resident only by *leaving the state* with the intention of becoming a non-resident. In the present case the defendant had not left the state when the order of attachment was issued and served. In one more day he probably would have been out of the state, and therefore a non-resident. But that one day is as important as though it had been a year. The order of attachment should have been dissolved.

The petition of the plaintiff was not very formal, but still, we think, it stated facts sufficient to constitute a cause of action. It probably would have been better if the petition *had stated all the facts of the case, and left nothing for the defendant to do but deny generally. It stated that the plaintiff "sold to the said A. Ballinger a stock of drugs, oils, paints, lamps, stationery, and furniture pertaining to a drug-store, for the sum of \$800;" and "that the said sum of \$800 has never been paid, nor any part thereof, but that the same yet remains due and unpaid." The petition did not mention, as the fact really was, that three promissory notes, not due when the action was commenced, were given for said \$800.

The answer of the defendant, we think, was also sufficient; and, as it alleged some new matter constituting a defense to the plaintiff's petition, we think it needed a reply from the plaintiff. The first defense stated in the answer was merely a general denial, and put in issue the truth of the allegations of the plaintiff's petition. The second defense was but little more than a general denial. If, however, the defendant had, under this defense, shown upon the trial that any of the "drugs, oils, paints, lamps, stationery, and furniture pertaining to a drug store" were in fact, as he alleged, "spirituous, vinous, or intoxicating liquors," within the meaning of the dram-shop act, (Gen. St. 399 *et seq.*) then, as the plaintiff had filed no reply, it is possible that she could not have shown that she had a license to sell that kind of goods. But upon this question we express no opinion.

The third and last defense stated in the answer substantially admits the plaintiff's cause of action, except that it denies that the amount for which the goods were sold was due at the commencement of the action; and by such admission, and to that extent, it substantially overrules the first and second defenses. *Butler v. Kaulback*, 8 Kan. *668, *671 *et seq.* But the defendant, after substantially admitting the plaintiff's cause of action, then set forth as new matter, in avoidance thereof, that a higher security was given, to-wit, that three promissory notes were given for the debt, describing the notes, and showing and alleging that neither of these notes was due when this action was commenced. Now, we think this stated a good defense to the plaintiff's action; and as it was new matter it

*612 *needed a reply to put it in issue, and as no reply was ever filed it must be taken as true. Code, § 128. Hence the court below erred in trying the cause, making findings, and rendering judgment over the objections of the defendant. According to the evidence, and the findings of the court below, the plaintiff had a good defense to the defendant's answer, and she ought to have set it up in a reply. Or probably it would have been better if she had set forth all the facts of the case in her original petition. It would seem from the evidence and the findings of the court below that said goods were sold to the defendant for \$800, to be paid for in cash down, or in three equal promissory notes, with approved security, due in three,

six, and nine months, respectively. The defendant elected to pay with the notes, and furnished them, and they were accepted by the plaintiff; but the name of the surety agreed upon by the parties was forged to the notes.

The judgment of the court below will have to be reversed, and cause remanded for further proceedings. We think that such proceedings may be had in the case that substantial justice may finally be done between the parties. It was evidently the strong desire of the trial court to do justice between the parties that caused it to err in the above-named particulars. Judgment reversed.

(All the justices concurring.)

F. C. MARTSOLF v. ROBERT BARNWELL.

July Term, 1875.

1. **Referee: Conclusiveness of Report.** Where a case is tried before a referee who reports his findings of fact and conclusions of law, and no motion is made to set aside the report, the findings of fact become conclusive as to the facts of the case.¹
2. ———: **Conclusions of Law for the Court.** The conclusions of law, however, drawn from these facts, remain for consideration by the court, and if it is satisfied that the referee erred in such conclusions, it is
 *G18 *its duty to apply the law correctly, and render such judgment as is appropriate to the facts.
3. **Liens: Priority of: Mortgagee and Mechanic.** Under the lien law of 1871, where a mortgage was executed and recorded on August 21st, and a contract to erect a hotel was executed and the work thereon commenced on August 23d, the lien of the mortgagee is prior to the mechanic's lien of the contractor.
4. ———. Where such mortgage did not upon its face provide for future advances, yet as a matter of fact the money was paid over at different times to the mortgagor, and only a small portion before the commencement of the work, but it did not appear that any part of the work done or materials furnished, which were not paid for and for which a lien was claimed, were so due and furnished before the last advancement of money by the mortgagee upon said mortgage, the lien of the mortgagee was properly adjudged the prior lien.

Error from Sedgwick district court.

An action to foreclose a mortgage was brought by Charles McDougall, as plaintiff, against Egbert J. Blood and wife, as mortgagees. Martsolf and Barnwell were joined as co-defendants. They answered

¹See *De Long v. Stahl*, 18 Kan. *558, and *nota*.

separately, Martsolf claiming a mechanic's lien on the mortgaged premises under a contract dated August 23, 1871, and Barnwell claiming under a mortgage executed and recorded two days earlier. The case was referred to C. C. N., who reported the facts as to each claim, but found as conclusions of law that Martsolf's lien was first, Barnwell's second, and McDougall's third, in order of priority. The district court, at the September term, 1873, upon the facts as reported, held that the referee erred in respect to the liens of Martsolf and Barnwell, and gave judgment in favor of the several lienholders, and in the order of priority as follows: In favor of Barnwell, \$5,000; in favor of Martsolf, \$1,754.50; in favor of McDougall, \$1,551. Martsolf brings the case here on error for review.

Sluss & Dyer, for plaintiff in error.

The findings of fact by the referee, being undisturbed by the court, are conclusive as to the determination of the questions of fact. The

referee finds that the Barnwell note and mortgage were made *614 August 21, 1871; that prior to that time Martsolf and Blood had agreed upon the terms of their contract, and it had been reduced to writing by *Barnwell*, and there was then an understanding had between Blood, Barnwell, and Martsolf that Barnwell was to furnish the money to pay Martsolf, and to furnish it *as the work progressed*. Martsolf then had the right to suppose, when he began work, on the 23d, that no money had been advanced, or would be advanced, by Barnwell to Blood, until after the work should be commenced. He had the right to suppose that Barnwell would not have any lien upon the premises until money was actually advanced, and then only to the extent of the advancement. *Clayton v. Drake*, 17 Ohio, 371. He had the right to suppose that he would be entitled to a lien from the date of the commencement of the work. *Laws* 1872, c. 141, § 1. And although the mortgage was of record, in the absence of any proof of actual knowledge of it, and in the absence of proof of any knowledge that \$400 had been advanced by Barnwell under the mortgage, he had the right to rely upon the arrangement made previously as to the time when the advances were to be made. This arrangement which existed between the three was evidently entered into in view of the terms of payment as expressed in Martsolf's contract with Blood.

The referee further finds that Barnwell, from first to last, recognized Martsolf as having the prior lien. But in any event, under the authorities cited, Barnwell could not claim a first lien for more than \$400. But there are two things which should not be overlooked in determining even that: Barnwell, by his conduct and agreement with Martsolf and Blood, *represented* to Martsolf that \$6,000 would be advanced to pay him for the work; that this money should be advanced as the work progressed, in accordance with the terms of the engagements of Blood to himself. In violation of this engagement Barnwell advanced Blood \$400 *before* the work commenced, and before

Blood was under any obligation to pay Martsolf anything, and finally failed and refused to advance the whole sum as he had agreed; *615 and it is reason*able to suppose Martsolf would have been paid in full if Barnwell had kept his agreement. These facts estop Barnwell from claiming even the \$400 as a prior lien.

A. L. Williams and Ross Burns, for defendant in error.

Notwithstanding the fact that Barnwell's mortgage was made and recorded before Martsolf made his contract, or commenced work, the referee found that Martsolf's lien was prior to the mortgage, and gave as his reasons for this conclusion of law the following: "(1) The contract for the building was written out by Barnwell before the twenty-first of August, 1871, and was executed August 23d, in presence of Barnwell; *therefore* Barnwell is estopped to deny the priority of Martsolf's lien. (2) When the mortgage was made to Barnwell, (August 21st,) and the contract with Martsolf, (August 23d,) Blood only owned *one-half* of the lots. He afterwards, (December 18, 1871,) and before the filing of Martsolf's lien, (January 29, 1872,) perfected his title to the whole property; *therefore* such subsequently acquired title inured, by operation of law, to the benefit of the *junior* lien, to the exclusion of the *senior*."

It is needless to say that no rules of law or equity were even incidentally mentioned as tending to support such propositions. The lien under which plaintiff in error claims is purely the creature of statute law. Its terms, its force, its effect, and its priority must be determined by that law. The lien law of 1871 is broad enough as it is, and the referee was not justified in interpolating new provisions by way of experiment. There might have been some shadow of excuse if it had been shown, or even asserted, that Barnwell had concealed the existence of his mortgage. On the contrary, it is shown, and the fact dwelt on by the referee, that Martsolf knew all about the mortgage, and that Barnwell was to furnish the money to build the house. Under such circumstances the following, in the mechanic's lien law of 1871, p. 252, will be found to not ineptly express the true rule of priority between the parties:

"Section 1. * * * Such lien shall be preferred to all other *616 *liens and incumbrances which may attach to or upon such lands * * * *subsequent* to the commencement of such building."

It seems too plain for argument that the whole proceedings before the referee were based either upon the deliberate intention to ignore the rights of a non-resident, or in gross ignorance of what those rights were. It may be a valid presumption of fact that all persons who agree to erect houses will be compelled to file a lien to secure their pay, but the referee in this case makes it a presumption of law. The law presumes that every man will pay his debts, but, with prudent foresight, secures to the creditor a remedy in any case where the presumption fails. Thus, the presumption of law in this case was that

Blood would voluntarily pay Martself what he owed him. But, in case he did not, the law contracted for him that Martself should have a lien upon the premises improved, to date from the commencement of the improvements. All persons acquiring an interest after work is begun, do so warned by the law of a contingency which, if it arises, postpones their interest or claim to the lien of Martself. But the law does not, and cannot, say that a lien legally acquired upon property which is in no other way incumbered, can afterwards, by operation of law, be postponed to the lien of a party who, at the time of making the first lien, had no lien, and no right to a lien.

The second conclusion of law is equally objectionable. It may be conceded that the subsequently acquired title of the mortgagor inured to the benefit of his mortgagee and other lienholders; but how it would have the effect to make the last lien better than the first is not so plain. If such after-acquired title does inure to the benefit of prior grantees, (and it is admitted that it does,) it has the effect to make perfect the grantor's title, and dates that perfected title back to the time of the first conveyance. In other words, the sheriff's deed of December 18, 1871, made Blood's title good on the twenty-

first of the preceding August, and left the mortgagee and lien-
 *617 holder's questions of priority in the same situation they *would have been had Blood's title been originally perfect. On the eighteenth of December, 1871, then, Blood's title became perfect. How, under such circumstances, can it be held that an inchoate lien—a lien not yet in existence, a lien which may never exist, and which, in truth, does not become a lien until January 29, 1872—can relate back and take precedence of a mortgage duly recorded before the commencement of the work upon which the lien is founded?

BREWER, J. The question in this case is as to the priority of certain liens. The matter was tried before a referee, who filed his report, with findings of fact and conclusions of law. He gave plaintiff in error priority over Barnwell, defendant in error. The district court, however, upon the facts as reported by the referee, awarded priority to Barnwell. No objection was made by plaintiff in error to the referee's report, and no motion made by him to set it aside. The facts, therefore, as found by the referee, are beyond question, and the only matter for consideration is the judgment required upon such facts. The district court was not bound by the conclusions of law of the referee any more than this court is bound by the conclusions of the district court. It was the duty of that court, upon examination of the facts found, to see that the proper judgment was entered upon them, whatever might have been the conclusions of the referee, as it is the duty of this court, upon a re-examination, to see if there has been any error in the conclusions and judgment of that court, and, if so, to direct the entry of the proper judgment.

Which lien was prior? Barnwell claimed a mortgage; Martself,

a mechanic's lien. Barnwell's mortgage was executed and recorded August 21, 1871. Martsolf's contract for work was executed, and his work commenced, August 23, 1871. Upon this alone Barnwell would have unquestioned priority. As against this, it is claimed that, prior to the execution of the mortgage, there was an understanding between the mortgagee, the lot-owner, and Martsolf, by *618 which Martsolf *was to erect a building, and the mortgagee was to advance to the lot-owner the money needed to pay for the work as it progressed, and that the mortgagee had actually drawn up the contract for the work between the lot-owner and Martsolf; and that from that understanding Martsolf had a right to suppose, on the 23d, when he executed his contract and commenced work, that no money had actually been advanced or mortgage executed. We fail to appreciate the force of this argument. It does not seem reasonable that a lot-owner would sign a contract for the construction of a large building (in this case a hotel) before he either had the money to pay for it, or had perfected arrangements to obtain it. Martsolf, then, ought to have presumed, if he was acting upon presumptions, that, if money was to be borrowed, the security therefor would be perfected before the building contract was signed. But the rights of these parties do not rest upon presumptions. The mortgage was on record, and Martsolf was chargeable with notice of its existence. He could acquire no rights against it, or in precedence of it. If doubtful about payment, or unwilling to risk the security of a second lien, he could decline the proposed contract.

Again, it was said that the money was to be advanced as the work progressed, and that in fact only a small portion was advanced prior to the commencement of the work, and that, therefore, to the extent of such prior advancement alone, could Barnwell's mortgage be preferred to the mechanic's lien. In this we think counsel are mistaken. The mortgage was for a single, fixed amount, and contained no provision for future advances. Now, if it be true that equity will look behind the face of the mortgage, and date the liens from the times of the several advances of money by the mortgagee, (and upon this question we express no opinion,) it will also, upon the same principle, date the mechanics' liens from the times of furnishing material and doing work. If the one can claim a lien only from the time of paying over his money, surely the other can claim his only from the time of supplying material and doing work. At such times *619 only *does either mortgagee or mechanic part with, or mortgagor and lot-owner receive, value. And, if this is the test of a lien, it must be so for both alike. Now, it does not appear that Martsolf supplied any material, or did any work, for which he did not receive pay, or for which he claimed a lien, prior to the last advance of money by the mortgagee. Under those circumstances he is in no position to claim that his entire lien should be referred back to the date of the commencement of his work, and the mortgagee's

be distributed along the dates of the several advances of money. Whether, therefore, we regard the dates of the liens of the two parties from either a legal or an equitable standpoint, the mortgagees must be preferred to the mechanic. It seems to us, therefore, that there was no error in the rulings of the district court, and the judgment must be affirmed.

(All the justices concurring.)

SHELLABARGER & LEIDIGH v. ISAAC THAYER and others.

July Term, 1875.

1. **Mechanic's Lien: Lien of Subcontractor.** Under the lien law of 1872 the lien of the subcontractor is limited only by the amount contracted to be paid the contractor; and all payments made to the contractor prior to the expiration of sixty days after the completion of the building are at the risk of the owner, and cannot be taken in reduction of the lien of the subcontractor.¹
2. ———. Thus, where T. entered into a contract with L., by which the latter agreed to build a house upon the lot of the former for \$1,300, \$300 of which was paid on the execution of the contract, and the balance was to be paid after the completion of the building, and thereupon L. proceeded to perform his contract, and build the house, and in so doing bought lumber and material of S., to the amount of about \$900, for which he did not pay, *held*, that S. was entitled to a lien for the full amount of his bill.
3. **Attorney's Fee not Taxable.** An attorney's fee is not taxable on the foreclosure of any lien, unless in pursuance of a contract therefor.

*620 *Error from Sedgwick district court.

Shellabarger & Leidigh, plaintiffs, claimed a subcontractors' lien upon lot No. 68, on Main street, in the city of Wichita, owned by Isaac Thayer and George Skipton, two of the defendants, for lumber sold to one H. H. Lindsay, to be used in the constructions of a building which Lindsay had contracted with said Thayer & Skipton to erect on said lot. Lindsay died after the completion of the building, and his administrator was made a co-defendant. The district court, at the September term, 1874, found due plaintiffs, from Lindsay's estate, on account of said lumber, \$918.74, and interest thereon, and \$75 attorney's fees, but held that their right to a lien, as against

¹The said law of 1872 is applicable to school-districts, *Wilson v. School-district*, 17 Kan. 111; payments at owner's risk, *Delahay v. Goldie*, Id. 265; sub-contractor is not bound by all the terms of original contract, *Clough v. McDonald*, 16 Kan. 117; contract price—fund for subcontractors—*pro rata* payment, Id.

the owners of the lot, Thayer & Skipton, was limited to the amount which T. & S. owed Lindsay, to-wit, \$500 and interest. Plaintiffs bring the case here.

Sluss & Dyer, for plaintiffs.

Does a payment made by the owner to the original contractor, at the time of the making of the contract, and before the commencement of the building, operate to defeat, to that extent, the lien of a subcontractor? Are subcontractors entitled to a lien upon the building and real estate to a sum equal to the *original contract price*, or only to a sum equal to what was owing to the original contractor by the owner at the time the subcontractor commenced furnishing the material? We think the only reasonable construction that can be placed upon section 2 of chapter 141 of the Laws of 1872 is that subcontractors are entitled to a lien for the full amount of their claim not exceeding the amount for which the original contractor agreed to perform the labor and furnish the material; and that it makes no difference whether the owner paid a part or the whole of the contract price at the time of the execution of the contract. Otherwise the

owner and contractor would have it in their power to wholly *621 defeat any and all liens of *subcontractors, and thus avoid the statute. We cannot express it in any stronger language than that of the statute: "But the risk of all payments made to the original contractor shall be upon *the owner* until the expiration of the 60 days hereinbefore specified." Nor is this unjust, for the same section provides that no owner shall be liable to an action by the contractor until the expiration of 60 days from the "completion of the building." See, also, Code 1868, §§ 632, 633; Laws 1870, c. 87, §§ 23, 24; Laws 1871, c. 97, § 2. As to constitutional questions raised by defendant in error, see *Cooley*, Const. Lim. 151, 168, 171; *People v. Mahaney*, 13 Mich. 497; *Turnpike Co. v. State*, 21 Mich. 286; *Jones v. Land-office Com'r*, 28 Ind. 382.

Wm. Baldwin, for defendants in error.

Where the immediate contract between the owner and builder provides for a different security, (as in this case, where a note and mortgage were given,) it is entirely inconsistent with the idea of a mechanic's lien on the same land to secure the debt contracted for the building. See *Burrough v. Baughman*, 9 Mich. 213. In such case the original contractor could not have a mechanic's lien; and as section 2 of chapter 141 of the Laws of 1872 merely extends the rights of the contractor to the subcontractor, the subcontractor could have none. But, suppose a mechanic's lien could legally attach in this case, then, by the provisions of said section 2, the subcontractor is to have a lien for the amount due him on the property of the "owner" "from the same time and to the same extent, and in the same manner and to the same extent," as his original contractor would have. Now, by section 1 of the same statute, a lien only to the extent of the amount due from the "owner" to the original contractor, on eleventh

of July, 1872, (the day on which the plaintiffs first had any connection with the transactions in relation to said building,) could have been created or obtained, viz., for the sum of \$500, and no more;

consequently the lien of the subcontractors would, by the *622 *plain terms of the statute, be restricted to that amount.

That part of the statute providing that payments made by the owner to the contractor shall be "at the risk of the owner," and that part providing that "contractor shall not sue owner until," etc., cannot, it would seem, be made to apply in this case to any part of the contract price of the building except the \$500 remaining unpaid on said eleventh of July, 1872. Any other construction of the language of the statute would place it in the power of the contractor, by mere silent collusion with a "stranger," to incumber the property of the owner, without his knowledge, and in fraud of his rights. The legislature cannot be presumed to have intended said statute to have any such effect. The record does not show that the defendant in error ever knew of any claim of plaintiffs against said real estate as the subcontractor of Lindsay, until the twenty-third day of August, 1872, after said building was completed. As said section 2 of chapter 141 of the Laws of 1872 provides that the owner may pay the demand of the subcontractor, and have it held a payment of such amount to the contractor, it would seem that the legislature contemplated that the right of lien of the subcontractor could not be for a greater amount than was owing from the owner to the principal contractor under their contract, and that a subcontractor's lien should not attach until the "owner" had notice of his relation to the principal contractor.

If the construction of said section 2 contended for in behalf of the plaintiffs is the correct construction, then it is an infraction of section 16 of article 2 of the constitution, as giving the statute a broader effect than that indicated by its title, and, in so far as it does this, it is void. See Cooley, Const. Lim. c. 6, § 5, p. 148. And, if that be "the only reasonable construction," then it is manifestly inequitable and unjust, in that it renders it necessary that all building contracts shall be made on time, and for a money consideration only,—thus tending to prevent the improvement of real estate, the encouragement of which is the origin and object of the mechanic's lien laws,—and as *being unequal legislation, for the benefit of one class, and to the detriment of another equally entitled to the protection of the laws.

BREWER, J. The facts in this case are, briefly, these: On June 28, 1872, the defendants in error contracted with one H. H. Lindsay for the building of a house on a lot belonging to them in the town of Wichita. The contract price was \$1,300,—\$800 of which was paid at the execution of the contract, and before the commencement of the work. Lindsay completed his contract. The plaintiffs in er-

ror sold Lindsay lumber for the building to the amount of about \$900. Having taken the proper steps to perfect their lien, the question is whether it extends to the full amount of their bill, or simply to the amount due the contractor. It is not pretended that Lindsay received any money from the defendants after the plaintiffs had commenced furnishing lumber, or, indeed, after the commencement of the building,—the only payment being the \$800. The law in force at the time of this building, (Laws 1872, c. 141, p. 294, § 2,) giving to subcontractors their lien, requires the filing of the statement within sixty days after the completion of the building, etc., and then reads: "And, if the contractor does not pay such person or subcontractor for the same, such subcontractor or person shall have a lien, for the amount due for such labor or material, on such lot or lots, from the same time and to the same extent, and in the same manner and to the same extent, as such original contractor: provided, that the owner shall not be liable to such subcontractor for any greater amount than he contracted to pay the original contractor; but the risk of all payments made to the original contractor shall be upon the owner until the expiration of the sixty days hereinbefore specified; and no owner shall be liable to an action by the contractor until the expiration of said sixty days," etc.

Three things are clear from this: *First*, that the subcontractor has a lien for his work or material; *second*, that the limit of *624 such lien is the amount contracted to be paid to the *original contractor; and, *third*, that the risk of all payments up to a certain date is upon the owner. Now, the money contracted to be paid in this case was \$1,300. That, then, is the limit of the subcontractor's lien,—not the amount due at the time of notice, or delivery of material, but the amount contracted to be paid. True, the owners had paid \$800 of that amount, but the risk of such payment was upon them. The very purpose of this clause in the statute was to prevent the cutting off of the liens of subcontractors by early payments to the contractor; and this is a clause, the exact counterpart of which we have not found in the statutes of any other state. In most, the lien applies only to the amount due at the time of notice. Such, also, until 1872, was our own law. Laws 1871, p. 253, § 2; Gen. St. p. 756, § 632.

It must be borne in mind that this is not an attempt to compel payment by the lot-owners before the time fixed by the contract therefor; for, though the contract called for note and mortgage for the five hundred dollars, yet the answer admits that amount to be due; nor to compel payment in money, when payment in some other commodity was stipulated for. Payment was contracted for in money; and the only question is whether, by advance payment, the lien of the subcontractor can be cut off. The plain letter of the statute forbids it. We do not think the law obnoxious to the constitutional objections raised against it.

We do not understand that the attorney's fees can be taxed in a case like this. *Stover v. Johnnycake*, 9 Kan. *369.

The judgment of the district court will be modified, and the case remanded, with instructions to adjudge the entire amount found due the plaintiffs in error (less the attorney's fees) a lien upon the premises.

(All the justices concurring.)

*625 *HENRY ALLEN and others v. JOSEPH HANNUM and others.

July Term, 1875.

Will: Refusal of Widow to Accept: Effect as to Others. Where a widow fails and refuses to accept under the will of the deceased husband, but elects to take under the law of descents and distributions, such failure and refusal does not render the will inoperative further than as between herself and others claiming portions of the estate. As between other persons, the will will be enforced as near in accordance with the intention of the testator as it can be so enforced.

Error from Nemaha district court.

Action for partition, brought by Olive Allen, as plaintiff, against Joseph Hannum, as executor, etc., and Henry Allen, Isaac W. Howe, Thomas Keller, Francis Hannum, Florence Hannum, Josephine Hannum, Julia Hannum, and Marietta Hannum, as defendants. The questions involved arose under the last will and testament of Samuel Allen, deceased, the father of said Henry Allen. The district court, at the April term, 1874, gave judgment, directing partition to be made, assigning one-half the lands in controversy to the plaintiff, Olive Allen, (widow of said Samuel,) and the remaining one-half in equal parts to said Francis, Florence, Josephine, Julia, and Marietta Hannum, minor children of the testator's sister. Henry Allen brings the case here for review.

Joseph Sharpe, for plaintiff in error, contended that the district court erred in deciding that the children of Huldah A. Hannum were owners in fee of one-half part of the real estate of which Samuel Allen died seized. Said judgment is not only erroneous, but irregular, as the answer of Henry Allen, the son and heir of said Samuel, was on file in said court, and was admitted to be true. Said Henry had rights that were overlooked and ignored, and said district court should have modified its judgment in accordance with the facts.

*626 *VALENTINE, J. This was an action for partition of real estate, brought by Olive Allen against Joseph Hannum, Henry Allen, and seven others. Olive Allen got all she asked for in the

court below, and, of course, she has no right to now complain in this court. But has Henry Allen, the other plaintiff in error, any right to complain? The facts of the case seem to be about as follows: The property in controversy originally belonged to Samuel Allen. He made a will, devising and bequeathing all his estate (after payment of debts and funeral expenses) to his wife, said Olive Allen, during her natural life, and, after her death, (after paying her debts, funeral expenses, and certain legacies,) then equally to all the minor children of his daughter, Huldah A. Hannum. One of the above-mentioned legacies was a legacy of fifty dollars to his son, said Henry Allen. Afterwards said Samuel Allen died, leaving surviving him his wife, said Olive, one son, said Henry, and one daughter, said Huldah A. Hannum. His widow refused to accept under the provisions of the will, but elected to take under the provisions of the law of descents and distributions; and hence she takes absolutely (instead of for life) one-half of all the estate of said Samuel Allen, deceased. The other half of the estate, we think, should be distributed in accordance with the will, or as near in accordance therewith as may be possible under the circumstances of the case. Of course, the whole estate is first chargeable with the payment of the debts of the estate, then the widow takes one-half thereof, then the legacies are to be paid out of the other half, and then the remainder goes equally to the minor children of Huldah A. Hannum. Henry Allen is entitled to nothing but his legacy of fifty dollars; and that portion of his father's estate which goes to his sister Huldah's children will be subject to the payment of such legacy. There is nothing in the judgment of the district court which will interfere with this order of the distribution of said estate, and hence we do not think the

*627 *district court erred. The refusal of the widow to take under the will did not render the will inoperative any further than as between the widow and others claiming portions of the estate. It did not render the will inoperative as between the issue of said Samuel Allen and the devisees, legatees, and executor.

The judgment of the court below is affirmed.

(All the justices concurring.)

CITY OF LEAVENWORTH v. WILLIAM BOOTH.¹

July Term, 1875.

1. **Municipal Corporations: Cities of First Class: Power of Council, by Ordinance, to Levy and Collect License Taxes from Insurance Companies and Insurance Agents.** The act of the legislature of Kansas of 1870 incorporating cities of the first class, which provides that the mayor and council of such cities shall have power to enact ordinances, "to levy and collect a license tax on fire or life insurance companies or agencies, and to impose fines, forfeitures, and penalties for the breach of any ordinances," does, by its terms, give to the mayor and council of a city of the first class the power to enact an ordinance which shall provide that every fire or life insurance company intending to do business in such city shall first obtain a license from the city to do such business; that the price of each license shall be \$50 for a fire insurance company, and \$100 for a life insurance company; and that any person who shall violate such ordinance shall, upon conviction, be fined not less than \$50 nor more than \$200, etc.
2. **Insurance Department: Act Creating, not in Conflict with Act of 1870.** Where a city of the first class did, in 1870, in pursuance of such statute, enact such an ordinance as that above mentioned, *held*, that the act of the legislature of 1871 creating the insurance department did not repeal or modify said statute of 1870, or said ordinance, so as to exempt from the operation of said ordinance that class of foreign corporations doing business in Kansas and in said city which pays to the superintendent of insurance, under section 17 of the Laws of 1871, on account of the laws of their own state, an amount greater than that ordinarily paid by other insurance companies.
- *628 *8. —. Neither said statute of 1870, nor said ordinance, so far as either has any application to this case, is in violation of section 1 of article 11 of the constitution, which requires that "the legislature shall provide for a uniform and equal rate of assessment and taxation."
4. —. Neither said statute of 1870, nor said ordinance, so far as either has any application to this case, is in violation of section 4 of article 11 of the constitution, which provides that "no tax shall be levied except in pursuance of a law which shall distinctly state the object of the same," although said ordinance may not distinctly state what shall be done with the money paid by the insurance companies for licenses.

Appeal from Leavenworth criminal court.

Booth, an agent of a foreign life insurance company, was prosecuted before the police court for a violation of an ordinance of the city of Leavenworth requiring foreign insurance companies to pay certain license taxes for the privilege of doing business in said city. The action was removed by appeal to the criminal court,² where a trial was had at the December term, 1874. It was a test case for

¹Power of municipal corporations to tax employments, considered. See *Fretwell v. Troy*, 18 Kan. 271; *Ottawa Co. v. Nelson*, 19 Kan. 241; *McGrath v. Newton*, 29 Kan. 369; *Newton v. Atchison*, 31 Kan. 156; 8. C. 1 Pac. Rep. 268.

²This court was abolished by chapter 86, Laws 1875. Said act took effect April 1, 1875.

the purpose of determining the validity of said city ordinance. The criminal court held the ordinance valid. Booth was thereupon found guilty, and fined \$50, and costs.

Clough & Wheat, for appellant.

When the Wisconsin insurance company, for which Booth was agent, paid to the state superintendent of insurance, in accordance with the requirements of the statute creating the insurance department, the sum of \$325 for the same purpose as required by the Wisconsin laws, (that is, for fines, penalties, licenses, fees, etc.,) such company might, for the year thus paid for, do business in this *629 state without being sub*jected to any *fine* for so doing. If it could not, then the amount thus paid is not, in *practical effect*, for fines, penalties, etc. The city cannot, of course, impose any fine except by virtue of a law of the state authorizing it so to do, and therefore, when, as by section 17 of the insurance law, (Laws 1871, p. 221,) certain payments are in certain special cases, as in this, made for fines, penalties, licenses, fees, etc., such payment is made *in lieu* of fines, penalties, licenses and fees, and the city is not authorized in such special case to require a license to be paid for, or to fine, etc. When a city passes or enacts an ordinance which imposes a fine by virtue of power conferred on it by a state law, it does so by virtue of delegated power, and does so as a part of the law-making power of the state. 2 Dill. Mun. Corp. § 245, and notes.

The ordinance mentioned in the agreed statement of facts is void, because of article 11 of the constitution of this state, in so far as thereby any tax is attempted to be levied; as the *object* of the tax is not specified either in the statutes of the state under which said city derives whatever power it has, nor in said *ordinance*, as required by section 4 of article 11 of the constitution. And said ordinance violates the rules of uniformity and equality specified in section 1 of said article 11. And, further, the power to levy and collect a license tax on fire and life insurance companies or agencies, mentioned in the sixth subdivision, on page 99 of the Laws of 1870, and in the second subdivision on page 58 of the Laws of 1874, even if valid, does not authorize a tax, properly so called, but only a tax or fee reasonable in amount, as a compensation for the trouble of issuing a license. 1 Dill. Mun. Corp. §§ 291-293, and notes.

H. Miles Moore, City Atty., for the City.

The counsel of the city, under and by virtue of the provisions of its charter, which is a general law of the state, has authority to levy and collect a license tax on fire or life insurance companies or agencies, etc. In pursuance of that authority the city council did, *630 for the purpose of raising a *revenue to pay the debts of the city for the support of common schools in the city, and under and by virtue of the police regulations of said city, enact the ordinance set forth in the record. The fact that the said company, of which the defendant was agent, had paid to the superintendent of

insurance the sum of \$325, or any other sum, as license to do business in this state, or even that said sum was in full for license, fines, etc., to the state of Kansas, has nothing to do with the authority given by the same legislature to cities of the first class to pass ordinances levying a license tax for them to do business within the limits of said city. Under the provisions of the state law of 1871, such insurance companies can do business anywhere in the state, if they comply with that law, outside of the city of Leavenworth; but, if they desire to do business in that city, the state law and city ordinance says they must conform to the local regulations of the city. The provisions of the ordinance are not in conflict with section 4 of article 11 of the constitution. That provision has reference to state taxes, and not municipal taxes. The ordinance does not violate any provision of the constitution. The provisions in the charter of 1870 and 1874, conferring the authority to levy and collect a license tax on certain avocations and employments, are constitutional. 1 Dill. § 291, and note.

VALENTINE, J. On March 2, 1870, an act of the legislature of Kansas amending "An act to incorporate cities of the second class" was passed, which provides, among other things, as follows: "The mayor and council of each city created or controlled by this act shall have the care, management, and control of the city, and its property and finances, and shall have power to enact and ordain any ordinances not repugnant to the constitution and laws of this state, and such ordinances to alter, modify, or repeal; and shall have power * * * to levy and collect a license tax on * * * fire or life insurance companies or agencies, * * * and to impose fines, forfeitures, and penalties for the breach of any ordinances," etc. Laws 1870, p. 97 *et seq.*

On May 21, 1870, the mayor and council of the city of Leavenworth—it being a city of the first class—passed an ordinance which provides, among other things, as follows:

"Section 1. No person or persons shall engage in the business of fire or life insurance, nor shall any company do business as a fire or life insurance company, in this city, after the fifteenth day of June, 1870, without first having obtained a license therefor. The price of such license for each and every fire insurance company doing business in this city shall be fifty dollars per annum; and the price for such license for each and every life insurance company doing business in this city shall be one hundred dollars per annum."

"Sec. 4. Each and every person or agent who shall violate any of the provisions of this ordinance shall, on conviction before the police judge, be fined not less than fifty dollars, nor more than two hundred dollars, for the first offense, and shall be fined the further sum of fifty dollars for each and every day he shall continue to violate the same."

There is no provision in the ordinance, or elsewhere, prescribing what shall be done with the money received for licenses. On March 1, 1871, an act of the legislature was passed, creating an insurance department, (Laws 1871, p. 214,) and providing for the appointment of a "superintendent of insurance," (section 2;) and also providing that "the said superintendent shall have the sole and exclusive charge of and control over said insurance department, under the laws relating thereto," (section 3.) Said act also provides that certain things shall be done, and certain moneys shall be paid, by each and every insurance company, before it shall have any authority whatever to do business in Kansas. And said act further provides that "whenever the existing or future laws of any other state or government shall require insurance companies organized under the laws of this state, applying to do business by agencies in such other state or government, or of the agents thereof, any deposit of security in such state for the

protection of policy-holders therein, or otherwise, or any payment *632 for taxes, fines, penalties, certificates of authority, licenses, fees, or otherwise, greater than the amount required for such purposes from insurance companies of other states by the then existing laws of this state, then, and in every such case, all companies of such states or governments establishing agencies in this state shall make the same deposit, for a like purpose, with the superintendent of insurance of this state, and pay to said superintendent, for taxes, fines, penalties, certificates of authority, licenses, fees, or otherwise, an amount equal to the amount of such charges and payments imposed by the laws of such other state or government upon the companies of this state, and the agents thereof." Section 17.

In February, 1874, the Northwestern Mutual Life Insurance Company of the state of Wisconsin applied to the superintendent of insurance of this state for permission to do business in Kansas. The agreed statement of facts upon which this case was tried in the court below shows, among other things, as follows:

"The laws of said state of Wisconsin, in force therein ever since and before the first day of January, 1874, require insurance companies organized under the laws of this state, (of Kansas,) or of any state other than said state of Wisconsin, applying to do business by agencies in said state of Wisconsin, payment of the sum of \$325 in amount, per annum, for taxes, fines, penalties, certificates of authority, licenses, fees for the privilege of doing business therein, and because thereof; and under and by virtue of section 17 of the act of the legislature of the state of Kansas, entitled 'An act to establish an insurance department in the state of Kansas, and to regulate the companies doing business therein,' approved March 1, 1871, the superintendent of insurance of this state of Kansas did, in the month of February, 1874, demand and require of and from the company first aforesaid that it pay to him said sum of \$325 before he would grant authority thereto to transact business in the state of Kansas; and the company first aforesaid then,

in February, 1874, paid to said superintendent of insurance of this state of Kansas \$325 for taxes, fines, penalties, certificates of authority, licenses, and fees, for the privilege of doing business in this state of Kansas for the term and period of one year from the twenty-eighth of February, 1874. And thereupon said superintendent of insurance of this state of Kansas authorized and licensed the company first aforesaid to engage in, do, and transact business as such life insurance *633 ance *company in this state of Kansas for the term and period of one year from and after the time last aforesaid, and to establish agencies in this state, and to engage in and do and transact such business in this state by an agent or agents of said company."

On March 6, 1874, the legislature re-enacted in substance the provisions of the act of 1870 first quoted in this opinion, without attempting to repeal said provisions either directly or by implication. Laws 1874, p. 58, § 13. The defendant, William Booth, is the duly-authorized agent of said Northwestern Mutual Life Insurance Company for Kansas; and the company, through him, did business as an insurance company in the city of Leavenworth on the twenty-second of April, 1874, without having obtained from said city any license to do such business. On the twenty-fourth of said April the defendant was arrested on the charge of violating said city ordinance, by doing life insurance business as aforesaid for said company, in said city, without having any city license therefor. The case was tried before the police judge of said city. The defendant was found guilty, and fined fifty dollars. He then appealed to the criminal court of Leavenworth county, where he was again tried, found guilty, and fined fifty dollars; and he now appeals to this court.

The only question involved in this case is whether said city ordinance is valid, as applied to this class of insurance companies. But involved in this question are several others: *First*. Do the provisions of the statute first quoted in this opinion, by its terms, authorize the passage of such an ordinance as was passed? That is, does it authorize the passage of an ordinance requiring more to be paid for the insurance license than the mere cost of issuing the license? *Second*. If said provision does, by its terms, authorize the passage of such an ordinance, then was not it, and any ordinance passed under it, so modified by the act of 1871, creating the insurance department, that such provision will no longer apply to this class of insurance companies which pays to the superintendent of insurance, on *634 account of the laws of their own state, a sum *greater than the amount ordinarily paid by the insurance companies in lieu (as is claimed) of all "taxes, fines, penalties, certificates of authority, licenses, fees," etc.? *Third*. Is said provision itself valid? Involved in this last question are these other questions: Is said provision in contravention of section 1 of article 11 of the constitution, which requires that "the legislature shall provide for a uniform and equal rate of assessment and taxation?" Is it in contravention of section 4 of

article 11 of the constitution, which provides that "no tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same?"

We think the said ordinance is valid, so far as it has any application to this case. There are many kinds of business, like that of selling intoxicating liquors, for instance, which may, under our constitution, be absolutely prohibited by the legislature, or be licensed, restrained, and regulated; and we know of no good reason why the business of insurance may not come within this category. Many good people believe that the world would be better off without insurance than with it, and all believe that it may be restrained, regulated, and allowed to exist only under a license. And of the different kinds of business which may be allowed to exist only under a license there are many whose license tax may be vastly more than the mere cost or value of issuing the license; and again we could instance the business of selling intoxicating liquors. In granting licenses the items which may be taken into consideration as elements in fixing the costs of the same would seem to be about as follows: *First*, the value of the labor and material in merely allowing and issuing the license; *second*, the value of the benefit of the license to the person obtaining the same; *third*, the value of the inconvenience and cost to the public in protecting such business, and in permitting it to be carried on in the community; *fourth*, and in some cases an additional amount imposed as a restraint upon the number of persons who might otherwise engage in the business. None of these items con-

templates, except incidentally, the raising of revenue for general purposes. In many cases a license which, if issued for proper purposes, would be valid, would not be valid if issued merely for the purpose of obtaining or increasing the general revenue fund. A proper license tax is not a tax at all within the meaning of the constitution, or even within the ordinary signification of the word "tax." *City of East St. Louis v. Wehrung*, 46 Ill. 393; *Addison v. Saulnier*, 19 Cal. 83; *Carter v. Dow*, 16 Wis. 318; *State v. Herod*, 29 Iowa, 123, 125; *Mitchell v. Williams*, 27 Ind. 62. This is so even where the license tax is much greater than the mere cost of issuing the license, and even where the surplus fund incidentally arising from the issuing of the license goes into the treasury to swell the general revenue fund. *Charity Hospital v. Stickney*, 2 La. Ann. 550; *Tenney v. Lenz*, 16 Wis. 566, 567; *Chilvers v. People*, 11 Mich. 48; *Ash v. People*, Id. 347; *Baker v. City of Cincinnati*, 11 Ohio St. 534, 543, 544; *Johnson v. Philadelphia*, 60 Pa. St. 445, 450; *Henry v. State*, 26 Ark. 523, 525; *Orton v. Brown*, 35 Miss. 426. And there are still other decisions holding that the constitutional provisions with reference to taxation have no reference to the collection of license taxes, among which are the following: *Anderson v. Kerns Draining Co.*, 14 Ind. 201; *Thomasson v. State*, 15 Ind. 449, 451; *Bright v. McCullough*, 27 Ind. 228, 232; *People v. Coleman*, 4 Cal. 46. The

imposition of a license tax is in the nature of a sale of a benefit or privilege to a party who would not otherwise be entitled to the same. The imposition of an ordinary tax is in the nature of requisition of a contribution from that which the party taxed already rightfully possesses in the state.

But whether the foregoing views are right or wrong, still we think the same conclusion must necessarily be reached from other considerations. It must be remembered that the insurance company involved in this controversy is a foreign insurance company, having no rights in this state except such as the state may see fit to confer upon it. It has no power to do business in Kansas by virtue of its organization in Wisconsin. It has no power to do business *636 in Kansas by *virtue of the laws of Wisconsin, or by virtue of the constitution or laws of the United States, or by virtue of all combined. *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Wall. 410; *Liverpool Ins. Co. v. Massachusetts*, Id. 556. It can do business in Kansas only under the laws of Kansas, and by permission from the state of Kansas. This state might absolutely exclude it, or might require that it do business only under a license, and might require that it not only get a license from the state, but also that it get a license from every city, county, or village in which it should attempt to do business. The state may permit such insurance company to come into the state under just such restraints and regulations as the state may choose. Hence the state is not bound to permit said insurance company to come to this state, (as individual citizens of other states have a right to do,) and then, for the purpose of raising revenue, resort only to the ordinary modes of taxation. On the contrary, the state, without resorting to taxation at all, may require that such insurance company shall pay for the privilege of coming into the state, and of doing business therein, and may require that it shall not only pay a sum to the state for the privilege of doing business therein, but that it shall also pay a sum to every municipal corporation in the state in which it shall attempt to do business. And all this the state may do without violating any provision of its own constitution. The provisions of the constitution with reference to taxation have no application whatever to this class of cases; and it would make no difference if these sums, required from foreign insurance companies, were required solely for the purpose of swelling the general revenue fund. That these views are correct, we would refer to the following decisions: *Fire Department of Milwaukee v. Helfenstein*, 16 Wis. 186; *People v. Thurber*, 13 Ill. 554; *Ducat v. City of Chicago*, 48 Ill. 172; *Slaughter v. Com.*, 13 Grat. 767, 774 *et seq.* We might refer to other authorities, but do not think that it is necessary.

*637 The said statute of 1870 (Laws 1870, p. 97 *et seq.*) *unquestionably authorized the city of Leavenworth to pass said ordinance; and we do not think that either the statute or the ordinance

was subsequently repealed or modified by the act of 1871 creating the insurance department. The act of 1871 does not purport to repeal or modify that of 1870, or anything done under it; and the two acts are not necessarily in conflict. Both may stand together. It is a well-settled principle of law that repeals by implication are not to be favored. The intention of the act of 1871 was that foreign insurance companies might, by paying a certain sum, be authorized to come into the state for the purpose of doing business therein. The intention of the act of 1870 was that all insurance companies, domestic as well as foreign, already rightfully in the state, and ready to do business therein, as far as the state is concerned, should, if they desired to do business in any particular city, pay to such city a license tax. In this there is no conflict.

The judgment of the court below is affirmed.

KINGMAN, C. J., concurring. BREWER, J., not sitting.

GEORGE G. HAYNES v. W. R. COWEN.

July Term, 1875.

1. Evidence: Foreign Judgment: Portion Only of Original Record.

A duly-authenticated copy of a judgment entry, from a court of record possessing general original jurisdiction, may, in some cases, be introduced in evidence without introducing the rest of the record.¹

2. ———: Where such judgment entry shows that a judgment sufficiently correct in form was rendered by the court, and shows that the court rendering the judgment had jurisdiction of all the necessary parties, it must be held that such judgment entry shows, *prima facie* at least, a valid judgment.²

3. ———: Attestation by Clerk: Judge's Certificate. Where a judicial record comes from a court of another state to this state, and is attested by the clerk of said court, with the seal thereof annexed, all that is

*638 *further necessary to make the attestation sufficient is that the presiding judge of the court rendering the judgment shall certify that the "attestation is in due form." And hence, in such case, when the presiding judge of a district court of Texas certifies to this much, and a great deal more, and says in his certificate, which is dated about five months after the clerk's certificate is dated, that the person who attests the record "is the clerk of said district court," without saying that such person was such clerk at the time of the attestation of the record, *held*, that such attestation and certificate are sufficient.³

¹See *Dodge v. Coffin*, *ante*, *277.

²Every presumption is in favor of jurisdiction. *Dexter v. Cochran*, 17 Kan. 450; *O'Driscoll v. Soper*, 19 Kan. 575. See, also, *Gross v. Funk*, 20 Kan. 356.

³It will be presumed, in the absence of evidence to the contrary, in favor of courts of general jurisdiction of sister states, that they have the authority they

4. ———: **Authentication by Presiding Judge.** Where such record is the record of a judgment rendered by the district court of Caldwell county, Texas, and the clerk in his attestation designates himself as the clerk of the district court of Caldwell county, Texas, and the judge commences his certificate by saying, "State of Texas, county of Caldwell," and designates himself as "presiding judge of the 22d judicial district in said state of Texas," and certifies that the person who attests as clerk "is clerk of said district court of the 22d judicial district within and for the said county of Caldwell," etc., *held*, that this sufficiently shows that the said judge is the presiding judge of the court that rendered the judgment.
5. **Pleading: Allegations of Time: Clerical Error.** Where a plaintiff who sues on a judgment states in his petition that the judgment was rendered April 15, 1872, at a term of the court begun and held April 18, 1872, but in these allegation does not attempt to recite the record, the allegations of time are immaterial, and the plaintiff may, under such allegations, show that the judgment was rendered April 18, 1872.
- [6. For other questions, including a correction of the decision in *Hargis v. Morse*, 7 Kan. *415, see the two opinions of the court, *infra*, pp. *642, *645.]

Error from Riley district court.

Cowen brought suit upon a foreign judgment, and recovered judgment thereon, at the September term, 1873, for \$161.07, and costs. Haynes, defendant, brings the case here on error.

H. G. Barner and Williams & Burns, for plaintiff in error.

Green & Hessen, for defendant in error.

VALENTINE, J. This was an action brought by Cowen against *639 Haynes, upon a judgment rendered by the district *court of Caldwell county, Texas. Said judgment was rendered in an action wherein said Cowen was plaintiff and one John N. Whittington was defendant. That portion of the judgment more particularly applicable to this case reads as follows: "And it appearing to the court, from the answer of George G. Haynes filed in this suit, that the said Haynes is indebted to the defendant, Whittington, in the sum of \$146.54, coin, it is therefore ordered and adjudged by the court that the plaintiff, W. R. Cowen, do have and recover of and from George G. Haynes, as garnishee, the sum of \$146.54 in coin."

The record of the judgment was attested by the certificates of the clerk and judge, as follows:

"*State of Texas, Caldwell County:* I, James A. Wiley, clerk of the district court of said county, certify that the foregoing is a true copy of a judgment rendered by the district court of said county on the eighteenth day of April, 1872, in the case of W. R. Cowen, plaintiff. v. John N. Whittington, T. J. Lee, and R. A. Brown, and Alvin

assume to exercise, and that the modes of procedure pursued by them, though different from those established by the laws of this state, are authorized by the laws of the state in which they act. *Ward v. Baker*, 16 Kan. 81.

Haynes and George G. Haynes, garnishees. Given under my hand, and the seal of the court, this December 2, 1872.

[Seal.]

"JAS. A. WILEY, Clerk D. C., C. Co.

"*State of Texas, County of Caldwell:* I, Henry Manny, presiding judge of the 22d judicial district in said state of Texas, do hereby certify that James A. Wiley, whose signature appears to the foregoing certificate of authentication, is the clerk of said district court of the 22d judicial district, within and for the said county of Caldwell; that he has the custody of the records of said court; that said certificate of authentication is in due form of law; and that the signature of the said James A. Wiley to said certificate is his genuine signature, and entitled to full faith and credit. In testimony whereof I have hereunto set my hand, and the seal of said court, this fifth of May, 1873.

"HENRY MANNY,

[Seal.]

"Judge of the 22d Judicial District of Texas."

At the trial of this case—which was before the court below without a jury—the foregoing attested copy of the record of said judgment was read in evidence, over the objection of the defendant below, and upon this evidence the court below found in favor of the plaintiff and against *the defendant, and rendered judgment accordingly; and the defendant below, as plaintiff in error, now brings the case to this court. In considering this case we shall follow the brief of plaintiff in error.

1. The plaintiff in error says in his brief: "The paper read in evidence by defendant in error, in the court below, to which plaintiff in error excepted, is only a copy of a judgment entry, and does not purport to be and is not a record of the proceedings of any court." It is true that "the paper read in evidence" "is only a copy of a judgment entry;" but it is not true that it does not purport to be the record of the proceedings of any court. It does purport to be a record of proceedings of the district court of Caldwell county, Texas. It commences as follows:

"*State of Texas, Caldwell County:* Be it remembered that on the eighteenth day of April, 1872, the following proceedings were had in the district court of Caldwell county, Texas, viz.: W. R. Cowen v. John N. Whittington. (No. 1,317.) In this cause came the plaintiff, by attorney, and announced himself ready for trial," etc.

Then follows a proceeding with reference to Martha Whittington, intervenor, who appears and withdraws her plea of intervention. Then follows a judgment in favor of the plaintiff, Cowen, and against John N. Whittington, T. J. Lee, and R. A. Brown, on an instrument in writing which is set out in the record. And the record shows that they all had "been legally cited to appear and answer this suit." Then follows a judgment in favor of the plaintiff, Cowen, and against Alvin Haynes, garnishee. Then follows a judgment in favor of the plaintiff, Cowen, and against George G. Haynes, garnishee, a copy

of which judgment we have already given. And then follows a proceeding with reference to some attached property.

The proper objection to the introduction of this record in evidence would probably have been that it is not a full and complete record of all the proceedings in the case. But even this objection would not be tenable. As we understand the law, a part of the record *641 of a case may sometimes be introduced in evidence. A record of a case is often divisible into many distinct parts, and each part is substantially a record of itself. And, when the record is so divisible, any distinct portion thereof may be introduced in evidence, if relevant, without introducing the other portions of the record. *Chinn v. Caldwell*, 4 Bibb, 543; *McGuire v. Kouns*, 7 T. B. Mon. 386; *Lee v. Lee*, 21 Mo. 531, 534; *Locke v. Winston*, 10 Ala. 849; *Smita v. McGehee*, 14 Ala. 404; *Henderson v. Cargill*, 31 Miss. 367, 413, 414. Indeed, it would seem useless and unnecessary, or even worse than useless and unnecessary, to introduce in evidence such portions of the record as may be entirely irrelevant to the case. Of course, where the record is indivisible, one portion of the same cannot be introduced without introducing the whole of it. And probably, as a rule, no portion of a record should be allowed to be introduced for the purpose of proving a particular fact, without requiring that all of the record which tends to prove or disprove this particular fact should also be introduced. But this, to a great extent, must rest in the sound judicial discretion of the court trying the cause. We think the court below did not err in allowing said judgment to be introduced in evidence.

But the next question arising is, what force and effect must be given to it? Now, we shall assume that the court rendering the judgment was and is a court of record, having general original jurisdiction. The name of the court, the seal thereof,—there being a clerk, a sheriff, and a presiding judge,—the body of the record, and the attestation, all indicate it; the constitution and laws of Texas, and the supreme court reports of that state, show it; and the plaintiff in error has made no point that it is not such a court, or that it has not such jurisdiction. For a discussion of substantially the same questions in another case, see *Dodge v. Coffin*, ante, *277, *280, *283. Now, for the purpose of determining the force and effect of this judgment, we must look to the record itself; and, as it constitutes only a portion of the record of the case in which it was rendered, we think it *642 cannot prove more than it purports to prove. No liberal presumptions can be entertained or resorted to for the purpose of supplying omissions, aiding deficiencies, or extending the import of its language. It is only when the whole of the record is introduced in evidence that liberal presumptions can be invoked to aid the record. *Hargis v. Morse*, 7 Kan. *415; *Ogden v. Walters*, 12 Kan. *283. *292. But the record we are now considering has no need of aid from liberal presumptions. It of itself shows that a judgment, sufficiently

correct in form, was rendered by the court. And it of itself shows that the court rendering the judgment had jurisdiction of all the necessary parties. This shows the judgment to be at least *prima facie* valid. Freem. Judgm. § 180. The defendant, Haynes, gave to the court jurisdiction over himself by filing his answer as garnishee. If the record of the judgment had failed to show that the court had jurisdiction of the parties, then it would have been necessary for the plaintiff, Cowen, to have introduced some other portion of the record for the purpose of showing that fact, or the judgment would be held to be void. But as the record of the judgment itself showed jurisdiction of the parties, at least *prima facie*, it was unnecessary for the plaintiff, Cowen, to introduce other evidence tending to show the same fact until his *prima facie* showing should be controverted by other evidence. There was no evidence introduced tending to impeach the validity of said judgment, and therefore we must hold it to be valid.

2. In the second place, the plaintiff in error says "the clerk's attestation was made December 2, 1872, and the judge's certificate on May 5, 1873; and the certificate nowhere shows that the clerk was, on December 2, 1872,—the time of the clerk's attestation,—the clerk of said court. The certificate of the judge is therefore insufficient." Perhaps, from the whole of the judge's certificate it may be gathered that the clerk was clerk on December 2, 1872. But, even if it cannot, it makes no difference. The act of congress does not require *643 or even authorize the judge to certify who is clerk. *Duncom-mun v. Hysinger, 14 Ill. 249; Thompson v. Manrow, 1 Cal. 428; Regan v. McCormick, 4 Har. (Del.) 435; Craig v. Brown, 1 Pet. C. C. 352; Gavit v. Snowhill, 26 N. J. Law, 76; Strode v. Churchill, 2 Litt. 75; Ferguson v. Harwood, 7 Cranch, 408. The act of congress provides that "the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken." 1 U. S. St. at Large, 122. Upon this subject the supreme court of Illinois says: "In this case the clerk has certified a transcript of the proceedings under the seal of the court, and the presiding judge of the court has certified that the attestation is in due form. This is a full compliance with the requirements of the law. The judge has only to certify that the attestation is in due form. He is not required to state that the person who certifies the record is the clerk of the court, or that the seal attached by him is the seal of the court. The seal speaks for itself, and is presumed to be affixed by

the officer having the custody thereof, as well as competent authority to do the act. The phrase 'in due form' means the mode of attestation in use in the state from whence the record comes. The record must be attested according to that mode, and the certificate of the judge is made the evidence of that fact. This is the only object of his certificate. When a record is attested by the clerk, under the seal of the court, in conformity to the law or usage of the state where the proceedings are had, it is entitled to the same faith and credit in every other state." *Duncommun v. Hysinger*, 14 Ill. 250. It is not an uncommon thing for the judge's certificate to be dated one or more days subsequent to the clerk's certificate, and yet we know of no case where the attestation has been held void for that reason. We think the attestation in this case is sufficient.

3. But it is claimed by plaintiff in error that "the certificate of the judge does not show him to have been the judge of the court rendering the judgment." Now, the judgment was rendered by the district court of Caldwell county, Texas. The clerk, in his attestation, designates himself as the clerk of the district court of Caldwell county, Texas. The judge commences his certificate by saying, "State of Texas, county of Caldwell." He designates himself as "presiding judge of the 22d judicial district in said state of Texas;" and he certifies that the person who attests as clerk "is the clerk of said district court of the 22d judicial district, within and for the said county of Caldwell," etc. This, we think, clearly shows that the judge is the presiding judge of the district court for Caldwell county. He is presiding judge for the whole of the Twenty-second judicial district, and it is shown that a clerk of said district is the clerk of the court "within and for" the whole of said county. Now, he could not be the clerk of the court of said district "for the said county" if the district does not embrace the whole of said county within its limits.

4. Plaintiff in error next complains that "the plaintiff in the court below declares on a judgment rendered on April 15, 1872, at a term of the court begun and held April 18, 1872." These averments in the petition of the plaintiff below do not purport to be recitals of the record. They are mere allegations of time; and while they show carelessness on the part of the pleader, still they are not such material allegations as require that they be proved as laid. Under them the true time may be shown, and it was shown that the judgment was rendered April 18, 1872.

5. Plaintiff in error further complains that "the paper purports to be in a case against Whittington only, by its caption, and is therefore uncertain as to who were the parties to the suit."

The caption plainly enough shows that Cowen was plaintiff, and that Whittington was a defendant, and so does the body of the judgment; and the body of the judgment also shows that the plaintiff in error, Haynes, was a *garnishee* in the suit, owing Whittington \$146.54. This we think is sufficient.

6. Plaintiff in error finally and lastly complains that "it nowhere appears that Haynes was made garnishee in the case, or what he answered." We think it does; and the substance of his answer is given.

The judgment of the court below will be affirmed.

KINGMAN, C. J., concurring.

BREWER, J. I concur fully in the decision in this case, and simply desire to add a few words to correct an error in the opinion in the case of *Hargis v. Morse*, 7 Kan. *415. The point upon which that case was decided was that "the presumption in favor of the proceedings of a court of general jurisdiction will not arise when it appears that only a part of the record is offered." Perhaps that, as a general proposition, is correct. But in the opinion it appears that the journal entry of the judgment contained an adjudication upon the sufficiency of the service. The court found that the defendants were "duly served by publication," etc. Now, in that opinion, this finding and adjudication were ignored, and held in fact no evidence or service, not even *prima facie*. In this there was error. That finding and adjudication were *prima facie* evidence of the fact of service. This seems to be settled by the great weight of authority, and is in harmony with the policy of the law to uphold the proceedings of courts of general jurisdiction. Indeed, in not a few states, such a finding and adjudication are deemed conclusive evidence, and can no more be attacked collaterally than the adjudication of the court upon the facts in dispute. We hold it to be *prima facie* evidence only, but whether it can be impeached by testimony outside of the record we leave for further consideration. I am authorized to say that *646 the other justices concur in this opinion. See, as among the many authorities bearing on this question, *Morgan v. Burnet*, 18 Ohio, 546; *Fowler's Lessee v. Whiteman*, 2 Ohio St. 270; *Callan v. Ellison*, 13 Ohio St. 456; *Wetherill v. Stillman*, 65 Pa. St. 105; *Hahn v. Kelly*, 84 Cal. 391; *Reily v. Lancaster*, 39 Cal. 354; *Coit v. Haven*, 30 Conn. 199; *Freem. Judgm.* 102, § 180.



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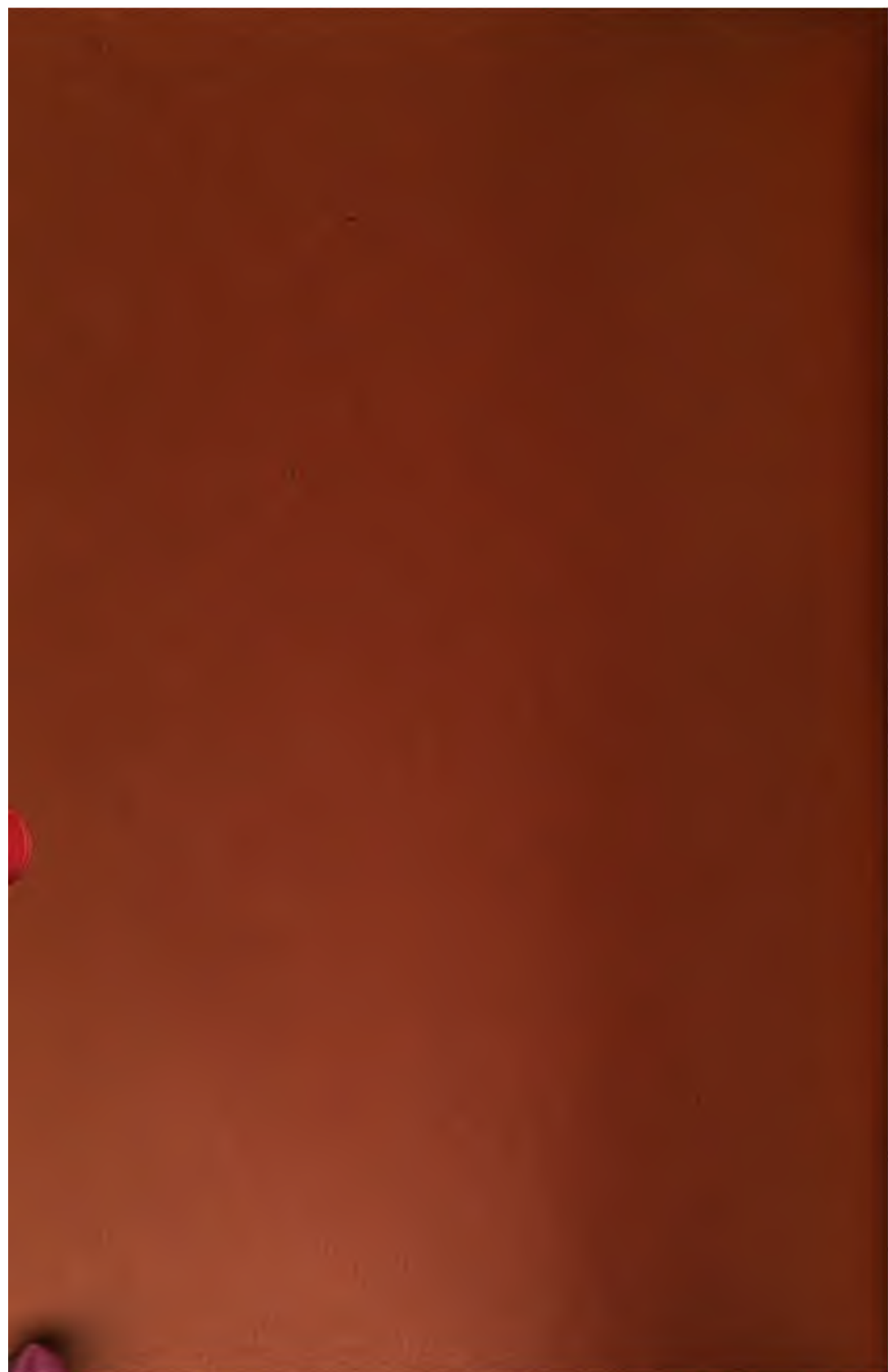
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EXTRA ANNOTATION
TO
PRECEDING VOLUME



NOTES

ON THE

KANSAS REPORTS

CASES IN 15 KANSAS

15 KAN. 9, DUFFEY v. RAFFERTY

Title in ejectment.—Cited in *Simpson v. Boring*, 16 Kan. 248; *Hollenback v. Ess*, 31 Kan. 87, 1 Pac. 275; *Horner v. Ellis*, 75 Kan. 675, 90 Pac. 275, 121 Am. St. Rep. 446—holding that the question of who shall recover in ejectment depends entirely on the question of which party has the paramount right to the property; *Mooney v. Olsen*, 21 Kan. 691, on the sufficiency of title to recover in ejectment; *Douglass v. Ruffin*, 38 Kan. 530, 16 Pac. 783, holding that plaintiff may recover on a showing of claim to the property by color of title against a defendant in possession without claim or color of title; *Christy v. Richolson*, 48 Kan. 177, 29 Pac. 398; *Redden v. Tefft*, 48 Kan. 302, 29 Pac. 157—holding that priority of possession gives precedence, where no better title can be shown as belonging to either party; *Jones v. Hollister*, 51 Kan. 310, 32 Pac. 1115, holding that a purchaser, holding under a bond or contract for a deed, who has paid part of the purchase money and taken immediate possession, has a better title than one who has taken subsequent possession under a void tax deed; *Pope v. Nichols*, 61 Kan. 230, 59 Pac. 257; *Laughlin v. Fariss*, 7 Okl. 1, 50 Pac. 254; *Shy v. Brockhause*, 7 Okl. 35, 54 Pac. 806; *Black v. Jackson*, 177 U. S. 349, 20 Sup. Ct. 648, 44 L. Ed. 801—holding that an equitable title, if the paramount one, is sufficient to maintain ejectment against the holder of the legal title; *Thomas v. Rauer*, 62 Kan. 568, 64 Pac. 80; *McBride v. Steinweden*, 72 Kan. 508, 83 Pac. 822—holding that defendant cannot plead an outstanding superior title in a third person.

Cited in note in 18 L. R. A. 784, on what title or interest will support ejectment.

Parol partition.—Cited in *McCullough v. Finley*, 69 Kan. 705, 77 Pac. 696, holding that a parol partition, acted upon, would not be disturbed.

15 KAN. 14, WOOD v. MILLSAUGH

Injunction—Discretion of court.—Cited in *Johns v. Schmidt*, 32 Kan. 383, 4 Pac. 872, holding that an order vacating a temporary injunction will not be reversed, unless the discretion of the court has been abused; *Johnson v. Board*

of Com'rs of Wilson County, 34 Kan. 670, 9 Pac. 384, holding that the refusal to grant a temporary injunction will not be interfered with, unless an abuse of discretion is shown; *Van Natta-Lynds Drug Co. v. Gerson*, 43 Kan. 660, 23 Pac. 1071, holding that a temporary injunction rests with the sound discretion of the judge.

15 KAN. 15, KANSAS PAC. RY. CO. v. MISSOURI, K. & T. RY. CO.
Affirmed in 97 U. S. 491, 24 L. Ed. 1095

Public lands—Conflicting claims.—Cited in *Kansas Pac. Ry. Co. v. Dunmeyer*, 24 Kan. 725, on the priority of a patent to a homestead entryman over a deed from a railroad company of withdrawn land.

15 KAN. 26, WHEELER v. BRADY

Qualifications of electors.—Cited in *State ex rel. Gibson v. Monahan*, 72 Kan. 492, 84 Pac. 130, 115 Am. St. Rep. 224, 7 Ann. Cas. 661, holding that the Legislature has power to authorize the creation of a drainage district, the powers of which are to be exercised by directors to be elected by the resident taxpayers; *Harris v. Burr*, 32 Or. 348, 52 Pac. 17, 39 L. R. A. 768, holding that the Legislature has plenary power to determine who shall vote at school elections, and may permit women to vote.

Cited in notes in 21 L. R. A. 662; 27 L. R. A. (N. S.) 524—on right of women to vote.

15 KAN. 33, BOARD OF EDUCATION OF CITY OF PAOLA v. SHAW

Pleading—Inconsistent allegations.—Cited in *Tweedell v. Warner*, 43 Kan. 597, 23 Pac. 603, holding that where an answer in ejectment alleged the execution of tax deeds, and all proceedings prior thereto, and that they were all in due and proper form, and attached copies thereof as exhibits, which copies showed the deeds to be void on their face, the court could not render judgment for defendant on the pleadings, plaintiff having filed an unverified reply; *Burke v. McDonald*, 2 Idaho (Hasb.) 339, 13 Pac. 351 (dissenting opinion), on the construction of inconsistent allegations in pleadings.

Same—Admission by failure to deny under oath.—Cited in *Chicago, B. & Q. R. Co. v. Imhoff*, 3 Kan. App. 765, 45 Pac. 627, holding that where an answer alleged the execution of a written contract of settlement of the matters in dispute, and no denial thereof under oath was made by plaintiff, the execution of such contract was admitted, with all natural inferences to be made therefrom.

15 KAN. 43, SCHOOL DIST. NO. 13 v. STATE EX REL. SCHOOL DIST. NO. 63

Apportionment of property on division of school district.—Cited in *School Dist. No. 49 of Pawnee County v. School Dist. No. 21 of Pawnee County*, 32 Kan. 123, 4 Pac. 189; *Robinet v. School Dist. No. 83*, 63 Kan. 1, 64 Pac. 970—on the validity of the apportionment of property on the division of a school district.

Repeal of statute—Saving clause.—Cited in *Douglass v. Loftus*, 85 Kan. 720, 119 Pac. 74, holding that the general saving clause, providing that the repeal of a statute shall not affect any rights accrued, applies to rights accrued, although no proceeding has been commenced for their enforcement.

15 KAN. 49, CHALLISS v. BOARD OF ATCHISON COUNTY COMES

Taxes—Restraining collection.—Cited in *Stebbins v. Challiss*, 15 Kan. 55, holding that the rule that the collection of taxes will not be enjoined until the taxes justly due are paid or tendered is not changed by the fact that the tax sale

certificates have been disposed of by the county; *Kansas City, Ft. S. & G. R. Co. v. Scammon*, 45 Kan. 481, 25 Pac. 853; *Kindley v. Rogers*, 85 Kan. 645, 118 Pac. 1087; *Sharpe v. Engle*, 2 Okl. 624, 39 Pac. 384; *Sweet v. Boyd*, 6 Okl. 689, 52 Pac. 939—holding that the collection of taxes will not be restrained, where the property is subject to taxation, the tax legal, and the valuation not excessive, simply because of irregularities in the proceedings; *Bank of Garnett v. Ferris*, 55 Kan. 120, 39 Pac. 1042, holding that the collection of taxes, because of an intentional overvaluation, will not be restrained until so much of the taxes as ought to be paid have been paid or tendered.

Cited in note in 69 Am. Dec. 200, on injunction against collection of taxes and assessments; in 22 L. R. A. 701, 702, 703, on injunction against collection of illegal taxes.

Same—Restraining assignment of tax sale certificate.—Cited in *Hagaman v. Commissioners of Cloud County*, 19 Kan. 394, holding that equity will not restrain the assignment of tax sale certificates where the property is subject to taxation, because of irregularities in the assessment and levy, unless the applicant for relief pays or tenders the taxes admitted to be due or just, or which the court finds ought to be paid.

Same—Setting aside tax sale certificate.—Cited in *Knox v. Dunn*, 22 Kan. 683; *Pritchard v. Madren*, 24 Kan. 486; *McKeen v. Haxtun*, 25 Kan. 698—holding that a lot owner, whose property has been sold for taxes, and who has not paid or offered to pay the taxes, cannot, when the property was subject to taxation, the levy legal, and the valuation not excessive, maintain a suit to quiet title against the holder of the tax sale certificate; *Miller v. Ziegler*, 31 Kan. 417, 2 Pac. 601, holding that, before suit to set aside a tax sale certificate can be maintained, plaintiff must pay or tender all taxes embraced therein which the records show to be valid.

Same—Restraining issue of tax deed.—Cited in *Dudley v. Gilmore*, 35 Kan. 555, 11 Pac. 398, holding that the issue of a tax deed would not be enjoined, in the absence of the payment or tender of the taxes due.

Same—Replevy of property levied on for taxes.—Cited in *Witschy v. Seaman*, 83 Kan. 634, 112 Pac. 739, applying the rule of the payment or tender of taxes due to the right of a purchaser of goods subject to a lien for taxes to replevy a part thereof, levied on under a warrant for the collection of the taxes.

15 KAN. 55, STEBBINS v. CHALLISS

Restraining collection of taxes.—Cited in notes in 69 Am. Dec. 201; 22 L. R. A. 702, 707—on injunction against collection of taxes and assessments.

15 KAN. 62, McMILLEN v. BUTLER

Restraining canvass of vote of county seat election.—Cited in *Sabin v. Sherman*, 28 Kan. 289, holding that, where the validity of a county seat election has been decided on the merits adversely to a plaintiff attempting to enjoin the canvass of the votes, another plaintiff, representing the same interest, was not entitled as a matter of right to enjoin the canvass of the vote and the declaration of the result of the election.

15 KAN. 66, SWALLOW v. THOMAS

Situs of taxable property.—Cited in *Commissioners of Ottawa County v. Nelson*, 19 Kan. 234, 27 Am. Rep. 101; *State v. Shaw*, 21 Nev. 222, 29 Pac. 321—discussing the situs of property for taxation.

Cited in note in 56 Am. Dec. 584, on place for taxation of property; in 22 L. R. A. 477, on tax on partnership property.

15 KAN. 70, CITY OF INDEPENDENCE v. TROUVALLE

Judgments against political subdivisions.—Cited in *Wilson v. School Dist. No. 2*, 17 Kan. 104, construing the act prohibiting the issue of executions on judgments against school districts; *Stevens v. Miller*, 3 Kan. App. 192, 43 Pac. 439, holding that mandamus to a city to levy a tax to pay a judgment against it is in the nature of an execution to enforce such judgment, and does not require a bond for costs, one having been given in the original action; *Ware v. Pleasant Grove Tp.*, Greenwood County, 9 Kan. App. 700, 59 Pac. 1080, holding that an execution may issue on a judgment against a township and property not used for public purposes sold thereunder.

Dogs.—Cited in *State ex rel. Curtis v. City of Topeka*, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529, discussing the nature of property in dogs.

Cited in notes in 40 L. R. A. 510; 67 Am. St. Rep. 289—on property in dogs and remedies for its enforcement.

15 KAN. 74, BURLINGTON TP. v. CROSS**15 KAN. 81, SMITH v. CITY OF LEAVENWORTH**

Use and care of city streets and alleys.—Cited in *Jansen v. City of Atchison*, 16 Kan. 358, holding that cities owe to the public the duty of keeping bridges, streets, and sidewalks in a safe condition for use for travel, and are liable for special injuries resulting from a neglect to perform such duty; *Jackson v. Winfield Town Co.*, 23 Kan. 542, holding that the fee of all streets, alleys, and other public grounds in cities is in the county, for the use and benefit of the public; *Mikesell v. Durkee*, 34 Kan. 509, 9 Pac. 278, holding that a city has no authority to give permission to an individual or corporation to construct a purely private railroad on any of its public streets; *City of Abilene v. Cowperthwait*, 52 Kan. 324, 34 Pac. 795, on the liability of a city for permitting a lot owner to make a dangerous cellarway under a sidewalk; *Fletcher v. City of Ellsworth*, 53 Kan. 751, 37 Pac. 115, holding a city liable for injuries sustained from falling into an unguarded cellarway or opening in an alley; *City of Chanute v. Higgins*, 65 Kan. 680, 70 Pac. 638, on the liability of a city for injuries to one falling into the entrance of an unguarded cellarway opening in a sidewalk; *Dallas v. City of Concordia*, 84 Kan. 734, 115 Pac. 558, holding that a city, knowingly permitting a deep cellarway to remain open and unguarded in a public alley, was responsible to one falling into it in the night; *City of Atchison v. Acheson*, 9 Kan. App. 33, 57 Pac. 248, holding it the duty of a city to keep its streets and alleys in a reasonably safe condition, free from unnatural, dangerous obstructions; *City of Guthrie v. Nix Halsell & Co.*, 5 Okl. 555, 49 Pac. 917, on the right to use city streets for other than public purposes.

Distinguished in *City of Atchison v. Jansen*, 21 Kan. 560, holding that where a city builds a sidewalk above the ground on posts, leaving openings underneath, or permits abutting owners to excavate under the walk, its duty is to use reasonable care and diligence in covering such openings or areas; *Schindler v. Schroth*, 146 Cal. 433, 80 Pac. 624, 2 Ann. Cas. 670, on the liability of an individual for injuries to one falling over iron doors standing erect on a sidewalk.

Cited in notes in 63 Am. Dec. 352; 19 L. R. A. (N. S.) 517; 20 L. R. A. (N. S.) 521, 630—on liability of municipality for permitting obstruction in street; in 61 L. R. A. 584, on liability of municipality for injuries to travelers, caused by persons using space under street; in 16 L. R. A. (N. S.) 1039, on right of abutter to change conditions in surface of street of highway.

15 KAN. 88, BROWN v. EVANS

Agreed case or statement of facts.—Cited in *City of Olathe v. Adams*, 15 Kan. 391, on the right of the Supreme Court to decide a case on an agreed

statement, and order the proper judgment to be rendered on the facts agreed to; *Gray v. Crockett*, 30 Kan. 138, 1 Pac. 50, holding that an agreement by the parties as to a particular fact in a cause was conclusive on the parties, and that the trial court had no right to receive evidence contrary thereto; *Woolverton v. Johnson*, 69 Kan. 708, 77 Pac. 559, holding that a trial court cannot make findings different from those agreed to by the parties; *Consolidated Steel & Wire Co. v. Burnham, Hanna, Munger & Co.*, 8 Okl. 514, 58 Pac. 654; *Goodwin v. Kraft*, 23 Okl. 329, 101 Pac. 856—holding that the Supreme Court will, on an agreed statement of facts, determine the law on such facts and render such judgment as the trial court should have rendered.

Payment of taxes.—Cited in *Opdyke v. Crawford*, 19 Kan. 604; *Kerr v. Hoskinson*, 5 Kan. App. 193, 47 Pac. 172—holding that taxes due on mortgaged property should first be paid out of the proceeds of the sale thereof; *Reading v. Wier*, 29 Kan. 429, on the duty of an administrator to pay taxes accumulating on real estate subsequent to the death of the intestate; *Capital Bank of Topeka v. Huntoon*, 35 Kan. 577, 11 Pac. 369, holding that where judgment creditors, after a sheriff's sale, paid taxes due on the property sold, the sale should be set aside only on condition that such taxes be paid by the judgment debtor or out of the proceeds of another sale of the property.

Authority of executor or administrator.—Cited in *Ætna Life Ins. Co. v. Swayze*, 30 Kan. 118, 1 Pac. 36, holding an administrator without power to compromise a claim belonging to the estate without the consent of the probate court; *Ingham v. Ryan*, 18 Colo. App. 347, 71 Pac. 899, on the power of an executor to employ an agent to sell land of the estate.

Cited in note in 51 L. R. A. 262, on capacity in which executor or administrator may be sued for personal tort; in 78 Am. St. Rep. 202, on common-law powers of executor.

15 KAN. 94, CRANE v. STONE

15 KAN. 99, BARKLEY v. STATE

Pleading—Objection to introduction of evidence.—Cited in *Reeve v. Downs*, 22 Kan. 330, on the effect of failing to question the sufficiency of a petition by demurrer or motion, and seeking for the first time to do so by an objection to the introduction of evidence at the trial; *Hoge v. Norton*, 22 Kan. 374, holding that, as to the conclusiveness of the ruling on a motion to vacate an attachment, the petition must be held sufficient as against any objection raised for the first time on the trial by objection to the introduction of evidence; *Barons v. Brown*, 25 Kan. 410, holding that a pleading cannot be attacked for insufficiency for the first time by a motion to exclude all evidence; *State v. School Dist. No. 3, Chautauqua County*, 34 Kan. 237, 8 Pac. 208; *Simmonds v. Richards*, 74 Kan. 811, 86 Pac. 452; *Connecticut Mut. Life Ins. Co. v. Barnes*, 2 Kan. App. 642, 42 Pac. 938; *Bank of Glasco v. Marshall*, 5 Kan. App. 252, 47 Pac. 561—holding that a pleading must be liberally construed in favor of the pleader on objection to the introduction of any evidence; *Schnitzler v. Fourth Nat. Bank of Wichita*, 1 Kan. App. 674, 42 Pac. 496, holding as to when an objection to the introduction of any evidence on the ground that the petition did not state a cause of action was properly overruled; *Hogan v. Bailey*, 27 Okl. 15, 110 Pac. 890, holding that, where a pleading is objected to for the first time by objection to the introduction of any evidence, the pleading should be sustained, unless there is a total failure to allege some matter essential to the relief sought.

Same—Cure of defects by subsequent proceedings.—Cited in *Grandstaff v. Brown*, 23 Kan. 176; *Clay v. Hildebrand Bros. & Jones*, 34 Kan. 694, 9 Pac. 466—as to the cure of defective allegations in a pleading by subsequent proceedings.

Same—Admissions by failing to verify.—Cited in *Walker v. Fleming*, 37 Kan. 171, 14 Pac. 470, holding that, where a defendant's general denial was not verified, it admitted the execution, assignment, indorsement, and legal effect of tax sale certificates.

Same—Review of variance.—Cited in *Patterson v. Missouri, K. & T. Ry. Co.*, 24 Okl. 747, 104 Pac. 81, holding that a variance between the pleadings and the proof, not amounting to a total failure of proof, cannot be first objected to in the reviewing court.

Recognizance.—Cited in *Swerdsfeger v. State*, 21 Kan. 475, on the sufficiency of the petition in an action on a recognizance; *Smith v. Collins*, 42 Kan. 259, 21 Pac. 1058, discussing the necessity of entering of record a default of a recognizance.

15 KAN. 112, **McCRUM v. CORBY**

Review of decision on motion for new trial.—Cited and followed in *Barrett v. Barnes*, 17 Kan. 266; *Day v. Harris*, 23 Kan. 216; *Brown v. Atchison, T. & S. F. R. Co.*, 29 Kan. 186; *McCauley v. Atchison, T. & S. F. R. Co.*, 70 Kan. 895, 79 Pac. 671; *Graf v. Vermont Savings Inv. Co.*, 72 Kan. 675, 83 Pac. 821; *Multnomah County v. Willamette Towing Co.*, 49 Or. 204, 89 Pac. 389—holding that the grant of a new trial will not be disturbed by the appellate court, where the evidence was conflicting.

15 KAN. 118, **WINSOR v. GODDARD**

Vacation of judgment.—Cited in *Schnitzler v. Fourth Nat. Bank of Wichita*, Kan., 1 Kan. App. 674, 42 Pac. 496; *Farmers' & Merchants' Ins. Co. v. Cuff*, 29 Okl. 106, 116 Pac. 435, 35 L. R. A. (N. S.) 892—as to when a judgment will be vacated on the ground of party being unavoidably prevented from making a defense.

15 KAN. 120, **JAEDICKE v. SCRAFFORD**

Inapplicable instructions.—Cited in *Grant v. Pendery*, 15 Kan. 236, holding that instructions not applicable to the facts in the case are properly refused.

15 KAN. 123, **STATE EX REL. CHASE COUNTY ATTORNEY v. BREESE**

Original jurisdiction of Supreme Court.—Cited in *State ex rel. v. Board of Com'rs of Anderson County*, 28 Kan. 67; *Evans v. Thomas*, 32 Kan. 469, 4 Pac. 833—on the discretion of the Supreme Court in issuing the writ of mandamus; *Supreme Lodge of Order of Select Friends v. Carey*, 57 Kan. 655, 47 Pac. 621; *In re Burnette*, 73 Kan. 609, 85 Pac. 575—on the propriety of first applying for relief to the lower court before asking for a remedial writ from the Supreme Court; *State ex rel. Coleman v. Welfelt*, 73 Kan. 791, 85 Pac. 583, holding that an original proceeding to remove a sheriff from office should have been brought in the district court; *Homesteaders v. McCombs*, 24 Okl. 201, 103 Pac. 691, 20 Ann. Cas. 181, on the original jurisdiction of the Supreme Court to issue the writ of mandamus.

Cited in note in 58 L. R. A. 856, on original jurisdiction of court of last resort in mandamus; in 13 L. R. A. (N. S.) 771, on exclusiveness of jurisdiction of highest court to issue remedial writs for prerogative purposes.

Right to mandamus.—Distinguished in *Boylan v. Warren*, 39 Kan. 301, 18 Pac. 174, 7 Am. St. Rep. 551, holding that one having an interest in obtaining information from public records may enforce his right to examine such records by mandamus.

15 KAN. 126, YARNOLD v. CITY OF LAWRENCE

Judgment against city.—Distinguished in *City of Wyandotte v. Zeitz*, 21 Kan. 649, holding that judgment could be rendered against a second-class city or on sidewalk improvement bonds, although a special tax had been levied to pay the bonds, which had not yet been collected.

Public contracts—Patented articles—Advertisement.—Cited in *State ex rel. Dawes v. Board of Com'rs of Shawnee County*, 57 Kan. 267, 45 Pac. 616; *Bunker v. City of Hutchinson*, 74 Kan. 651, 87 Pac. 884—holding the public not precluded from using what was deemed desirable and necessary in a public improvement, merely because it was covered by letters patent and a royalty had to be paid for its use; *Perry v. City of Los Angeles*, 157 Cal. 146, 106 Pac. 410, holding that a city could do certain work without letting a contract therefor, when so authorized by its charter; *Worthington v. City of Boston (C. C.)* 41 Fed. 23, holding that the fact that pumping engines to be purchased by a city were patented did not relieve the city from the necessity of advertising for their purchase.

Cited in notes in 97 Am. Dec. 190 (par. 2); 18 L. R. A. 46—on municipality's power to let contract for patented article owned by single firm; in 50 Am. St. Rep. 491, on who are responsible bidders and how to enforce their rights.

15 KAN. 133, HUTCHINSON v. HARTTMANN

Land records as notice.—Cited in *Hillyard v. Bancher*, 85 Kan. 516, 118 Pac. 67, on the notice given by the land records of an instrument of conveyance.

15 KAN. 143, KEYES v. SNYDER

Delegation of legislative power.—Cited in *Board of Com'rs of Marion County v. Winkley*, 29 Kan. 36, holding that the act to encourage the growth of hedges and offering a bounty therefor was not unconstitutional as a delegation of legislative power; *State ex rel. Atwood v. Hunter*, 38 Kan. 578, 17 Pac. 177, holding that the metropolitan police act was not a delegation of legislative power; *Smith v. Board of Com'rs of Atchison County*, 81 Kan. 91, 105 Pac. 37, holding that the provision in the act for extra allowance for boarding and lodging prisoners shall not become operative until the board of county commissioners make an order to that effect was not an invalid delegation of legislative power.

Repeal of statute.—Cited in *Lauer v. Livings*, 24 Kan. 273, holding that the night herd law of 1868 (Gen. St. c. 105, art. 1) was not repealed, either in terms or by implication, by the general herd law of 1872 (Laws 1872, c. 193).

15 KAN. 146, TARRANT v. SWAIN

Homestead—Property subject to.—Cited in *Moore v. Reaves*, 15 Kan. 150, holding that an equitable owner of real estate may occupy and hold the same as his homestead; *Hogan v. Manners*, 23 Kan. 551, 33 Am. Rep. 199, holding that a homestead may be acquired in a building erected on a leasehold interest; *Linn v. Ziegler*, 68 Kan. 628, 76 Pac. 489, holding that the owner of an undivided interest in real estate may assert a homestead right to the extent of his interest, but not to the prejudice of his cotenant; *Stowell v. Kerr*, 72 Kan. 330, 83 Pac. 827, holding that a homestead may be acquired in land to which the claimant has only an equitable title; *Merchants' Nat. Bank of Kansas City, Mo., v. Kopplin*, 1 Kan. App. 599, 42 Pac. 263, on the right to acquire a homestead in the undivided one-half of a hotel; *Dallemand v. Mannon*, 4 Colo. App. 262, 35 Pac. 679, holding that it is not necessary that a homestead claimant be the owner of the premises in fee, but that an equitable title, a lease for a term of years, or any title which may be the subject of levy and sale, may be the subject of a homestead claim; *In re Swearinger*, Fed. Cas. No. 13,683; *Lindley v. Davis*, 7

Mont. 206, 14 Pac. 717—holding that a homestead may be claimed in a tenancy in common.

Cited in note in 63 Am. Dec. 124, on attachment of homestead rights to undivided interest in lands; in 70 Am. Dec. 345, on what may be exempt as homestead.

Same—Abandonment.—Cited in *G. C. Hixon & Co. v. George*, 18 Kan. 253, holding that the abandonment of a homestead, title to which was in the name of the wife, did not of itself authorize its seizure for the husband's debts.

Same—Alienation.—Cited in *Bell v. Slasor*, 8 Kan. App. 669, 57 Pac. 130, holding that a homestead cannot be alienated without the joint consent of the husband and wife.

Tenancy in common.—Cited in *Coulson v. Wing*, 42 Kan. 507, 22 Pac. 570, 16 Am. St. Rep. 503, holding that, where a patent was issued to the heirs of a deceased entryman, the heirs were tenants in common thereof.

Cited in note in 63 Am. Dec. 125 (par. 3), on protection of cotenant.

15 KAN. 150, MOORE v. REAVES

Possession as notice of title.—Cited in *Tucker v. Vandermark*, 21 Kan. 263, holding that one in actual possession of real estate under an unrecorded deed is, as against all persons having actual notice of such deed, the legal and absolute owner thereof; *Gray v. Zellmer*, 66 Kan. 514, 72 Pac. 228, holding that open and notorious possession of real estate is constructive notice to all the world of the rights of the one in possession; *Kansas City Inv. Co. v. Fulton*, 4 Kan. App. 115, 46 Pac. 188, holding that open, notorious, exclusive possession of real estate is notice to the world of whatever title or interest the person in possession may have therein; *Phoenix Mut. Life Ins. Co. v. Beaman*, 5 Kan. App. 772, 43 Pac. 1007, on the sufficiency of possession and claim of a homestead.

Cited in note in 13 L. R. A. (N. S.) 129, on possession of land as notice of title.

Homestead—Property subject to.—Cited in *Hogan v. Manners*, 23 Kan. 551, 33 Am. Rep. 199, holding that a homestead may be acquired in a building erected on a leasehold; *Stowell v. Kerr*, 72 Kan. 330, 83 Pac. 827, holding that a homestead may be claimed in lands to which the claimant has only an equitable title; *Alexander v. Jackson*, 92 Cal. 514, 28 Pac. 503, 27 Am. St. Rep. 158, holding that a homestead may be impressed upon land acquired under a contract of sale.

Cited in note in 70 Am. Dec. 345, on what may be exempt as homestead.

Same—Alienation.—Cited in *Schermerhorn v. Mahaffie*, 34 Kan. 108, 8 Pac. 199, holding that a deed by a husband to a homestead is void; *Thimes v. Stumpff*, 33 Kan. 53, 5 Pac. 431, on the validity of a contract to convey a homestead without the wife's consent; *Goldsborough v. Hewitt*, 23 Okl. 66, 99 Pac. 907, 138 Am. St. Rep. 795, holding that the separate deed of a married man to a homestead is void.

Cited in note in 65 Am. Dec. 487, on conveyance of homestead; in 95 Am. St. Rep. 912, on effect of conveyance or incumbrance of homestead by one spouse only.

Same—Abandonment.—Cited in *G. C. Hixon & Co. v. George*, 18 Kan. 253, holding that the abandonment of a homestead, title to which was in the name of the wife, did not of itself subject it to the husband's debts.

Same—Notice of.—Cited in *Davies v. Cole*, 28 Kan. 259, on the necessity of taking notice of a homestead interest.

15 KAN. 154, OSWALT v. HALLOWELL

Property subject to taxation.—Cited in *Morgan v. Board of Com'rs of Clay County*, 27 Kan. 229, holding that taxes were properly levied on public

lands held under a contract of sale; Board of Com'rs of Dickinson County v. Baldwin, 29 Kan. 538, holding that lands belonging to the Agricultural College sold under a time contract were subject to taxation; Logan, Rand & Co. v. Board of Com'rs of Clark County, 51 Kan. 747, 33 Pac. 603, on the power to tax Osage trust and diminished reserve lands; Washington Iron-Works Co. v. King County, 20 Wash. 150, 54 Pac. 1004, holding that purchaser of state lands under an executory contract must pay taxes thereon.

Distinguished in Board of Regents of Kansas State Agricultural College v. Hamilton, 28 Kan. 376, holding that property taken by the state on foreclosure of a mortgage given the state as security for a loan of funds arising from the sale of Agricultural College lands was exempt from taxation.

Cited in note in 35 L. R. A. (N. S.) 670, on property granted with reservation of title or lien in favor of public as subject of taxation.

15 KAN. 157, SETTER v. ALBEY

Rights and remedies of parties to illegal contract.—Cited in State ex rel. Bradford v. Harwi, 36 Kan. 588, 14 Pac. 158, holding that donations may be made to a county as inducement to obtain the location of a county seat at a particular place; Keene Syndicate v. Wichita Gas, Electric Light & Power Co., 69 Kan. 284, 76 Pac. 834, 67 L. R. A. 61, 105 Am. St. Rep. 164, 2 Ann. Cas. 949, holding that a lessor or its assigns could not recover rents on a lease which was in contravention of public policy; Branham v. Stallings, 21 Colo. 211, 40 Pac. 396, 52 Am. St. Rep. 213, holding that parties to an illegal contract are in pari delicto, and neither can recover from the other any money transferred thereunder; Glass v. Basin & Bay State Mining Co., 31 Mont. 21, 77 Pac. 302, on the right to recover on an illegal contract; Thomas v. Brownville, Ft. K. & P. Ry. Co., 2 Fed. 877, holding that equitable relief would not be granted under a contract between a railroad and a construction company, where some of the directors of the company were members of the construction company; Western Union Telegraph Co. v. Union Pac. Ry. Co., 3 Fed. 1, holding that a contract between a telegraph company and a railroad company for the free transmission of certain messages was against public policy and not enforceable; Cook v. Sherman, 20 Fed. 167, holding that a court will leave the parties to an illegal contract precisely where it found them.

15 KAN. 162, SCOTT v. PAULEN

Subscriptions in aid of railroad.—Cited in Paola & Fall River Co. v. Commissioners of Anderson County, 16 Kan. 302, on the validity of a county subscription to the capital stock of a railroad.

Meetings of municipal governing bodies.—Cited in National Bank of Commerce v. Shumway, 49 Kan. 224, 30 Pac. 411, on the power of directors of a bank to act singly, and on the notice of special meetings; Town of Fletcher v. Hickman, 136 Fed. 568, 69 C. C. A. 350, holding that a town meeting at which a bond issue ordinance was passed would be presumed to be a special meeting as to which notice had been given; Atchison Board of Education v. De Kay, 148 U. S. 591, 13 Sup. Ct. 706, 37 L. Ed. 573, on the validity of a meeting of a city board of education at which bonds were issued.

15 KAN. 168, RIDDEL v. SCHOL DIST. NO. 72, CHEROKEE COUNTY

Liability of sureties on bonds.—Followed in Monger v. Board of Com'rs of Harvey County, 22 Kan. 318; Board of Com'rs of Rice County v. Lawrence, 23 Kan. 288—on the liability of sureties on the bond of an official holding over.

Cited in Horton v. Watson, 23 Kan. 229, discussing the liability of sureties on bonds of officials holding over; Ryan v. Williams, 29 Kan. 437, on the lia-

bility of the sureties on the bond of an administrator for acts of a subsequent administrator; *Kaw Life Ass'n v. Lemke*, 40 Kan. 661, 20 Pac. 512, holding that the obligation of an official bond does not extend beyond the official year for which it was given, or the term of the officer who gave it; *Barton v. Decker*, 54 Kan. 608, 38 Pac. 783, holding that the liability of sureties on a bond cannot be extended by implication or enlarged beyond their specific agreements; *Sparks v. Board of Com'rs of Cherokee County*, 76 Kan. 280, 91 Pac. 89, 13 Ann. Cas. 1064, holding that a surety was not liable on an official bond for acts of the official after the expiration of the time for which he was elected, although his term was extended by reason of a change in the date of the election; *Baker City v. Murphy*, 30 Or. 405, 42 Pac. 133, 35 L. R. A. 88, holding that the sureties on the bond of a city treasurer were liable for his acts when holding over.

Cited in note in 10 Am. St. Rep. 857, on liability of sureties on successive bonds; in 35 L. R. A. 92; 103 Am. St. Rep. 933, 939—on liability of sureties on official bond after expiration of term of office.

Terms of office, etc.—Cited in *Pruit v. Squires*, 64 Kan. 855, 68 Pac. 643 (dissenting opinion), discussing the question of terms of office, vacancies therein, and the power of appointment to fill vacancies.

15 KAN. 171, *JAY v. GRANBY MIN. CO.*

15 KAN. 173, *CARLIN v. DONEGAN*

15 KAN. 178, *BUTLER v. BOARD OF NEOSHO COUNTY COM'RS*

County contracts.—Cited in *Gillett v. Commissioners of Lyon County*, 18 Kan. 410; *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142—on the right of a county to deny liability on a contract, the benefits of which it has received, on the ground that the county commissioners had not made a record of the proceedings leading up to the making of the contract; *Huffman v. Board of Com'rs of Greenwood County*, 23 Kan. 281, on the existence of an implied contract to pay a county attorney for services rendered the county board.

Cited in note in 27 L. R. A. (N. S.) 1125, on liability of municipality or other public corporation on implied contract.

County records.—Cited in *Chicago, K. & W. R. Co. v. Board of Com'rs of Stafford County*, 36 Kan. 121, 12 Pac. 593, holding that the records of a county board are not the only evidence of its acts and proceedings.

City contracts.—Cited in *City of Ellsworth v. Rossiter*, 46 Kan. 237, 26 Pac. 674, on the right to recover for accepted services rendered a city, notwithstanding irregularities in the employment.

15 KAN. 181, *LEWIS v. LEWIS*

Divorce—Constructive service of process.—Cited in *Strode v. Strode*, 6 Idaho, 67, 52 Pac. 161, 96 Am. St. Rep. 249; *Larimer v. Knoyle*, 43 Kan. 338, 23 Pac. 487; *McCormick v. McCormick*, 82 Kan. 31, 107 Pac. 546; *Rodgers v. Nichols*, 15 Okl. 579, 83 Pac. 923; *Cordray v. Cordray*, 19 Okl. 36, 91 Pac. 781—on the sufficiency of the service of summons by publication in a divorce suit; *Ensign v. Ensign*, 45 Kan. 612, 26 Pac. 7, holding that the affidavit required of plaintiff in a divorce suit, that the residence of defendant is unknown and cannot be ascertained, forms no part of the constructive service, and need not be made and filed within three days after first publication is made; *Wesner v. O'Brien*, 56 Kan. 724, 44 Pac. 1090, 32 L. R. A. 289, 54 Am. St. Rep. 604, holding that the district court has power to award alimony in and in a divorce suit based on constructive notice to defendant; *Medina v. Medina*, 22 Colo. 146,

43 Pac. 1001, holding that the county court had power to vacate a divorce decree entered on constructive service.

Distinguished in: *Hemphill v. Hemphill*, 38 Kan. 220, 16 Pac. 457, holding that a party against whom a divorce decree had been entered without other service than by publication in a newspaper could have the decree vacated.

Cited in note in 19 L. R. A. 817, on validity of decree of divorce obtained on publication or service out of state where defendant did not appear.

Same—Vacation of decree.—Cited in *Re Smith*, 74 Kan. 452, 87 Pac. 169, holding that, where, through fraud, no provision was made in a divorce decree for alimony, the judgment could be impeached for fraud; *Graham v. Graham*, 54 Wash. 70, 102 Pac. 891, 18 Ann. Cas. 999, on the jurisdiction to vacate a decree of divorce for fraud.

Cited in note in 61 Am. Dec. 460, on proceedings to vacate and annul divorces and effect on parties and on marriages which they have contracted; in 60 Am. St. Rep. 658, on vacation of judgments on motion when not specially authorized by statute.

Same—Effect of final decree.—Cited in *Roe v. Roe*, 52 Kan. 724, 35 Pac. 808, 39 Am. St. Rep. 367, holding that a final judgment of divorce settles all property rights of the parties, and is a bar to an action by either party to determine alimony or property rights which might have been settled by such judgment.

15 KAN. 194, DIVISION OF HOWARD COUNTY, IN RE

Change of school district boundaries.—Cited in *School Dist. No. 57 v. Board of Education of City of Emporia*, 16 Kan. 586, on the power to change school district boundaries.

Statutes—Determination of validity.—Cited in *Commissioners of Leavenworth County v. Higginbotham*, 17 Kan. 62, holding that, unless a very clear showing of the invalidity of an act passed 11 years ago was made, it would be the duty of the courts to hold it valid; *Commissioners of Leavenworth County v. Higginbotham*, 17 Kan. 62; *Saum v. Dewey*, 84 Kan. 811, 115 Pac. 570, holding that the enrolled bills and the legislative journals are the principal evidence of the passage and validity of bills, and generally cannot be contradicted; *Prohibitory Amendment Cases*, 24 Kan. 700, on the validity of the passage of a constitutional amendment, notwithstanding defects in the journal entries relating thereto; *State ex rel. Attorney General v. Francis*, 26 Kan. 724; *Ex parte Vanderberg*, 28 Kan. 243; *Weyand v. Stover*, 35 Kan. 545, 11 Pac. 355; *Ex parte Gunn*, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519; *Homrighausen v. Knoche*, 58 Kan. 646, 50 Pac. 879; *State ex rel. Godard v. Andrews*, 64 Kan. 474, 67 Pac. 870; *City of Portland v. Yick*, 44 Or. 439, 75 Pac. 706, 102 Am. St. Rep. 633—holding that an enrolled statute is conclusive of the regularity of its passage and validity, unless the legislative journals clearly, conclusively, and beyond all doubt show to the contrary; *Ex parte Gunn*, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519, on the verity of the house journals; *City of Belleville v. Wells*, 74 Kan. 823, 88 Pac. 47, holding that, where the legislative journals leave it doubtful whether the title to an act as it appears by the enrolled bill was the same as the title it had when it passed the House and Senate, the doubt should be resolved in favor of the enrolled bill; *Missouri, K. & T. Ry. Co. v. Simons*, 75 Kan. 130, 88 Pac. 551, holding that where an act has been approved, certified, and authenticated, as required by the Constitution, it cannot be overthrown by contradictory and doubtful journal entries; *Saum v. Dewey*, 84 Kan. 811, 15 Pac. 570; *Stelling v. Kansas City*, 85 Kan. 397, 116 Pac. 511—holding that the legislative journals are judicially noticed and examined by the court to determine whether a statute was constitutionally passed; *Hughes v. Felton*, 11 Colo. 489, 19 Pac. 444, holding that for the purpose of determining the validity of a legislative act the courts will not consider evidence outside the

act itself, the enrolled bill, and the journals; *Robertson v. People*, 20 Colo. 279, 38 Pac. 326; *State ex rel. City of Cheyenne v. Swan*, 7 Wyo. 166, 51 Pac. 209, 40 L. R. A. 195, 75 Am. St. Rep. 889—holding that, in determining whether an act has been passed in accordance with the constitutional requirements, resort may be had to the legislative journals.

Cited in note in 51 Am. Dec. 622, on evidence as to whether statute was so passed as to be invalid; in 85 Am. Dec. 358, 360, on right to attack statutes showing illegal enactment; in 23 L. R. A. 347, on conclusiveness of enrolled bill.

Same—Subjects and titles.—Cited in *Woodruff v. Baldwin*, 23 Kan. 491, holding that the breadth and comprehensiveness of the title of an act is a matter of legislative discretion; *State v. Bankers' & Merchants' Mut. Ben. Ass'n*, 23 Kan. 499, holding that, where the Legislature has selected a restrictive title for an act, the courts can neither enlarge nor amend it; *Board of Education of City of Atchison v. State ex rel. Johnston*, 26 Kan. 44, holding that section 5, c. 81, Laws 1879, was not invalid, as not being included in the title of the act; *State v. Barrett*, 27 Kan. 213, on the invalidity of an act the title to which is broad enough to cover two separate and independent subjects having no connection with each other; *Missouri Pac. Ry. Co. v. City of Wyandotte*, 44 Kan. 32, 23 Pac. 950, on the validity of an ordinance the title to which is broad enough to cover two separate and independent subjects having no connection with each other; *Star Grain & Lumber Co. v. Atchison, T. & S. F. Ry. Co.*, 85 Kan. 281, 116 Pac. 906, holding that the title of Laws 1905, c. 345, relating to demurrage, was sufficient to embrace all its provisions; *Frost v. Pfeiffer*, 26 Colo. 838, 58 Pac. 147, holding that "A bill for an act to establish the county of Teller," was valid; In re Commissioners of Counties Comprising Seventh Judicial Dist., 22 Okl. 435, 98 Pac. 557, holding that the constitutional requirement that every act "shall embrace but one subject, which shall be clearly expressed in its title," is mandatory, but not to be exactly enforced; *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520, discussing the construction of the constitutional provision that "no bill shall embrace more than one subject, and that shall be embraced in its title."

Cited in note in 61 Am. Dec. 343, on statute containing only one subject to be expressed in its title; in 55 L. R. A. 839, on power of Legislature to enact or amend a Code or compilation of laws by a single statute.

Same—Judicial notice of.—Cited in *Prohibitory Amendment Cases*, 24 Kan. 700, holding that the courts will take judicial notice of the statutes; *City of Topeka v. Gillett*, 32 Kan. 431, 4 Pac. 800, holding that, for the purpose of construing a Constitution or statute, courts may take judicial notice of everything which may affect the validity or meaning thereof; *St. Louis & S. F. Ry. Co. v. Weaver*, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176, holding that the courts will take judicial notice of the common law of Kansas; *State ex rel. Coleman v. Kelley*, 71 Kan. 811, 81 Pac. 450, 70 L. R. A. 450, 6 Ann. Cas. 298, discussing the question of taking judicial notice of the laws of the state.

Cited in notes in 89 Am. Dec. 667; 49 Am. Rep. 203—on judicial notice.

Same—Special or local laws.—Cited in *City of Pond Creek v. Haskell*, 21 Okl. 711, 97 Pac. 338, holding that an act providing for special elections for the relocation or removal of county seats, applicable to all counties, was not a special or local law.

Discharge of attachment at chambers.—Cited in *Shedd v. McConnell*, 18 Kan. 594, holding that a judge of the district court has power at chambers to discharge an attachment.

Abolition of political subdivisions.—Cited in *Ex parte Hinkle*, 31 Kan. 712, 3 Pac. 531, holding that, where a township is abolished by the Legislature, the township offices go with it; *State ex rel. Bradford v. Hamilton*, 40 Kan. 323, 19 Pac. 723, holding that the Legislature has the power to abolish a county or-

ganisation; *Aikman v. Edwards*, 55 Kan. 751, 42 Pac. 366, 30 L. R. A. 149, holding that the Legislature has power to transfer the counties in a judicial district to another district; *People ex rel. Lincoln County v. George*, 3 Idaho (Hash.) 72, 26 Pac. 983, holding act to divide a county and attach the part cut off to another county, without submitting the proposition to a vote of the people in the segregated part, unconstitutional.

Distinguished in *McDonald v. Doust*, 11 Idaho, 14, 81 Pac. 60, 69 L. R. A. 220, holding that an act abolishing a certain county and creating two new counties was void as attempting to abolish an organized county.

Legislative power over counties.—Cited in note in 68 Am. Dec. 298, on mode of enforcing liability of counties and legislative power to modify or impair same.

Original jurisdiction in mandamus.—Cited in note in 58 L. R. A. 843, on original jurisdiction of court of last resort in mandamus.

15 KAN. 216, JACKSON v. LATTA

Amendment of judicial proceedings.—Cited in *Wilson v. Paxton*, 7 Kan. App. 79, 52 Pac. 911, holding that it was not error, on appeal from a justice court to the district court, to allow the transcript to be amended so as to show the rendition and entry of the judgment that was in fact rendered; *Clark v. Bank of Hennessey*, 14 Okl. 572, 79 Pac. 217, 2 Ann. Cas. 219, holding that district courts have the power, while a case is pending and before final judgment, to amend the record, or any order or proceeding had in the cause, by a nunc pro tunc order.

Parol evidence of judgment.—Cited in *Pulsifer v. Arbuthnot*, 59 Kan. 380, 53 Pac. 70, holding that parol evidence is inadmissible in a collateral proceeding to prove the rendition of a judgment or the making of any order by a court of record.

15 KAN. 224, CARTRIGHT v. SMITH

15 KAN. 226, NASH v. CAMPBELL

15 KAN. 228, STATE EX REL. WILLIAMS v. McLAUGHLIN, 22 AM. REP. 264

Suits affecting public interests, rights, or duties.—Cited in *Center Tp. v. Hunt*, 16 Kan. 430, holding that a township could not enjoin the collection of an illegal tax on the taxable property of a private individual; *Atchison, T. & S. F. R. Co. v. State ex rel. Sanders*, 22 Kan. 1, on the right of a private individual to maintain an action to recover the statutory penalty for the failure to give crossing signals by a railroad train; *City of Atchison v. State ex rel. Tufts*, 34 Kan. 379, 8 Pac. 367, holding that the state could not enjoin a county treasurer from disbursing money received from the payment of an illegal tax levied to create a sinking fund to pay city bridge bonds; *City of Argentine v. State ex rel. Pollock*, 46 Kan. 430, 26 Pac. 751, holding that the state was not entitled to enjoin a city from expending the proceeds of the sale of a bond issue for the purpose of purchasing of lots for, and the erection thereon of, a city hall; *Troutman v. De Boissiere Odd Fellows' Orphans' Home and Industrial School Ass'n*, 66 Kan. 1, 71 Pac. 286, holding that charities which the Attorney General can sue to enforce or conserve must be charities of a character so public as to interest the whole community; *United States ex rel. Search v. Choctaw, O. & G. R. Co.*, 3 Okl. 404, 41 Pac. 729, holding that, where relief is sought by injunction to protect private rights merely, relator must show some special interest in the matter in litigation; *Territory ex rel. Oklahoma Gas & Electric Co. v. De Wolfe*, 13 Okl. 454, 74 Pac. 96, on the right of one gas company to restrain another

company from laying its pipes in the streets of a city; *State ex rel. Taylor v. Lord*, 28 Or. 498, 43 Pac. 471, 31 L. R. A. 473, holding that private individuals cannot enjoin public officers from using public funds, unless they themselves will be injuriously affected by the proposed expenditure.

Trial of title to office.—Cited in *Neeland v. State ex rel. Bradford*, 39 Kan. 154, 18 Pac. 165, holding that quo warranto, not injunction, is the proper remedy to try title to office.

Restraining collection of taxes.—Cited in note in 23 Am. Rep. 623, on injunction against collection of tax.

Powers of municipalities.—Cited in note in 2 Am. St. Rep. 101, on powers of municipalities.

15 KAN. 236, GRANT v. PENDER

New or amended pleadings.—Cited in *Wright v. Bacheller*, 16 Kan. 259, on the facts that error was committed in refusing to allow plaintiff, during the trial, to amend his reply so as to put in issue the truth of certain portions of defendant's answer; *Rice v. Hodge*, 26 Kan. 164; *German Ins. Co. v. Wright*, 6 Kan. App. 611, 49 Pac. 704—holding that the court has the power to permit new pleadings or amended pleadings, and compel a trial at the same term, unless the interests of justice require a continuance.

Secondary evidence.—Cited in *Central Branch U. P. R. Co. v. Walters*, 24 Kan. 504, holding it error to permit proof of a demand for the value of stock killed, by the introduction of a copy of the written demand, without any foundation therefor having been laid.

Statute of frauds.—Cited in *Plano Mfg. Co. v. Burrows*, 40 Kan. 361, 19 Pac. 809, holding that an agreement by a purchaser of property to pay the purchase price to a third person in payment of a debt due from his vendor to such third person was not within the statute of frauds.

Use of deposition.—Cited in *Bank of Orland v. Finnell*, 183 Cal. 475, 65 Pac. 976, holding that a party cannot introduce in evidence selected portions of a deposition of his own witness, omitting the rest of the deposition.

15 KAN. 244, FT. SCOTT COAL & MIN. CO. v. SWEENEY

Pleading varying terms of written instrument.—Cited in *Merrill v. Young*, 5 Kan. App. 761, 47 Pac. 187, holding that it was not error to strike an answer setting up a defense contrary to the express terms of a written instrument sued on.

15 KAN. 249, BREWSTER v. MADDEN

Alienation of public lands by entryman.—Distinguished in *Bell v. Parks*, 18 Kan. 152, holding that where an actual settler on Sac and Fox lands, subject to pre-emption, who had made improvements thereon, quitclaimed all his rights in such land to a third person, and delivered possession, and received cash and a note therefor, the note was supported by a sufficient consideration, although the title to the land remained in the government; *Stewart v. Powers*, 98 Cal. 514, 33 Pac. 486, holding that a mortgage by a pre-emption claimant before entry was not void; *Wilcox v. John*, 21 Colo. 367, 40 Pac. 580, 52 Am. St. Rep. 246, holding that neither a mortgage nor a deed of trust by a pre-emptor of public lands, before final proof, were void; *Runyan v. Snyder*, 45 Colo. 156, 100 Pac. 420; *Weber v. Laidler*, 26 Wash. 144, 66 Pac. 400, 90 Am. St. Rep. 726—holding that the acts of Congress do not prevent one entering lands under the pre-emption or homestead laws from executing a mortgage thereon in advance of patent, or even entry, or the obtaining of a receiver's receipt, unless such mortgage was a device to transfer title in evasion of the statute; *Norris v. Heald*, 12 Mont.

282, 29 Pac. 1121, 33 Am. St. Rep. 581, holding that a mortgage by a pre-emptor of public lands, before final proof, was not a grant or conveyance prohibited by the Revised Statutes of the United States; Church v. Adams, 37 Or. 355, 61 Pac. 639, holding that a claimant under the timber culture claims act, who has made an entry in good faith, may contract to sell his claim before final proof.

Cited in *Brake v. Ballou*, 19 Kan. 397, holding that a contract, by which plaintiff, not an actual settler, procured defendant, an actual settler, to enter on public lands and purchase them in his own name from the United States, plaintiff furnishing the purchase money and defendant agreeing to convey to plaintiff, was void; *Lucas v. Sturr*, 21 Kan. 490, holding contracts with reference to government lands between parties, while the title is still in the government, illegal; *Green v. Houston*, 22 Kan. 35, as to circumstances under which a homestead entryman would be estopped to assert the invalidity of a mortgage thereof; *Jarvis v. Campbell*, 23 Kan. 370, holding that the sale of a claim to Osage ceded lands, before it was sold by the United States, and vacant and unoccupied, was void; *Mellison v. Allen*, 30 Kan. 382, 2 Pac. 97, holding that equity would not compel the specific performance of a contract to convey a part of a homestead entry, made before the expiration of five years from the date of his entry thereon; *Biddle v. Adams*, 5 Kan. App. 734, 46 Pac. 986, holding that a mortgage on land, given prior to the making of final proofs by an occupying homesteader, was void; *Bass v. Buker*, 6 Mont. 442, 12 Pac. 922, holding a mortgage by a pre-emptor of public lands before final receipt void; *Hafemann v. Gross*, 199 U. S. 342, 26 Sup. Ct. 80, 50 L. Ed. 220, holding that an agreement by a pre-emptor with a person advancing money to pay part of the expense of final proof to repay such party a portion of the proceeds of the sale of the land, if it could be sold at its proper value, was not void.

Overruled in *Stark v. Morgan*, 73 Kan. 453, 85 Pac. 567, 6 L. R. A. (N. S.) 934, 9 Ann. Cas. 930, holding that a mortgage of a homestead entry was not an alienation thereof prohibited by the Revised Statutes of the United States.

Cited in note in 6 L. R. A. (N. S.) 936, on mortgage upon public lands executed by homesteader prior to patent or final proof.

Estoppel by mortgage.—Cited in note in 45 Am. Dec. 394, on estoppel by mortgage.

15 KAN. 252, *BABBITT v. JOHNSON*

Deeds—Time of taking effect.—Cited in *Cain v. Robinson*, 20 Kan. 450, holding that ordinarily the date of a deed is prima facie evidence of the time of its delivery, but that such presumption may be rebutted by evidence; *Green v. Green*, 34 Kan. 740, 10 Pac. 156, 55 Am. Rep. 256, holding that a deed takes effect only from the time of its delivery.

Same—Acknowledgment.—Cited in note in 41 Am. Dec. 169, on sufficiency of acknowledgment of deeds.

Taxes—Rights of holder of invalid tax deed.—Cited in *Jeffries v. Clark*, 23 Kan. 448, holding that where the holder of a tax deed is defeated in an action against him for the recovery of the land sold, and the successful claimant is adjudged to pay to such holder all taxes, interest, and costs before he shall be entitled to possession, it is not error to refuse an execution to the holder of the tax deed against the property of the successful claimant to collect the taxes against the goods and chattels and lands and tenements of such claimant; *Millbank v. Ostertag*, 24 Kan. 462, holding that the possessor of land under a void tax deed could not be ousted without compensation for taxes and improvements; *Shinkle v. Meek*, 69 Kan. 368, 76 Pac. 837, holding that a tender of the amount actually due is not a condition precedent to the maintenance of an action to set aside a tax deed.

Same—Sale to county.—Cited in *Larkin v. Wilson*, 28 Kan. 518; *Rush v. Lewis and Clark County*, 36 Mont. 566, 93 Pac. 943; *Hanenkratt v. Hamil*, 10

Okl. 219, 61 Pac. 1050—as to when a tax sale to a county was void, the tax deed showing on its face that the county was a competitive bidder at the sale.

Same—Who may purchase at sale.—Cited in note in 75 Am. St. Rep. 225, on who may purchase and enforce a tax title.

15 KAN. 255, CHURCHILL v. MOORE

15 KAN. 259, SPENCER v. JOINT SCHOOL DIST. NO. 6 OF NEMAHA AND BROWN COUNTIES, 22 AM. REP. 268

Suits affecting public interests, rights or duties.—Followed in Blain v. Riley County Agr. Society, 21 Kan. 558, on the facts that a petitioner did not show a sufficient interest to entitle him to maintain mandamus to compel a county treasurer to pay an order issued by the board of county commissioners.

Cited in Amusement Syndicate Company v. City of Topeka, 68 Kan. 801, 74 Pac. 606, holding that the owner of an opera house had no such interest as would entitle him to enjoin a city from permitting its auditorium being used for public entertainments for profit; Davenport v. Buffington, 97 Fed. 237, 38 C. C. A. 453, 46 L. R. A. 377, holding that a resident and taxpayer of a city could enjoin the diversion to private use by the original proprietor of a town site, which, when the town was laid out and platted, was dedicated as a public park, and had since been maintained as such.

Use of schoolhouse.—Cited in Lewis v. Bateman, 26 Utah, 434, 73 Pac. 500, holding that the trustees of a school district had no right to permit the schoolhouse to be used for public and private dances.

Cited in note in 105 Am. St. Rep. 157, on religious and sectarian teaching in public schools.

Sectarian school.—Cited in note in 8 Am. St. Rep. 412, on what constitutes sectarian institution or school; in 31 L. R. A. (N. S.) 591; 33 L. R. A. 118—on use of school property for other than school purposes.

Powers of municipalities.—Cited in note in 2 Am. St. Rep. 101, on powers of municipalities.

15 KAN. 263, RICE v. POYNTER

Judicial sales—Effect of confirmation.—Cited in Capital Bank of Topeka v. Huntoon, 35 Kan. 577, 11 Pac. 369, holding that mere irregularities in the proceedings connected with a sheriff's sale are cured by the order of the court confirming the sale, but that matters which are not mere irregularities, or which form no part of the proceedings connected with the sale, are not so cured; Mills v. Pettigrew, 45 Kan. 573, 26 Pac. 33, holding that the final decision of the district court, overruling a motion to set aside a judicial sale, is not conclusive as to the ultimate rights of the parties.

Same—Appraisement.—Cited in Shaffer v. Knox, 7 Kan. App. 182, 53 Pac. 785, holding that a sale of attached property, without any appraisement having been made, for more than two-thirds of the actual and appraised value of the property, was voidable only.

15 KAN. 269, DICKENSON v. COWLEY

Attachment—Interveners.—Cited in Standard Implement Co. v. Lansing Wagon Works, 58 Kan. 125, 48 Pac. 638, holding that persons interpleading in attachment and claiming priority of liens cannot defeat the attachment by showing that the claim sued on was not due, or that the debt was evidenced by promissory notes; Ballew v. Young, 24 Okl. 182, 103 Pac. 623, 23 L. R. A. (N. S.) 1084, holding that an intervening claimant in attachment can make only such objections to the irregularity of the proceedings as he could make in an independent collateral proceeding; Noyes v. Canada, 30 Fed. 665, holding that a third party,

claiming to own goods attached, was entitled to set aside the attachment on the ground that no service thereof was made on defendant.

Same—Affidavit for.—Cited in *Mentzer v. Ellison*, 7 Colo. App. 315, 43 Pac. 464, holding that the affidavit for attachment must contain an allegation of indebtedness from defendant, and also the grounds upon which the statute authorizes the attachment.

Same—Irregularities.—Cited in note in 79 Am. Dec. 171, on irregularities and defects avoiding attachment.

Same—Judgments in rem.—Cited in note in 76 Am. St. Rep. 802, on judgments depending for validity on attachment of property.

Same—Dissolution.—Cited in note in 123 Am. St. Rep. 1044, on proceedings to dissolve attachments.

Same—Right to question validity.—Cited in note in 35 L. R. A. 773, 778, on right of creditors to question validity of attachment; in 23 L. R. A. (N. S.) 1085, on right of intervener in attachment to attack validity of service of process.

15 KAN. 274, STARKWEATHER v. MORGAN.

Return of service of process.—Cited in *Chambers Bros. & Co. v. King Wrought-Iron Bridge Co.*, 16 Kan. 270, holding that a sheriff's return of service of original process may be impeached so far as it states facts on which jurisdiction depends, where the facts stated do not come within the personal knowledge of the sheriff; *Gapen v. Stephenson*, 17 Kan. 613, as to when a sheriff could contradict his official return of a sale; *Jones v. Marshall*, 3 Kan. App. 529, 43 Pac. 840, holding that a sheriff's return of original process may be questioned as to facts upon which jurisdiction depends; *Huntington v. Crouter*, 33 Or. 408, 54 Pac. 208, 72 Am. St. Rep. 726, holding that an officer's return of service of process is prima facie evidence of the material matters therein stated, subject to contradiction; *Abraham v. Miller*, 52 Or. 8, 95 Pac. 814, holding that equity will not grant relief against a default judgment on a false return of service of process, except on clear, satisfactory, and convincing proof of want of service.

Distinguished in *Goddard v. Harbour*, 56 Kan. 744, 44 Pac. 1055, 54 Am. St. Rep. 608, holding that the return of a sheriff that he has served the summons on defendant personally is conclusive on the parties, and cannot be questioned in an action to enjoin a judgment based on such service.

15 KAN. 277, DODGE v. COFFIN

Authentication of foreign records.—Cited in *Haynes v. Cowen*, 15 Kan. 637, on the sufficiency of the authentication of a record from a court of another state.

Presumptions as to jurisdiction of courts of other states.—Followed in *Ward v. Baker*, 16 Kan. 31; *Westervelt v. Jones*, 5 Kan. App. 35, 47 Pac. 322—holding that it will be presumed, in the absence of evidence to the contrary, that courts of general jurisdiction of other states have the authority they assume to exercise, and that their modes of procedure are authorized by their laws; *Comstock v. Adams*, 23 Kan. 513, 33 Am. Rep. 191, holding that it would be presumed that a Michigan circuit court had authority to set aside a decree of divorce; *Poll v. Hicks*, 67 Kan. 191, 72 Pac. 847, holding that circuit courts of Ohio are presumed to be courts of general jurisdiction.

Presumptions as to laws of other states.—Cited in *Speer v. Missouri, K. & T. Ry. Co.*, 23 Kan. 571; *Missouri Pac. Ry. Co. v. Sharitt*, 43 Kan. 375, 23 Pac. 430, 8 L. R. A. 385, 19 Am. St. Rep. 143; *First Nat. Bank of Galva, Ill. v. Nordstrom*, 70 Kan. 485, 78 Pac. 804—holding that the Kansas courts will presume, in the absence of evidence to the contrary, that the laws of other states are like those of Kansas.

Cited in note in 11 Am. Dec. 783, on presumption and judicial notice of laws.

Judicial notice of jurisdiction of courts of other states.—Cited in *Friend v. Miller*, 52 Kan. 139, 34 Pac. 397, 39 Am. St. Rep. 340, holding that the Supreme Court can take notice of the Constitutions of other states creating courts, and also of acts of Congress providing for the organization of territories and the creation of courts therein, so far as the jurisdiction of such courts is shown; *Bleakley v. Barclay*, 75 Kan. 462, 89 Pac. 906, 10 L. R. A. (N. S.) 230, holding that the Supreme Court will take judicial notice that the circuit courts of Illinois are courts of general original jurisdiction; *Hinman v. Missouri, K. & T. Ry. Co.*, 83 Kan. 35, 110 Pac. 102, 21 Ann. Cas. 1152, holding that the Kansas courts will take judicial notice that the Missouri Constitution makes the circuit courts of that state courts of record and of general jurisdiction.

Cited in notes in 83 Am. Dec. 451 (par. 4); 89 Am. Dec. 674; 49 Am. Rep. 201—on judicial notice of laws of sister state.

What law governs right of action.—Cited in *Kitchen v. Bellefontaine Nat. Bank*, 53 Kan. 242, 36 Pac. 344, 42 Am. St. Rep. 282, holding that a judgment by confession in Ohio, in an action on a note, with a warrant of attorney to confess judgment, executed in Ohio, was valid, notwithstanding defendant's removal from that state.

Full faith and credit.—Cited in *Keyser v. Lowell*, 117 Fed. 400, 54 C. C. A. 574, holding that a statute striking down all remedies and preventing the maintenance of an action in one state on a judgment of a court of another state, founded on a cause of action barred in the former, but not in the latter, state, where the action in which the judgment was rendered was commenced, did not give full faith and credit to the records and judicial proceedings of the latter state.

Cited in note in 103 Am. St. Rep. 322, 324, on judgments of courts of other states.

Exemptions.—Cited in note in 19 Am. St. Rep. 145, on exemption of property from judicial process.

Collateral attack on judgments.—Cited in note in 23 Am. St. Rep. 116, on collateral attack upon judgment.

15 KAN. 287, JEADICKE v. PATRIE

Injunction against judicial proceedings.—Cited in note in 30 L. R. A. 135, 563, on injunctions against execution sales or other proceedings under final process.

15 KAN. 290, SMITH v. SMITH

Rights of purchasers at tax sales.—Cited in *Waterson v. Devoe*, 18 Kan. 223; *Larkin v. Wilson*, 28 Kan. 513; *Uhl v. Grissom*, 12 Okl. 322, 72 Pac. 372—on the right of an occupying claimant under a tax deed to recover for improvements; *Millbank v. Ostertag*, 24 Kan. 462, holding that a person in peaceable possession under a tax deed could not be ousted without being reimbursed for taxes paid and improvements made; *Coe v. Farwell*, 24 Kan. 566; *Coonradt v. Myers*, 31 Kan. 30, 2 Pac. 858—holding that a purchaser at a tax sale, whose title is adjudged defective, is entitled to recover taxes paid by him, with interest; *Wilder v. Cockshutt*, 25 Kan. 504, holding that before a landowner or a mortgagee of land can contest with the holder of a tax certificate illegal taxes or charges included in the tax sale, where the land was taxable and the taxes have not been paid, he must pay or tender the taxes or charges conceded to be legal, with interest; *Belz v. Bird*, 31 Kan. 139, 1 Pac. 246, on the right to taxes paid as between purchasers at different tax sales; *Cohen v. St. Louis, Ft. S. & W. R. Co.*, 34 Kan. 158, 8 Pac. 138, 55 Am. Rep. 242, holding that one holding possession under a void tax deed may recover compensation for improvements from the paramount owner under the occupying claimant law; *Stet-*

son v. Freeman, 38 Kan. 606, 14 Pac. 256; Jackson v. Challis, 41 Kan. 247, 21 Pac. 87; Baldwin v. Gibson, 85 Kan. 267, 116 Pac. 827—on the right of the holder of illegal tax deeds to recover for taxes paid, interest, costs, etc.; Ritchie v. Mulvane, 39 Kan. 241, 17 Pac. 830, on the right to recover taxes paid by a purchaser at a tax sale; Smith v. Newman, 62 Kan. 318, 62 Pac. 1011, 53 L. R. A. 984, holding that, although a tax deed is void on its face, a holder thereof, who had paid taxes, penalties, and costs, was entitled to hold possession until the tax charges were paid; Douglass v. Byers, 69 Kan. 59, 76 Pac. 432, holding that the fact that a tax deed was found to be invalid does not mean that the property was not taxable, or that the holder of the invalid tax deed could not recover the taxes which he had paid on the property; Pierce v. Adams, 77 Kan. 46, 93 Pac. 594, holding that a tax deed void on its face as a conveyance is sufficient to transfer the lien for taxes to the grantee therein; Lewis Academy v. Wilkinson, 79 Kan. 577, 100 Pac. 510, on the right of a tax deed holder to a lien for the amount of taxes paid by him; Humphrey v. Yost, 10 Kan. App. 324, 62 Pac. 550, holding that, where the holder of a tax deed does not have it recorded within the time required by statute, it is void, and he cannot have a lien for taxes paid on the land described therein by taking possession thereof.

Cited in note in 34 L. R. A. (N. S.) 551, on right of one holding under invalid tax deed to be reimbursed for improvements.

15 KAN. 296, BABCOCK v. JONES

Lien of judgment.—Cited in Plumb v. Ray, 18 Kan. 415; Harrison & Willis v. Andrews, 18 Kan. 535—as to the time when a judgment lien attached; Morris v. Brown, 5 Kan. App. 102, 48 Pac. 750, holding that a judgment is a lien on real estate formerly occupied as a homestead from and after its abandonment as a homestead; Coad v. Cowhick, 9 Wyo. 316, 63 Pac. 594, 87 Am. St. Rep. 953, as to when a judgment is a lien on after acquired lands.

Cited in note in 117 Am. St. Rep. 784, on estates and interests to which judgment liens attach.

15 KAN. 302, STATE v. POTTER

Homicide—Indictment or information—Sufficiency.—Cited in State v. Stackhouse, 24 Kan. 445, holding that an indictment for murder alleging an assault, a killing and a deliberate and premeditated intent to kill was sufficient; State v. Harp, 31 Kan. 496, 3 Pac. 432, holding that an information for murder sufficiently charged an intent to kill or murder.

Instructions—Lesser offense—Harmless error.—Cited in State v. Yarborough, 39 Kan. 581, 18 Pac. 474, holding that any error in instructions as to a lesser offense than that of which accused was found guilty was harmless; State v. Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322; State v. McCarty, 54 Kan. 52, 36 Pac. 338—applying the same rule to a failure to charge as to a lesser offense; State v. Winters, 81 Kan. 414, 105 Pac. 516, holding that, where accused objected to the giving of instructions as to lesser offenses than that charged, their omission was not reversible error.

Verdict—Recommendation to mercy.—Cited in State v. Borchert, 68 Kan. 365, 74 Pac. 1108, holding that, while the court might reject a verdict containing a recommendation for mercy, it was not error to inform them, in the absence of accused and counsel, that it would be received; State v. Arata, 56 Wash. 185, 105 Pac. 227, 21 Ann. Cas. 242, holding that it was not error to receive a verdict of guilty of murder in the first degree with a recommendation to mercy, although the recommendation could be given no effect.

Trial—Oral and written instructions.—Cited in City of Atchison v. Jansen, 21 Kan. 560; State v. Stoffel, 48 Kan. 864, 29 Pac. 685; Boggs v. United States, 10 Okl. 424, 68 Pac. 969; 65 Pac. 927 (dissenting opinion); Boggs v.

United States, 11 Okl. 139, 65 Pac. 927 (dissenting opinion); *Hopt v. People*, 104 U. S. 631, 26 L. Ed. 873—holding that the giving of instructions orally in addition to those written was reversible error; *Brown v. Crawford*, 2 Colo. App. 235, 29 Pac. 1137; *Rich v. Lappin*, 43 Kan. 666, 23 Pac. 1038; *State v. Bennington*, 44 Kan. 583, 25 Pac. 91; *Wheat v. Brown*, 3 Kan. App. 431, 43 Pac. 807—holding that it was error to give oral instructions, although they were taken down by a stenographer and reduced to writing; *Walton v. Wild Goose Mining & Trading Co.*, 123 Fed. 209, 60 C. C. A. 155; *Boggs v. United States*, 10 Okl. 424, 63 Pac. 989, 65 Pac. 927; *Sturgis v. State*, 2 Okl. Cr. 362, 102 Pac. 57—holding that oral remarks of the court in answer to questions asked by the jury were not reversible error; *State v. McLafferty*, 47 Kan. 140, 27 Pac. 843; *Douglas v. Territory*, 1 Okl. Cr. 583, 98 Pac. 1023—holding that an oral statement to the jury, not constituting an instruction, was not error; *Bird & Mickle Map Co. v. Jones*, 27 Kan. 177, holding that an oral direction as to the manner of answering special findings was not reversible error, where no objection was made or exception taken; *State v. Hobbs*, 62 Kan. 612, 64 Pac. 73, holding that oral remarks of the judge could not have prejudiced accused, where he told the jury that he did not want to give any additional instructions and that they should be guided by the written instructions; *State v. Schoenewald*, 26 Kan. 288, as to oral modifications of written instructions.

Same—Failure to request additional instructions.—Cited in *State v. Walke*, 69 Kan. 183, 76 Pac. 408, holding that where the charge was sufficient to present the salient features of the case, and no additional instructions were requested, the court's failure to go into details was not error.

Supreme Court—Jurisdiction.—Cited in *City of Leavenworth v. Weaver*, 26 Kan. 392, holding that an appeal cannot be taken to the Supreme Court from the decision of a police judge in a criminal prosecution.

15 KAN. 322, *STATE v. HARPSTER*

15 KAN. 323, *BAINTER v. FULTS*

Appeal and error—Presumptions.—Cited in *Lucas v. Sturr*, 21 Kan. 480, holding that it would be presumed, in the absence of any showing to the contrary in the record, that the motion for a new trial was not filed in time, and hence was properly overruled.

Rescission—Necessity of restoration of consideration.—Cited in *Jeffers v. Forbes*, 28 Kan. 174, holding that a party seeking to avoid a conveyance induced by fraud must tender a reconveyance of the property taken in exchange; *Yaw v. Roberts*, 9 Kan. App. 135, 58 Pac. 490, holding that a vendor, seeking to rescind his contract of sale, must return the purchase money paid.

15 KAN. 333, *DAVIS v. FILLMORE*

Errors—Review—Necessity of mentioning in brief.—Cited in *Campbell v. Phillips*, 28 Kan. 753; *Oklahoma City v. McMaster*, 12 Okl. 570, 73 Pac. 1012—holding that only those assigned errors discussed by plaintiff in error in his brief will be reviewed.

15 KAN. 336, *DOUGLAS v. McFADIN*

15 KAN. 341, *EASTMAN v. GODFREY*

15 KAN. 344, *DRESSER v. WOOD*

Cited in *Crist v. Cosby*, 11 Okl. 635, 69 Pac. 885.

Lis pendens—Force and effect.—Cited in *Everston v. Central Bank of Kansas*, 33 Kan. 352, 6 Pac. 605, holding that a party purchasing land pending a suit to quiet title had no greater rights than his grantor; *Smith v. Kimball*, 36 Kan.

474, 13 Pac. 801, holding that a purchaser at a sheriff's sale under execution, pending a suit to determine the priority of judgment liens, was bound by the judgment therein.

Ratification of unauthorized acts.—Cited in *West v. Western Union Telegraph Co.*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530, holding that an action was maintainable on a contract by the party for whose benefit it was made and who subsequently ratified and approved it; *Hodson v. Tootle, Shireman & Co.*, 28 Kan. 317, holding that an affidavit for an attachment, not showing that the party making it was plaintiff's agent, had been ratified and adopted by plaintiff as his own; *Hughes County, S. D., v. Ward*, 81 Fed. 314, holding that a board of county commissioners could ratify the unauthorized commencement of an action by a state's attorney; *Girard Trust Co. v. Owen*, 83 Kan. 692, 112 Pac. 619, 33 L. R. A. (N. S.) 262, as to the effect of the ratification of an unauthorized act.

Pleadings—Sufficiency—Waiver of objections.—Cited in *Kansas Pac. Ry. Co. v. Yanz*, 16 Kan. 583; *Kansas Pac. Ry. v. Taylor*, 17 Kan. 566; *Clay v. Hildebrand Bros. & Jones*, 34 Kan. 694, 9 Pac. 406—holding that, where a case was tried as if the pleadings were sufficient, defects therein were waived.

Judgment—Process to support.—Cited in note in 44 Am. Dec. 570, on effect of judgment against partnership or joint debtors on service on one.

15 KAN. 363, DAVENPORT v. OGG

Witness—Disobedience of rule—Remedy.—Cited in *State v. Falk*, 46 Kan. 498, 26 Pac. 1023, holding that a witness remaining in court in violation of an order of the court could be punished for contempt, but his evidence should not be rejected.

15 KAN. 368, MEHNERT v. THEIEME

Relief against judgment rendered during party's absence.—Cited in *Green v. Bulkley*, 28 Kan. 130; *Turner v. Miller*, 28 Kan. 44; *First Nat. Bank v. Wentworth*, 28 Kan. 183; *Weems v. McDavitt*, 49 Kan. 260, 30 Pac. 481—holding that a party absenting himself from court did so at his peril, and was not entitled to a new trial on the ground of surprise; *Noble v. Butler*, 25 Kan. 645, holding that equity would not relieve against a judgment rendered against a party through his negligence; *Farmers' & Merchants' Ins. Co. v. Cuff*, 29 Okl. 106, 116 Pac. 435, 35 L. R. A. (N. S.) 802, holding that the denial of a new trial on account of the absence of defendant's counsel would not be disturbed, in the absence of an abuse of discretion.

15 KAN. 371, KNOWLES v. ARMSTRONG

Foreclosure—Summons—Indorsement.—Cited in *Sparks v. Beyer*, 5 Kan. App. 721, 46 Pac. 980, holding that in a foreclosure suit it was not necessary to indorse on the summons the amount for which plaintiff would take judgment.

15 KAN. 372, WILTON TOWN CO. v. HUMPHREY

Justices of the peace—Disregarding technical defects.—Cited in *Barackman v. Girard*, 26 Kan. 284, as to sustaining proceedings before a justice of the peace, although defective in form, where substantial justice has been had.

Execution—Variance from judgment.—Cited in note in 13 Am. Dec. 202, on variance between execution and judgment.

15 KAN. 376, HAMLYN v. BOULTER

Chattel mortgage—Liability of mortgagee for conversion.—Distinguished in *Wygall v. Bigelow*, 42 Kan. 477, 22 Pac. 612, 16 Am. St. Rep. 495, holding that, where mortgagee unlawfully, fraudulently, and unfairly disposed of the property, he was liable for the excess in value over the debt without payment or tender of the debt.

15 KAN. 378, HOLCOMB v. DOWELL

Cited in *Seaman v. Huffaker*, 21 Kan. 254.

Appeal and error—Extent of review.—Cited in *Ritchie v. Kansas, N. & D. Ry. Co.*, 55 Kan. 36, 39 Pac. 718; *Stanard v. Sampson*, 23 Okl. 13, 99 Pac. 796—holding that the Supreme Court may review the question whether on the facts found the conclusions of law and judgment are correct without a motion for a new trial; *De Vitt v. City of El Reno*, 28 Okl. 315, 114 Pac. 253, holding that an assignment of error that the judgment is contrary to law raises only the question whether on the pleadings and findings the proper judgment was rendered.

Statute of frauds—Contracts affecting realty.—Cited in *Bogle v. Jarvis*, 58 Kan. 76, 48 Pac. 558, holding that where a vendee complied with a vendor's written offer to sell, although there was no written acceptance of the offer, the contract was not void under the statute of frauds; *Burnell v. Bradbury*, 67 Kan. 762, 74 Pac. 279, holding that where a vendee went into possession under an oral contract, and made valuable improvements with the vendor's consent, the vendor was estopped to plead the statute of frauds; *McCullough v. Finley*, 69 Kan. 705, 77 Pac. 696, holding that a parol partition of real estate, when followed by possession and the making of improvements, was not void under the statute of frauds.

Vendor and purchaser—Right of vendor to maintain ejectment.—Cited in *Gumaer v. Draper*, 33 Colo. 122, 79 Pac. 1040, as to a vendor's right to bring an action against the vendee for possession.

15 KAN. 383, HAGAMAN v. NEITZEL

Justices of the peace—Appeal—Record.—Cited in *Sutton v. Nichols*, 20 Kan. 43; *Hennigh v. Commercial Nat. Bank*, 53 Kan. 370, 36 Pac. 711—holding that an entry in a justice's docket, not required by statute, was not a part of the record; *Madden v. Riedel*, 71 Kan. 176, 80 Pac. 45, holding that matters not required to be entered on the justice's docket should be embodied in a bill of exceptions, to be available in the district court.

Torts—Waiver—Suing on contract.—Cited in *Missouri Pac. Ry. Co. v. Atchison*, 43 Kan. 529, 23 Pac. 610, holding that, where a justice of the peace had no jurisdiction of an action for trespass, plaintiff could waive the trespass and sue on implied contract for use and occupation.

15 KAN. 389, WHEELER v. JOY

Instructions—Exceptions—Sufficiency.—Cited in *Palmer v. Meiners*, 17 Kan. 478; *Fullenwider v. Ewing*, 25 Kan. 69; *Hunt v. Haines*, 25 Kan. 210; *Hentig v. Kansas Loan & Trust Co.*, 28 Kan. 617; *Bard v. Elston*, 31 Kan. 274, 1 Pac. 565; *Tays v. Carr*, 37 Kan. 141, 14 Pac. 456; *Young v. Youngman*, 45 Kan. 65, 25 Pac. 209; *Ryan v. Madden*, 46 Kan. 245, 26 Pac. 679; *Standard Life & Accident Ins. Co. v. Davis*, 59 Kan. 521, 53 Pac. 856; *Isnard v. Edgar Zinc Co.*, 81 Kan. 765, 106 Pac. 1003; *Beach v. Moser*, 4 Kan. App. 66, 46 Pac. 202; *Glaser v. Glaser*, 13 Okl. 389, 74 Pac. 944—holding that a general exception to the whole charge is insufficient, where the charge in its general scope is not erroneous; *Markley v. Kirby*, 6 Kan. App. 494, 50 Pac. 953; *Rhea v. United States*, 6 Okl. 249, 50 Pac. 992—holding that an exception to the instructions as a whole and to each instruction separately was sufficient.

Same—Necessity.—Cited in *Joseph v. First Nat. Bank*, 17 Kan. 256, holding that an instruction not excepted to will not be reviewed.

15 KAN. 391, CITY OF OLATHE v. ADAMS

Criminal law—Acquittal—Conclusiveness.—Cited in *State v. Crosby*, 17 Kan. 396, holding that a verdict or finding of "not guilty" in a criminal case is conclusive, and cannot be set aside; *City of Oswego v. Belt*, 16 Kan. 480, holding

that a judgment of acquittal in a prosecution for violating a city ordinance cannot be reversed and a new trial granted; *State v. Cummerford*, 16 Kan. 507, as to the conclusiveness of special findings in a criminal case.

Cited in note in 27 Am. Dec. 479, on power to set aside verdict of acquittal.

Same—Appealability.—Cited in *State v. Phillips*, 33 Kan. 100, 5 Pac. 436; *State v. Moon*, 45 Kan. 145, 25 Pac. 614; *State v. Lee*, 49 Kan. 570, 31 Pac. 147; *State v. Hickerson*, 55 Kan. 133, 39 Pac. 1045—holding that the state cannot appeal from a judgment of acquittal in a criminal prosecution; *State v. Rook*, 61 Kan. 382, 59 Pac. 653, 49 L. R. A. 186, holding that, where defendant had not been placed in jeopardy, the state could appeal on a reserved question as to the propriety of his discharge on the hearing of a special plea; *City of Burlington v. James*, 17 Kan. 221, holding that prosecutions for violations of city ordinances may be brought to the Supreme Court by appeal.

Cited in note in 19 L. R. A. 347, on right of state to appeal in a criminal case.

15 KAN. 396, STATE v. REEVES

15 KAN. 400, STATE v. BROWN

Jurors—Qualifications—Formation of opinion.—Cited in *State v. Spaulding*, 24 Kan. 1, holding that a juror's statement that he had formed an "opinion" was not conclusive, when his whole testimony showed it did not amount to an opinion; *State v. Snodgrass*, 52 Kan. 174, 34 Pac. 750, holding that jurors having fixed opinions requiring evidence to overcome are incompetent.

Distinguished in *State v. Wells*, 28 Kan. 321, holding that, where it was conceded that defendant killed deceased, an opinion to that effect did not disqualify a juror.

Cited in note in 36 Am. Dec. 581, on bias or opinion as ground for challenge to jurors.

Same—Overruling challenges—When prejudicial.—Cited in *State v. Vogan*, 56 Kan. 61, 42 Pac. 352; *Burch v. Southern Pac. Co.*, 32 Nev. 75, 104 Pac. 225, Ann. Cas. 1912B, 1166—holding that error in overruling a challenge for cause was prejudicial, although the juror was afterwards challenged peremptorily, where defendant exhausted his peremptory challenges; *Ford v. Umatilla County*, 15 Or. 313, 16 Pac. 33, holding that such error was not prejudicial where the party, after exhausting his peremptory challenges, made no further objections to any of the jurors.

15 KAN. 402, STATE v. WHITBY

15 KAN. 404, STATE v. NULF

Indictment or information—Verification—Sufficiency.—Cited in *State v. Gleason*, 32 Kan. 245, 4 Pac. 363, holding that an information filed before any preliminary examination on which defendant is to be arrested cannot be verified on information and belief; *Lustig v. People*, 18 Colo. 217, 32 Pac. 275, holding that an information not verified by oath or affirmation should have been quashed; *State v. Stoffel*, 48 Kan. 364, 29 Pac. 685, holding that the verification of an information by the county attorney on knowledge and belief was sufficient.

Same—Who should sign.—Cited in *State v. Bowles*, 70 Kan. 821, 79 Pac. 726, 69 L. R. A. 176, holding that an indictment was not defective because signed by the Attorney General, who was acting as prosecuting attorney, instead of by the county attorney.

15 KAN. 407, STATE v. BOHAN

Venue—Change—Local prejudice.—Cited in *State v. Furbeck*, 29 Kan. 532, holding that motion for change of venue for local prejudice is not to be deter-

mined solely on defendant's affidavit; *State v. Parmenter*, 70 Kan. 513, 79 Pac. 123, holding that the court did not abuse its discretion in denying a change of venue for local prejudice; *State v. Bohan*, 19 Kan. 28, as a previous decision in the same case.

Dying declarations.—Cited in notes in 56 L. R. A. 358; 86 Am. St. Rep. 665, 666, 667—on admissibility of dying declarations.

15 KAN. 420, *STATE v. TAYLOR*

Criminal law—Fatal variance.—Cited in *State v. Woodrow*, 56 Kan. 217, 42 Pac. 714, holding that a variance between the allegations and proof as to the names of makers of notes unlawfully destroyed was fatal.

15 KAN. 423, *KUHN v. FREEMAN*

Eminent domain—Who entitled to compensation.—Cited in *St. Louis, L. & D. R. Co. v. Wilder*, 17 Kan. 239, holding that a person having a title bond to land condemned was entitled to the same damages as if he owned the unincumbered fee; *Goodrich v. Board of Com'rs of Atchison County*, 47 Kan. 355, 27 Pac. 1006, 18 L. R. A. 113, applying the same rule in the case of a mortgagor in possession; *Armstrong v. Moore*, 1 Kan. App. 450, 40 Pac. 834, holding that an award in eminent domain proceedings was properly paid to a mortgagor, when the mortgagee did not appear and protect his interest.

Same—Interests subject to.—Cited in *State ex rel. Trimble v. Superior Court of King County*, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897, holding that a vendee under an executory contract with the state has such an interest in the land as is subject to condemnation.

Vendor and purchaser—Effect of condemnation.—Cited in *Nixon v. Marr*, 190 Fed. 913, 111 C. C. A. 503, 36 L. R. A. (N. S.) 1067, holding that condemnation of land after making of executory contract was not a defense to a recovery of the purchase price; *Gammon v. Blaisdell*, 45 Kan. 221, 25 Pac. 580, holding that condemnation of land after making of executory contract did not entitle purchaser to sue for breach of contract.

Distinguished in *Nixon v. Marr*, 190 Fed. 913, 111 C. C. A. 503, 36 L. R. A. (N. S.) 1067 (dissenting opinion), holding that, where vendor covenanted to convey free from incumbrances, subsequent condemnation of part of the land was a defense to a suit by the vendor for specific performance.

Same—Right of vendor to maintain ejectment.—Cited in *Haggood v. Morten*, 28 Kan. 764, holding that an owner of land, who had executed a title bond, could maintain ejectment against a third person, where he had never put his grantee in possession.

15 KAN. 428, *KOHN v. FIRST NAT. BANK OF FT. SCOTT*

Statute of frauds.—Cited in note in 95 Am. Dec. 252, on oral promise to answer for debt of another.

15 KAN. 435, *MISSOURI, K. & T. RY. v. CITY OF FT. SCOTT*

Case-made—Power of judge pro tem.—Cited in *Garvin v. Jennerson*, 20 Kan. 371, holding that the case-made was properly signed by the judge pro tem. before whom the trial was had.

Same—Time for bottling and signing.—Cited in *Waterfield v. Hutchinson Nat. Bank*, 6 Kan. App. 743, 50 Pac. 971; *Stoddard Mfg. Co. v. Columbia Mfg. Co.*, 8 Kan. App. 690, 5 Pac. 136—holding that a judge pro tem. could not settle a case-made after the time allowed by him for making and serving it and suggesting amendments; *Missouri Pac. Ry. Co. v. Preston*, 63 Kan. 819, 66 Pac. 1050 (dissenting opinion), holding that a pro tem. judge may settle a case-made at any

time that a regular judge whose term has not expired may; *Weeks v. Medler*, 18 Kan. 425, holding that a case-made, settled and signed the same day it was served on the opposite party, thus depriving him of the opportunity to suggest amendments, could not be considered; *Tripp & Moore Boot & Shoe Co. v. Martin*, 45 Kan. 765, 26 Pac. 424, as to the time within which the case-made may be signed and settled.

Same—Making, saving, settling and signing—Distinction.—Cited in *Chicago, B. & Q. R. Co. v. Guild*, 8 Kan. App. 368, 55 Pac. 555, holding that making and serving the case are separate and distinct acts, and an order extending the time to make one did not extend the time to serve it; *Butler v. Scott*, 68 Kan. 512, 75 Pac. 496, holding that the making of the case and its settlement and signing are distinct acts, the making of the case being the act of the plaintiff in error.

Same—Disregarding certificate.—Cited in *Salina Building, Saving & Trust Ass'n v. Beebe*, 24 Kan. 363; *Baker v. Sears*, 2 Kan. App. 617, 42 Pac. 501—holding that the judge's certificate to the case-made, when not shown to be intentionally false or fraudulently prepared, was conclusive; *Lamont v. Williams*, 43 Kan. 558, 23 Pac. 592, holding that the judge's certificate to a case-made may be disregarded, if shown to be intentionally false.

Municipal corporations—Aiding construction of railroads.—Cited in *Leavenworth, L. & G. R. Co. v. Commissioners of Douglas County*, 18 Kan. 169, holding that municipal corporations, when authorized by the Legislature, may issue bonds to aid in the construction of railroads.

Damages—Loss of profits.—Cited in *Atchison, T. & S. F. Ry. Co. v. Thomas*, 70 Kan. 409, 78 Pac. 861; *Dody v. State Bank of Commerce*, 82 Kan. 406, 108 Pac. 804; *Coos Bay R. Co. v. Nosler*, 30 Or. 547, 48 Pac. 361; *Eckington & S. H. Ry. Co. v. McDevitt*, 191 U. S. 108, 24 Sup. Ct. 36, 48 L. Ed. 112—holding that prospective profits were too remote and uncertain to be recovered as damages.

Cited in note in 53 L. R. A. 97, on loss of profits as element of damages for breach of contract.

15 KAN. 492, HOWE MACH. CO. v. CLARK

Agency—Evidence—Declarations of agent.—Cited in *French v. Wade*, 35 Kan. 391, 11 Pac. 138; *Ream v. McElhone*, 50 Kan. 409, 31 Pac. 1075; *Donaldson v. Everhart*, 50 Kan. 718, 32 Pac. 405; *National Fence-Mach. Co. v. Highleyman*, 71 Kan. 347, 80 Pac. 568—holding that the existence of an agency cannot be proved as against the principal by the alleged agent's declarations.

Same—Testimony of agent.—Cited in *Wales v. Mower*, 44 Colo. 146, 90 Pac. 971; *Cowles v. Burns*, 28 Kan. 32; *Aultman Thrashing & Engine Co. v. Knoll*, 71 Kan. 109, 79 Pac. 1074; *Wicktorwitz v. Farmers' Ins. Co.*, 31 Or. 569, 51 Pac. 75—holding that the testimony of the agent as to the fact of agency was competent.

Same—Brokers.—Cited in note in 93 Am. Dec. 172, on rights, duties, and liabilities of brokers.

Witnesses—Impeachment—Laying foundation.—Cited in *State v. Bartley*, 48 Kan. 421, 29 Pac. 701, holding that a witness cannot be impeached by proof of contradictory statements, where no foundation therefor has been laid.

15 KAN. 495, CARLIN v. DONEGAN

Equity—Jury trial.—Cited in *G. C. Hixon & Co. v. George*, 18 Kan. 253; *Woodman v. Davis*, 32 Kan. 844, 4 Pac. 262; *Drinkwater v. Sauble*, 46 Kan. 170, 26 Pac. 433; *Maas v. Dunmeyer*, 21 Okl. 434, 96 Pac. 591—holding that in an equity case the court may send any of the issues to a jury and try the others itself, or send them to a referee or another jury; *City of Emporia v.*

Soden, 25 Kan. 588, 37 Am. Rep. 265; *Carpenter v. Carpenter*, 30 Kan. 712, 2 Pac. 122, 46 Am. Rep. 108—holding that it is not error to refuse to call a jury in an equitable action; *Hunt v. Spencer*, 20 Kan. 126, holding that, where only certain questions in an equity case were submitted to a jury, the court did not err by making further findings of fact itself.

Verdict or findings—Defects—Waiver.—Cited in *Kolleen v. Atchison, T. & S. F. Ry. Co.*, 72 Kan. 426, 83 Pac. 990, holding that a verdict, although defective, would be held sufficient, where no objection thereto was made when it was returned; *Briggs & Watson v. Eggan*, 17 Kan. 589, holding that a failure to find on some particular matter or a defective finding is not material error, unless the trial court's attention is called thereto.

15 KAN. 500, COUNTY SEAT OF LINN COUNTY, IN RE

Cited in *City of Belleville v. Wells*, 74 Kan. 823, 88 Pac. 47.

Statutory construction—Meaning of words or phrases.—Cited in *Constitutional Prohibitory Amendment Cases*, 24 Kan. 700; *Bailey v. Kelley*, 70 Kan. 869, 79 Pac. 735—holding that, where succeeding Legislatures have used a word or phrase in a restricted or enlarged sense, such meaning will be judicially recognized.

Cited in note in 15 L. R. A. 107, on "election" of officers as distinguished from "appointment."

Legislative powers—Rules of evidence.—Cited in *Sanders v. Greenstreet*, 23 Kan. 425, holding that the Legislature could make executors' and administrators' deeds prima facie evidence of the regularity of prior proceedings; *Missouri, K. & T. Ry. Co. v. Simonson*, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765, 91 Am. St. Rep. 248 (dissenting opinion), holding that the Legislature could make bills of lading conclusive evidence of the weights of shipments; *Hawker v. New York*, 170 U. S. 189, 18 Sup. Ct. 573, 42 L. Ed. 1002, holding that the Legislature can make conviction of a felony evidence of bad character, depriving a person of the right to practice medicine; *State v. Butts*, 31 Kan. 537, 2 Pac. 618, holding that, while the Legislature cannot overthrow constitutional provisions by rules of evidence, it could make failure to register conclusive evidence of disqualification to vote.

Elections—Failure to vote—Presumption.—Cited in *Board of Com'rs of Marion County v. Winkley*, 29 Kan. 36; *State ex rel. Crocker v. Echols*, 41 Kan. 1, 20 Pac. 523; *Philomath College v. Wyatt*, 27 Or. 390, 31 Pac. 206, 37 Pac. 1022, 26 L. R. A. 68—holding that electors not voting on a proposition submitted to a popular vote were presumed to assent to the action of those voting.

Same—Majority—What constitutes.—Cited in *Town of Eufaula v. Gibson*, 22 Okl. 507, 98 Pac. 565, holding that a majority of the votes cast at a county seat election means a majority of all legal ballots, including those so mutilated that they cannot be counted, but not including blanks and marked ballots; *Knight v. Shelton (C. C.)* 134 Fed. 423, holding that a majority of the votes on a question submitted was insufficient, unless this was also a majority of those voting at the election on any question; *State ex rel. Durkheimer v. Grace*, 20 Or. 154, 25 Pac. 382, holding that a majority of the votes cast on the location of a county seat was sufficient, although not a majority of the votes at the election on all questions; *Philomath College v. Wyatt*, 27 Or. 390, 31 Pac. 206, 37 Pac. 1022, 26 L. R. A. 68, holding that, under a church constitution requiring changes to be made by two-thirds of the whole society, the General Conference could provide that two-thirds of those voting should be deemed to be two-thirds of the whole society.

Same—County seat elections—"Assessment rolls."—Cited in *State ex rel. McBride v. Board of Com'rs of Phillips County*, 26 Kan. 419, holding that

the lists prepared by the township assessors and delivered to the county clerk are the assessment rolls referred to in the act relative to the removal of county seats; *State ex rel. Kellogg v. Board of Com'rs of Rawlins County*, 44 Kan. 528, 24 Pac. 956, holding that under an amendment of the statute the real estate as well as personal property assessment rolls are to be considered in determining the sufficiency of the petition.

Same—Consent of electors—How ascertained.—Cited in *State ex rel. Sears v. Burton*, 47 Kan. 44, 27 Pac. 141, holding that an unauthorized election sufficiently showed electors' consent to change of county seat to justify its change by an act of the Legislature.

Same—Contests—Extent of inquiry.—Cited in *Brown v. State ex rel. Ward*, 44 Kan. 291, 24 Pac. 345, holding that the validity of a county seat election prior to the one last held could not be attacked; *State ex rel. Anthony v. Barton*, 58 Kan. 709, 51 Pac. 218, holding that in a statutory contest of a county seat election the sufficiency of the petition can be inquired into.

15 KAN. 532, JOHNSON v. CAIN

Courts—District and probate—Jurisdiction.—Cited in *Fudge v. Fudge*, 23 Kan. 416, holding that the probate court could order the sale of the homestead for the payment of debts chargeable thereon; *Klemp v. Winter*, 23 Kan. 690, holding that the district court had jurisdiction of a suit to vacate fraudulent settlements by a guardian in the probate court and a release fraudulently obtained from plaintiff, although part of the relief could have been had in the probate court; *Stratton v. McCandless*, 27 Kan. 296, holding that actions in the district court against an administrator, who is still acting, and his sureties, should not be encouraged; *Gafford v. Dickinson*, 37 Kan. 287, 15 Pac. 175, holding that a suit to set aside orders and judgments of the probate court procured by fraud was maintainable in the district court; *McLean v. Webster*, 45 Kan. 644, 26 Pac. 10, holding that a suit was maintainable in the district court to subject a decedent's land to the payment of a debt, where there had been no administration and there were no other debts; *Andrews v. Morse*, 51 Kan. 30, 32 Pac. 640, holding that a mortgage can be foreclosed in the district court without presentation of the claim to the mortgagor's administrator; *Barker v. Battey*, 62 Kan. 584, 64 Pac. 75, holding that a suit to set aside a fraudulent conveyance was maintainable in the district court, although the grantor's estate was in process of administration in the probate court; *Hill Inv. Co. v. Honeywell*, 65 Kan. 349, 69 Pac. 334, holding that the district court had no jurisdiction of a suit to subject property in the hands of a guardian of an insane person to the payment of his debts; *Kothman v. Markson*, 34 Kan. 542, 9 Pac. 218, holding that the district court would not enforce payment of a claim against a decedent, where no reason was disclosed why relief could not be had in the probate court; *Carter v. Christie*, 57 Kan. 492, 46 Pac. 964, holding that the district court had jurisdiction of a suit by an administratrix against a surviving partner of her intestate for an accounting; *Mendenhall v. Burnette*, 58 Kan. 355, 49 Pac. 93, holding that a judgment after revivor against the judgment debtor's executors may be enforced by execution without resort to the probate court.

Debtor and creditor—Liability of heir—Enforcement.—Cited in *Clawson v. McCune's Adm'r*, 20 Kan. 337, as to the right of action of a creditor against the heir of his debtor.

15 KAN. 540, JONES v. LAPHAM

Mortgages—Foreclosure—Necessary parties.—Cited in *Ashmore v. McDonnell*, 39 Kan. 669, 18 Pac. 821; *Boatmen's Bank v. First Nat. Bank of Herington*, 70 Kan. 624, 79 Pac. 125; *Henderson v. New England Loan & Trust Co.*, 6 Kan. App. 279, 51 Pac. 61—holding that a mortgagor who had conveyed the premises was not a necessary party to a foreclosure suit; *Harding v. Gillett*,

25 Okl. 199, 107 Pac. 605, holding that a mortgagor who had conveyed was not a necessary party, while the then owner of the equity of redemption was a necessary party, to a foreclosure suit.

Same—Equitable mortgage.—Cited in note in 4 Am. St. Rep. 703, on what constitutes an equitable mortgage.

Same—Who may mortgage.—Cited in *Houghton v. Allen*, 75 Cal. 102, 16 Pac. 532 (dissenting opinion); *Clark v. Lyster*, 155 Fed. 513, 84 C. C. A. 27; *Seaman v. Huffaker*, 21 Kan. 254; *Langhlin v. Braley*, 25 Kan. 147—holding that an equitable owner of real estate may mortgage it.

Liens—Priority—Notice.—Cited in *Foster Lumber Co. v. Harlan County Bank*, 71 Kan. 158, 80 Pac. 49, 114 Am. St. Rep. 470, 6 Ann. Cas. 44, holding that the lien of an equitable mortgage was superior to that of a subsequent legal mortgage given to a person having knowledge of the equitable mortgage.

Sale of land—Executory contract—Interest of parties.—Cited in *Burke v. Johnson*, 37 Kan. 337, 15 Pac. 204, 1 Am. St. Rep. 252, holding that a vendor under an executory contract had only the bare legal title as security, which was not subject to attachment in an action against him.

15 KAN. 547, SHELLABARGER v. NAFUS

Married women—Power to contract and hold property.—Cited in *Dickson v. Randal*, 19 Kan. 212, holding that a married woman may buy, sell, exchange, and dispose of and receive property by sale from any person and by gift from any person other than her husband.

Witnesses—Credibility—"Falsus in uno, falsus in omnibus."—Cited in *State v. Potter*, 16 Kan. 80; *Higbee v. McMillan*, 18 Kan. 133; *Atchison, T. & S. F. R. Co. v. Retford*, 18 Kan. 245; *Garvin v. Jennerson*, 20 Kan. 371; *Greer v. Higgins*, 20 Kan. 420—holding that it is error to instruct the jury to disregard the testimony of any witness testifying falsely to any material fact; *Robert Burgess & Son v. Alcorn*, 75 Kan. 735, 90 Pac. 239, holding that an instruction that the jury might disregard the testimony of such a witness was proper, although it made no exception as to testimony which was corroborated; *Itea v. State*, 3 Okl. Cr. 269, 105 Pac. 381, holding that an instruction that the jury were justified in disregarding the testimony of such a witness, except so far as it was corroborated, required them to accept it as true if corroborated, and was improper.

Same—Province of court and jury.—Cited in *Kansas Pac. Ry. Co. v. Kunkel*, 17 Kan. 145, holding that imperative instructions to believe or disbelieve particular witnesses are improper; *Ball v. Hardesty*, 38 Kan. 540, 16 Pac. 808, holding that an instruction, in effect requiring the jury to disregard expert testimony, was improper.

15 KAN. 555, KENNEDY v. BECK

Replevin—Order of delivery—Vacation.—Cited in *Carr v. Huffman*, 47 Kan. 188, 27 Pac. 827, holding that an order of delivery in replevin could not be vacated after answer, although defendant, for the purpose of moving to vacate, withdrew his answer.

Same—Appearance—Effect.—Cited in *Kelly-Goodfellow Shoe Co. v. Todd*, 5 Okl. 360, 49 Pac. 53, holding that a defendant in replevin, appearing generally and answering, submitted himself to the court's jurisdiction, although not a resident of the county.

Appeal and error—Review—Orders affecting provisional remedies.—Cited in *Snively v. Abbott Buggy Co.*, 36 Kan. 106, 12 Pac. 522, holding that an order overruling a motion to discharge an attachment is not reviewable prior to final judgment.

15 KAN. 563, WILLIAMS v. TOWNSEND

Verdict—Conclusiveness—Review of evidence.—Cited in *Allison v. Ahlers*, 26 Kan. 582, holding that the findings of the jury on a disputed question of fact were conclusive; *Johnson v. Leggett*, 28 Kan. 500; *Atchison, T. & S. F. R. Co. v. Matthews*, 58 Kan. 447, 49 Pac. 602—holding that it is the trial court's duty to set aside a verdict only when it is manifestly against the evidence and the jury have manifestly mistaken the testimony; *Union Pac. Ry. Co. v. Diehl*, 33 Kan. 422, 8 Pac. 566; *Lee v. Birmingham*, 39 Kan. 320, 18 Pac. 218; *Cherokee & Pittsburg Coal & Mining Co. v. Stoop*, 56 Kan. 426, 43 Pac. 766—holding that the trial court should set aside a verdict which is clearly against the weight of the evidence; *Atchison, T. & S. F. R. Co. v. Keller*, 31 Kan. 439; *Kansas City, W. & N. W. R. Co. v. Ryan*, 49 Kan. 1, 30 Pac. 108; *City of Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288, 47 Pac. 738—holding that where the trial court, in overruling a motion for a new trial, held that the verdict was contrary to the weight of the evidence, a new trial would be granted; *Bass v. Swingley*, 42 Kan. 729, 22 Pac. 714, holding that it is the trial court's duty to pass on the weight of evidence, and hence a motion for a new trial on the facts before another judge than the one trying the case should be granted of course; *McCarthy v. Talbot*, 9 Kan. App. 444, 60 Pac. 656, holding that the trial court should set aside a verdict clearly against the weight of evidence, but the Court of Appeals cannot, if the verdict is supported by any evidence.

Torts—Liability—Co-operation.—Cited in *Barnhart v. Ford*, 37 Kan. 520, 15 Pac. 542, holding that two persons acting in concert with another in obtaining possession of plaintiff's property were liable jointly with him, although they were acting as his employes, where they did not disclaim when sued, but filed a general denial; *Reed v. Dick*, 7 Kan. App. 760, 53 Pac. 486, holding that the question of co-operation between two defendants in the wrongful act sued for was for the jury, and its finding would not be disturbed.

Followed in *Merriman v. Blanton*, 25 Kan. 572, affirming judgment on authority of cited case.

15 KAN. 572, COOPER v. CONDON

Harmless error.—Cited in *Lanone v. McKinnon & Co.*, 19 Kan. 408, as to immaterial error.

Mortgages—Change in secured notes—Effect.—Cited in *Topeka Capital Co. v. Merriam*, 60 Kan. 397, 56 Pac. 757, holding that a chattel mortgage is not extinguished by a substitution of other notes for those originally evidencing the secured debt.

Notes—Payment or evidence of debt.—Cited in *Shepard & Playford v. John G. Allen & Son*, 16 Kan. 182; *Medberry, Yetter & Co. v. Soper, Brainard & Co.*, 17 Kan. 369—holding that whether a note is payment of a debt or only additional evidence thereof depends on the agreement of the parties.

Cited in note in 35 L. R. A. (N. S.) 89, on payment by commercial paper.

15 KAN. 579, YOUNG v. WHITTENHALL

Limitation of actions—Actions for fraud.—Cited in *Sweet v. Hentig*, 24 Kan. 497; *Woodman v. Davis*, 32 Kan. 344, 4 Pac. 262—holding that an action for relief on the ground of fraud was barred by limitations two years after the discovery of the fraud; *Main v. Payne*, 17 Kan. 608, holding that an action by a principal to have a resulting trust declared in land fraudulently purchased by an agent with the principal's money should be brought within two years after discovery of the fraud.

Same—Fraudulent concealment.—Cited in *Branner v. Nichols*, 61 Kan. 356, 59 Pac. 633, holding that cause of action was not barred by limitations, where its existence had been fraudulently concealed from plaintiff.

Same—Pleading.—Cited in *Doyle v. Doyle*, 33 Kan. 721, 7 Pac. 615; *Myers v. Center*, 47 Kan. 324, 27 Pac. 978; *McCalla v. Daugherty*, 4 Kan. App. 410, 46 Pac. 30—holding that, in an action for fraud consummated more than two years prior to the commencement of the action, plaintiff must allege when the fraud was discovered.

Cited in note in 87 Am. Dec. 164 (par. 3), on pleading statute of limitations.

Same—Proving exception.—Cited in *Nelson v. Stull*, 65 Kan. 585, 68 Pac. 617, 70 Pac. 590; *Fuller v. Horner*, 69 Kan. 467, 77 Pac. 88—holding that plaintiff in such a case must prove ignorance of the fraud until within two years; *Crissey v. Morrill*, 125 Fed. 878, 60 C. C. A. 460, holding that plaintiff had the burden of establishing absence or concealment by defendant, preventing the bar of the statute of limitations.

Same—Insufficiency of petition showing bar.—Cited in *Oakland Home Ins. Co. v. Allen*, 1 Kan. App. 108, 40 Pac. 928, holding that a petition showing on its face that the claim sued on was barred by limitations was insufficient to sustain the judgment on appeal.

15 KAN. 584, STEVENS v. ABLE

Set-off and counterclaim—Unliquidated damages.—Cited in *Fanson v. Linsley*, 20 Kan. 235; *Gardner v. Risher*, 35 Kan. 93, 10 Pac. 584; *Challiss v. Wylie*, 35 Kan. 506, 11 Pac. 438; *St. Louis, Ft. S. & W. R. Co. v. Chenault*, 36 Kan. 51, 12 Pac. 303—holding that a cause of action on contract for unliquidated damages is a good set-off in an action on contract; *Read v. Jeffries*, 16 Kan. 534, holding that a judgment may be pleaded as a set-off in an action for unliquidated damages.

Followed in *Axford v. Hubbell*, 24 Kan. 444, affirming a judgment for defendant on a set-off for unliquidated damages.

Cited in note in 89 Am. Dec. 483, on scope and office of counterclaim.

Justice's court—Application of statutes.—Cited in *Barnett v. Lark*, 45 Kan. 428, 25 Pac. 869, holding that Code Civ. Proc. § 581, relative to dispensing with security for costs, applies to actions in justice court; *Morgan v. Saline Valley Bank*, 4 Kan. App. 668, 46 Pac. 61, holding that Gen. St. 1889, pars. 4306-4311, relative to disposition of attached property, apply to attachment proceedings in justice court.

15 KAN. 587, BARRY v. BARRY

Husband and wife—Power to dispose of property by will.—Cited in *Noecker v. Noecker*, 66 Kan. 347, 71 Pac. 815, holding that under Gen. St. 1901, § 7973, a married man may devise half of his property without the consent of his wife, although there are no children; *Hanson v. Hanson*, 81 Kan. 305, 106 Pac. 444, holding that a husband with the wife's consent may dispose of all of his property by will to persons other than the wife; *Vining v. Willis*, 40 Kan. 609, 20 Pac. 232, holding that a wife can devise a one-half interest in a homestead owned by her without the consent of her husband.

Succession of estates of intestates.—Cited in note in 12 Am. St. Rep. 83, on succession to estates of intestates.

15 KAN. 591, ROYAL v. LINDSAY

Extension of time of payment—Consideration.—Cited in *Lorimer v. Fairchild*, 68 Kan. 328, 75 Pac. 124, holding that an agreement to keep an overdue loan and pay interest thereon for a definite period of time was sufficient consideration for the creditor's agreement to extend the time of payment; *Halderman v. Woodward*, 22 Kan. 734, holding that part payment of an overdue note would not support an agreement to extend the time of payment, so as to release the surety.

Same—Release of surety.—Cited in *Hubbard v. Odgen*, 22 Kan. 363, as to what will constitute a valid agreement for an extension of payment, so as to release the surety.

15 KAN. 595, **ROBINSON v. WILSON**, 22 AM. REP. 272

Homestead—When subject to judgment lien.—Cited in *Smith v. Richards*, 2 Idaho (Hast.) 498, 21 Pac. 419; *Ashton v. Ingle*, 20 Kan. 670, 27 Am. Rep. 197; *Hansen v. Jones*, 57 Or. 416, 109 Pac. 868—holding that a homestead right was subordinate to a judgment lien acquired before the property became a homestead.

Cited in note in 34 Am. St. Rep. 496 (par. 4), on judgment liens on homesteads.

Exempt property—Execution against.—Cited in *Naill v. Kansas Farmers' Fire Ins. Co.*, 47 Kan. 223, 27 Pac. 854, holding that an execution against the exempt property of a debtor could not be issued on a general judgment against him.

Bankruptcy—Effect on attachment liens.—Cited in *Gillett v. McCarthy*, 23 Kan. 668, holding that an attachment lien acquired more than four months before bankruptcy proceedings were commenced was not released thereby and could be enforced by the state courts.

15 KAN. 600, **SUMNER v. McFARLAN**

Conditional sales—Rights of vendor and third persons.—Cited in *Homans v. Newton*, 4 Fed. 880; *In re Binford*, Fed. Cas. No. 1,411; *Heinbockle v. Zugbaum*, 5 Mont. 344, 5 Pac. 897, 51 Am. Rep. 59—holding that a sale of property by a conditional vendee did not affect the title of the conditional vendor; *Standard Implement Co. v. Parlin & Orendorff Co.*, 51 Kan. 544, 33 Pac. 360, holding that a conditional vendor could reclaim the goods from a mortgagee of the vendee, who had taken his mortgage for a prior indebtedness; *Hallowell v. Milne*, 16 Kan. 65, holding that a purchaser of property who agreed that the title should pass to a surety for the purchase price until the property was paid for could not transfer a good title to a bona fide purchaser from him; *Branson v. Heckler*, 22 Kan. 610, holding that a bona fide pledgee from one having the possession, but no title, acquired no interest as against the true owner, possession, although prima facie evidence of title, being open to rebuttal.

Followed in *Lynds v. Winkler*, 23 Kan. 698, reversing on the authority of the cited case.

Cited in note in 25 L. R. A. (N. S.) 767, on right of one leaving chattels in another's possession as against latter's vendees or creditors.

15 KAN. 602, **HEADLEY v. CHALLISS**

Appeal and error—Rehearing—Questions considered.—Cited in *Western News Co. v. Wilmarth*, 34 Kan. 254, 8 Pac. 104, holding that a question not presented on the original hearing of an appeal would not be considered on rehearing.

Cited in note in 91 Am. Dec. 195, on writ of error.

Same—Former decision as the law of the case.—Cited in *Crockett v. Gray*, 31 Kan. 346, 2 Pac. 809; *A. J. Harwi Hardware Co. v. Klippert*, 73 Kan. 783, 85 Pac. 784; *United States v. Denver & R. G. R. Co.*, 11 N. M. 145, 66 Pac. 550—holding that a prior decision was the law of the case, not merely as to questions considered and decided, but as to all those necessarily involved in the decision; *Central Branch U. P. R. Co. v. Shoup*, 28 Kan. 394, 42 Am. Rep. 163, holding that, while the court has power to reconsider and reverse a prior decision in the same case, it will not do so, unless it was clearly erroneous; *Wheelock v. Myers*, 64 Kan. 47, 67 Pac. 632, holding that the reversal of a judg-

ment for the assignee of a mortgage, because the assignment was not admissible, did not prevent a subsequent recovery, where, after the first trial and pending the proceedings in error, the statute was changed so as to make it admissible in evidence; *Lorimer v. Fairchild*, 68 Kan. 328, 75 Pac. 124, holding that a former decision of the Court of Appeals in the same case would not be followed as the law of the case, where clearly erroneous and involving a matter of public importance; *Missouri Pac. Ry. Co. v. Stone*, 80 Kan. 7, 101 Pac. 666, holding that a question considered and determined on a former appeal would not be reconsidered; *Atchison, T. & S. F. R. Co. v. McFarland*, 9 Kan. App. 197, 59 Pac. 665, holding that a former decision of the Court of Appeals was the law of the case and binding on the district court, although it was possible that the case might be taken to the Supreme Court.

Cited in note in 34 L. R. A. 333, on conclusiveness of prior decisions on subsequent appeals.

15 KAN. 608, BALLINGER v. LANTIER

Provisional remedies—Bond—Necessity.—Cited in *Simon v. Stetter*, 25 Kan. 155, holding that an attachment bond is never required, where defendant is a nonresident; *Kellogg v. Hazlett*, 2 Kan. App. 525, 43 Pac. 987, holding that a summons in garnishment proceedings should be vacated, where the statutory bond was not given.

Residence—Change—What constitutes.—Cited in *Adams v. Evans*, 19 Kan. 174, holding that an intention to remove to this state, not followed by an actual removal, did not prevent an attachment on the ground of nonresidence; *Amsbaugh v. Exchange Bank of Maquoketa, Iowa*, 33 Kan. 100, 5 Pac. 384, holding that a person leaving a state with intent to remove therefrom ceased to be a resident thereof, although his wife still lived in that state; *Garlinghouse v. Mulvane*, 40 Kan. 428, 19 Pac. 798, holding that a temporary absence from the state with the intention of returning did not justify the attachment of the homestead on the ground of nonresidence.

Cited in note in 32 Am. Dec. 428, on meaning of inhabitancy, residence, and citizenship; in 19 L. R. A. 668, on what is nonresidence for purpose of attachment; in 1 L. R. A. (N. S.) 779, as to when nonresidence of person intending to leave permanently begins.

Pleading—Reply—Necessity.—Cited in *Brown v. Massey*, 19 Okl. 482, 92 Pac. 246, holding that, where no reply was filed to an answer containing new matter, the court should either have granted judgment for defendant on the pleadings or required plaintiff to file a reply.

15 KAN. 612, MARTSOLF v. BARNWELL

Referee—Findings—Conclusiveness.—Cited in *Burchett v. Hamil*, 5 Okl. 300, 47 Pac. 1053, holding that a referee's findings, when not excepted to, were conclusive on a motion to confirm the report.

Same—Conclusions of law—Conclusiveness.—Cited in *Tribal Development Co. v. White Bros.*, 28 Okl. 525, 114 Pac. 736, holding that a referee's conclusions of law are not binding on the court.

Same—Review.—Cited in *Kelley & Lysle Mill Co. v. Schreiber*, 82 Kan. 403, 108 Pac. 816, 20 Ann. Cas. 192, holding that a referee's conclusions of law could be reviewed by the trial court without the filing of any exceptions thereto.

15 KAN. 619, SHELLABARGER v. THAYER

Mechanics' liens—Payments by owner.—Cited in *Wilson v. School Dist. No. 2*, 17 Kan. 104; *Delahay v. Goldie*, 17 Kan. 263—holding that a payment by an owner to a contractor within 60 days after completion of the building did

not release him from liability to a subcontractor; *Fossett v. Rock Island Lumber & Mfg. Co.*, 76 Kan. 428, 92 Pac. 833, 14 L. R. A. (N. S.) 918, holding that, where the cost exceeded the contract price, the owner, who had paid some subcontractors before their time for filing liens had expired, was entitled to credit for the proportionate share of such payments.

Cited in note in 20 L. R. A. 565, on payment to contractors or subcontractors as affecting liens of subordinate claimants.

Same—Statement—Time for filing.—Cited in *Cunningham v. Barr*, 45 Kan. 158, 25 Pac. 583, holding that a subcontractor's statement of lien, filed within 60 days after completion of the contract by the principal contractor, was in time.

Same—Contract—Force as against subcontractor.—Cited in *Clough v. McDonald*, 18 Kan. 114, holding that a subcontractor is not bound by the terms of the contract between the owner and original contractor as to the terms of payment.

15 KAN. 625, ALLEN v. HANNUM

Will—Renunciation by widow—Effect.—Cited in *Fennell v. Fennell*, 80 Kan. 730, 106 Pac. 1038, 18 Ann. Cas. 471, holding that, where the widow's refusal to take under the will made it impossible to carry out the intention of the testator, the whole estate should be distributed under the statute of descents and distributions; *Ashelford v. Chapman*, 81 Kan. 312, 106 Pac. 534, holding that, where a widow renounced her rights under the will, she could not have the benefit of a provision therein requiring devisees to pay certain purchase-money liens; *Pittman v. Pittman*, 81 Kan. 643, 107 Pac. 235, 27 L. R. A. (N. S.) 602, holding that, where the widow renounced, the will should be enforced as to other beneficiaries as nearly as possible in accordance with the testator's intent.

Cited in notes in 14 L. R. A. 293; 27 L. R. A. (N. S.) 602—on effect of widow's election against will.

15 KAN. 627, CITY OF LEAVENWORTH v. BOOTH

License taxes—Validity.—Cited in *Fretwell v. City of Troy*, 18 Kan. 271, holding that a municipal license tax of \$5 a day on auctions was valid; *McGrath v. City of Newton*, 29 Kan. 364, holding that a municipal ordinance imposing a license tax on various classes of business was valid, at least as to some of the classes.

Cited in note in 52 Am. Dec. 332, on power of state to exact licenses and charge therefor; in 77 Am. Dec. 67 (par. 2), on constitutionality of license taxes; in 30 L. R. A. 415, 423, 427, 439, on limit of amount of license fees.

Same—Failure to pay—Effect.—Cited in *Yount v. Denning*, 52 Kan. 629, 35 Pac. 207, holding that persons carrying on a real estate business without paying the license tax imposed by a municipal ordinance could not recover for their services.

Same—Necessity of uniformity.—Cited in *Commissioner's of Ottawa County v. Nelson*, 19 Kan. 284, 27 Am. Rep. 101; *City of Newton v. Atchison*, 81 Kan. 151, 1 Pac. 288, 47 Am. Rep. 496; *In re Martin*, 62 Kan. 638, 64 Pac. 48—holding that the constitutional provision as to uniformity of taxation does not apply to license taxes.

Revenue tax—Necessity of uniformity.—Cited in *Marion & McPherson Ry. Co. v. Champlin*, 37 Kan. 682, 16 Pac. 222, holding that a statute in effect exempting from taxation property not owned by citizens of a township was void under the constitutional provision requiring uniformity; *Ellis v. Frazier*, 38 Or.

462, holding that a tax on bicycles was not a license tax, its principal purpose being the raising of revenue, and was void because not uniform.

Cited in note in 57 L. R. A. 86, on taxation of corporate franchises; in 60 L. R. A. 334, 335, on constitutional equality in relation to corporate taxation.

Foreign insurance companies—Conditions on admission to state.—Cited in *State v. Phipps*, 50 Kan. 609, 31 Pac. 1097, 18 L. R. A. 657, 34 Am. St. Rep. 152, holding that the Legislature can prescribe the conditions on which foreign insurance companies may do business in this state; *Phoenix Ins. Co. of New York v. Welch*, 29 Kan. 672, holding that a statute making license fees on foreign insurance companies dependent on the conditions imposed by their home state on Kansas corporations was valid.

Cited in note in 24 L. R. A. 299, on restrictions on business of foreign insurance companies.

Quasi criminal prosecutions—Appealability.—Cited in *City of Burlington v. James*, 17 Kan. 221, holding that prosecutions for violations of city ordinances may be taken to the Supreme Court by appeal.

Municipal corporations—Power to pass ordinances.—Cited in note in 34 Am. Dec. 638, on limitations on power of municipality to pass ordinances or by-laws.

15 KAN. 637, HAYNES v. COWEN

Evidence—Portion of record—Force.—Cited in *Capital Bank of Topeka v. Huntoon*, 35 Kan. 577, 11 Pac. 369, holding that, where a part only of a record was introduced in evidence, it proved only what it purported to prove.

Cited in note in 14 Am. Dec. 187, on admissibility of judgment in evidence without the judgment roll.

Foreign records—Authentication.—Cited in *Friend v. Miller*, 52 Kan. 139, 34 Pac. 397, 39 Am. St. Rep. 340, holding that the record of proceedings in a Utah court was properly authenticated, the court taking judicial notice of the acts of Congress creating courts in that territory.

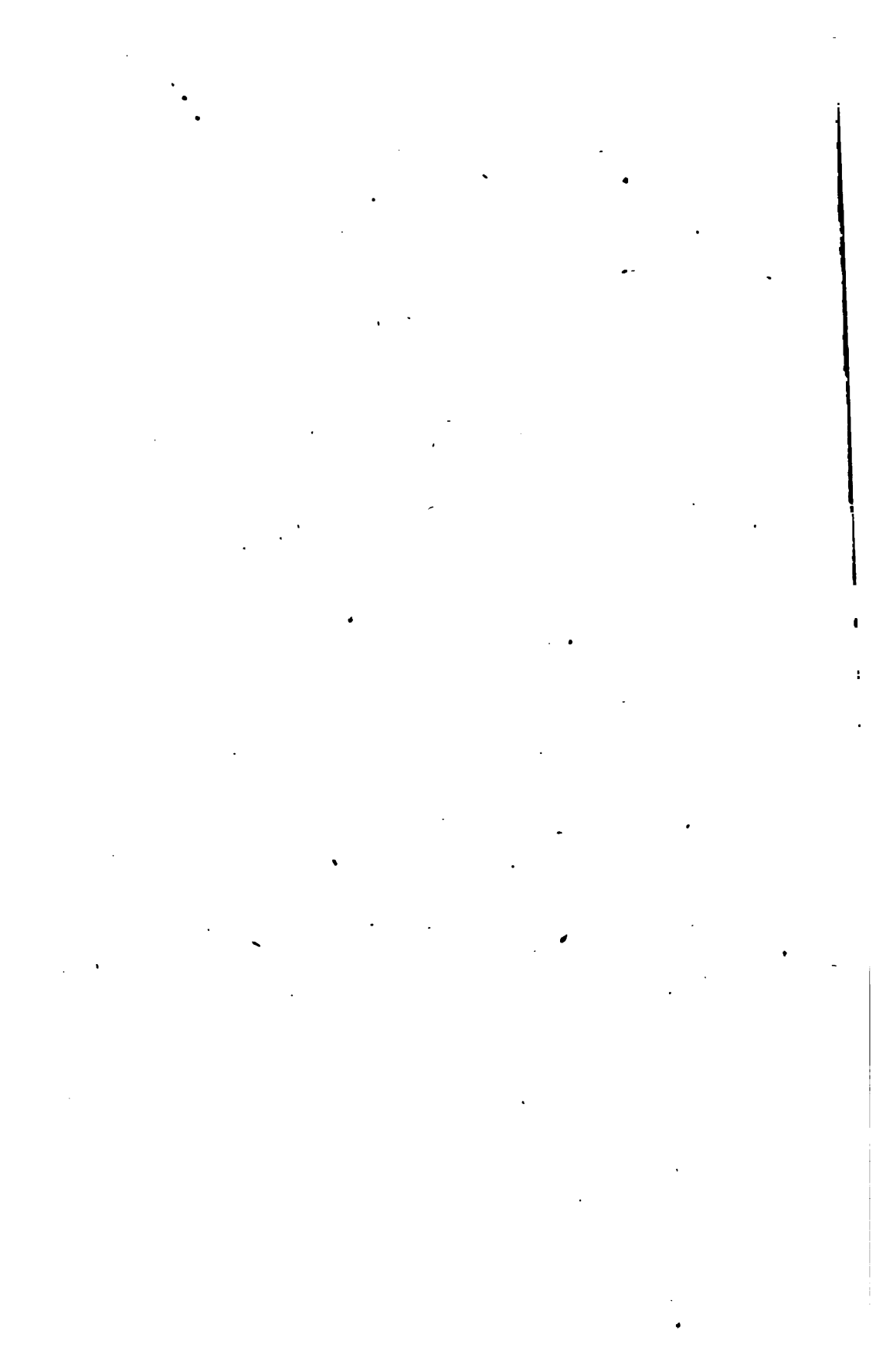
Same—Admission in evidence.—Cited in *Ward v. Baker*, 16 Kan. 31, holding that a transcript of a foreign judgment was properly admitted in evidence.

Cited in note in 5 L. R. A. (N. S.) 960; on admissibility in evidence of copies of records of other states.

Service—Finding of—Force as evidence.—Cited in *Dexter v. Cochran*, 17 Kan. 447; *O'Driscoll v. Soper*, 19 Kan. 574—holding that a finding of due service in the journal entry of a judgment was prima facie evidence thereof; *Gross v. Funk*, 20 Kan. 655; *Westchester Fire Ins. Co. v. Coverdale*, 9 Kan. App. 651, 58 Pac. 1029—holding that a finding in the case-made that notice of settlement was given was prima facie evidence thereof.

Judgments—Presumptions to support.—Cited in *Head v. Daniels*, 38 Kan. 1, 15 Pac. 911; *Core v. Smith*, 28 Okl. 909, 102 Pac. 114—holding that it would be presumed, in support of a judgment, that lost affidavits for an attachment and for publication were sufficient; *National Bank of America v. Home Security Co.*, 65 Kan. 642, 70 Pac. 646, holding that, where a judgment record showed an appearance by a party and an order in its behalf respecting the subject-matter of the litigation, it would be presumed that the court had jurisdiction over such party.





EXTRA ANNOTATED EDITION

REPORTS

OF

CASES ARGUED AND DETERMINED ·

IN THE

SUPREME COURT

OF THE

STATE OF KANSAS.

By W. C. WEBB,
REPORTER.

VOL. XVI.

CONTAINING CASES DECIDED AT THE JANUARY AND JULY
TERMS, 1876.

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JUDGES OF THE SUPREME AND DISTRICT COURTS OF KANSAS,

DURING THE PERIOD COVERED BY THIS VOLUME.

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FOR THE YEARS 1875 AND 1876

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*Resigned October 1st, 1876, and P. I. BONEBRAKE, of Topeka, appointed for unexpired term.

†Appointed in December, 1875, for the unexpired term, in place of SAMUEL LAPPIN, resigned.

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SUPREME COURT,

STATE OF KANSAS.

JANUARY TERM, 1876.

PRESENT:

HON. SAMUEL A. KINGMAN, CHIEF JUSTICE.

HON. DANIEL M. VALENTINE, } ASSOCIATE JUSTICES.
HON. DAVID J. BREWER, }

THE STATE OF KANSAS V. N. B. FREELAND.

APPEALS, in Criminal Actions; When to be Taken. In a criminal action an appeal cannot be taken by the defendant from the district court to the supreme court until after a judgment has been rendered in the case; therefore, an appeal will not lie from an order of the district court, which overrules a motion to quash an information, or which sustains a motion for a continuance, while the action is still pending in the district court. [*Cummings v. The State*, 4-225; *State v. Horneman*, post, 452.]

Appeal from Pawnee District Court.

INFORMATION for forgery. The questions raised in this case are fully stated in the subjoined opinion. The rulings appealed from were made by the district court at the December Term 1875.

Neison Adams, J. P. Worrell, and R. H. Ballinger, for the appellant.

J. M. Van Winkle, and A. M. F. Randolph, for The State.

The opinion of the court was delivered by

VALENTINE, J.: This was a criminal action for forgery. The defendant moved the court below to quash the information,

The State v. Freeland.

which motion the court overruled, and the defendant excepted. The state then, by the county attorney, moved the court to continue the case until the next term thereof, which motion the court sustained, and the defendant again excepted. The defendant then appealed the case to this court.

The first question arising in the case is, whether a defendant in a criminal action can appeal from the district court to the supreme court on the overruling of a motion of the defendant to quash the information, or on the sustaining of a motion of the state for a continuance of the case till the next term, while the case is still pending in the district court, undisposed of. We do not think that an appeal will lie in such a case. The only section of the statutes authorizing a defendant in a criminal action to appeal reads as follows:

"SEC. 281. An appeal to the supreme court may be taken by the defendant, as a matter of right, from any judgment against him; and, upon the appeal, any decision of the court, or intermediate order, made in progress of the case, may be reviewed." (Gen. Stat., 865.)

Section 288 of the same act (criminal code) provides for the state taking an appeal in certain cases. Section 282 of the same act, and of the same article, provides as follows:

"SEC. 282. An appeal from a judgment in a criminal action may be taken in the manner and in the cases prescribed in this article."

That article is article 14 of the code of criminal procedure. The provisions of the code of civil procedure for taking cases from the district court to the supreme court are not in their nature applicable to criminal cases. Among other reasons, criminal cases can be taken from the district court to the supreme court only by appeal, while civil cases can be taken from the district court to the supreme court only on petition in error. And there is no statutory provision which in terms makes the provisions relative to proceedings in error in civil cases applicable to appeals in criminal cases, or *vice versa*. Besides, there can be no such motion as a motion to quash an information, in a *civil* action; and where a criminal case has been tried on its merits, and the defendant acquitted, the state has no appeal. The acquittal is conclusive. And taking §§ 281

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and 282 of the criminal code, and applying the maxim, *expressio unius, est exclusio alterius*, and [a criminal appeal can be taken by the defendant only after judgment; and an intermediate order of which he complains can be reviewed only on such an appeal.]

We do not think that an appeal can be taken in cases of this kind, and therefore the appeal in this case must be dismissed.

All the Justices concurring.

JOHN W. HOOVER V. JOHN MEAR.

HERD LAW OF 1872; *Order of County Commissioners; Proof of Publication.* On the 20th of March 1872, the county commissioners of Dickinson county made an order under the herd law of 1872, specifying April 12th 1872, as the time for the taking effect of the order, and directing a publication for four successive weeks in the "Abilene Chronicle." The publication was made as directed, though not completed until after April 12th, but no affidavit thereof was made or entered upon the record of the county commissioners until May 20th 1873: *Held*, That the order went into effect upon the completion of the publication, and that it was not invalidated by the fact that the publication was not and could not be completed prior to the time fixed by the commissioners for its going into effect, and that it was neither invalidated nor its operation postponed by the delay in filing and entering of record the affidavit of publication. [*Reed v. Sexton's Adm'rs*, 20-195.]

Error from Dickinson District Court.

ACTION by *Mear* to recover from *Hoover* damages for injuries done on the premises of *Mear* by the stock of *Hoover*, between the 9th of December 1872 and 2d of January 1873. It was brought before a justice of the peace in January 1873, and appealed to the district court, and there tried at the May Term 1873, on an agreed statement of facts. It is admitted that the horses and cattle of *Hoover* damaged *Mear*, as charged, but that *Mear's* fields were not inclosed by fence, and that *Mear* claims under the herd law of 1872. Judgment against *Hoover* for \$12 damages, and for costs, and he brings the case here on error.

James Huffmire, and Case & Putnam, for plaintiff in error.
Burroughs & Burris, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: The question in this case is, whether the herd law of 1872 was, between December 9th 1872, and January 2d 1873, in force in Dickinson county. The facts are these: On the 20th of March 1872 the county commissioners made the order authorized by the statute, (Laws 1872, p. 384.) They fixed the time for the order to go into effect on April 12th 1872, and directed publication of the order in the "Abilene Chronicle." The publication was made as required by law, but the affidavit of publication was not made and filed until May 20th 1873, more than a year thereafter, and after the commencement of this suit. Two points are made: It is insisted that the order never went into effect because the time fixed by the commissioners for its taking effect was before the expiration of the four weeks' publication required; and secondly, that if it ever went into effect it did not until the affidavit was filed and made a part of the record. The first section of the law grants to the commissioners the power to make such an order. The second section provides that the order shall be entered upon the records of the county commissioners, and shall be published for four successive weeks next after the entry on the records, and adds this proviso: "*Provided*, that the board of county commissioners shall specify a certain time at which said order shall take effect, and that said order shall not go into effect until the completion of the publication aforesaid, * * * which publication * * * shall be verified by the affidavit of the person doing the same, and the said affidavit entered upon the records of the said commissioners." Was the order in force? We think it was. It went into force at the time of the completion of the publication. The law directs the commissioners to specify the time in which the order shall go into effect. They may specify a time many months after the order, and then, though the publication be completed in four weeks, the order remains inoperative until the time designated arrives

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If however they specify a time, as in this case, anterior to the publication, the law steps in and says that it shall not go into effect, notwithstanding the specification of time by the commissioners, until the completion of the publication, and therefore postpones the operation of the order until that time. In other words, they may not by a specification of the time anticipate the completion of the publication, though they may thereby postpone the operation of the order.

In reference to the second matter, the law directs the manner of preserving proof of the publication of the order, but does not make the operation of the order depend upon the preservation of the evidence. It does not say that the order shall not go into effect until the affidavit of publication is entered upon the record, while it does say that it shall not go into effect until the completion of the publication. It makes one thing a prerequisite, and is silent as to the other. By what right do we make both prerequisite? Suppose the legislature should pass a special law affecting only Shawnee county, and should declare that the law should not go into effect until its publication in the "Topeka Commonwealth," and should also add a direction that the publisher of that paper should file in the secretary of state's office an affidavit of the publication: would not the law go into effect when the publication was made? That would be the only matter the legislature had specified as a condition of and prerequisite to its going into effect, and the other matter would be simply a direction of the means of preserving evidence of its publication. In other words, the *publication*, and not the evidence of it, is the vital matter. *Foreman v. Carter*, 9 Kas. 674.

The judgment will be affirmed.

All the Justices concurring.

THE STATE OF KANSAS v. DANIEL A. INGRAM.

1. **NOLLE PROSEQUI**—*When no Bar to a Second Action.* A *nolle prosequi* of a criminal prosecution entered before the commencement of a trial is no bar to a subsequent prosecution for the same offense. [*State v. Curtis*, 29-384; *State v. Rust*, 31-509; *State v. Hart*, 33-218.]
2. **FORMER ACQUITTAL**; *Plea of.* A plea to an indictment of *autrefois acquit* which simply alleges a *nolle prosequi*, is bad, and a demurrer to it should be sustained. [*State v. Curtis*, 29-384; *State v. Rust*, 31-509; *State v. McKinney*, 31-570; *State v. Hart*, 33-218.]
3. ——— Where a demurrer to such a plea is however overruled, and then a denial filed, and the court on the trial of such plea refuses to call a jury, but hears the testimony and decides against the plea, and the testimony only shows a *nolle prosequi* before trial, *held*, that the substantial rights of the defendant were not prejudiced.
4. **EVIDENCE**—*When Objection to be Made.* Where testimony is admitted without objection, it is too late to insist for the first time in this court that it was admitted without first laying the proper foundation therefor. [*Brumbaugh v. Schmidt*, 9-117; *Grandstaff v. Brown*, 23-176; *A. T. & S. F. R. R. Co. v. Stanford*, 12-380.]
5. **ADMISSIONS OF DEFENDANT**; *When Admissible.* It is not error to admit in evidence the admissions and confessions of the defendant, although made after his arrest, and while in custody, and although at the time a crowd of persons was surrounding the building in which he was confined, provided it appears that such confessions and admissions were made without, and were uninfluenced by, any threats, promises, or other inducements. [*State v. Reddick*, 7-143; *State v. Folwell*, 14-105; *State v. White*, 17-487; *State v. Mortimer*, 20-93.]
6. **LARCENY**; *Evidence of Identity of Property; Competency.* On the trial of a prosecution for the larceny of a horse, which rests largely upon circumstantial evidence, it is not error to admit the evidence of certain witnesses who testify to seeing the defendant, recently after the larceny, in the possession of a horse, without fully identifying it as the horse that was stolen. The weight of such testimony is matter for the consideration of the jury. [*A. T. & S. F. R. R. Co. v. Stanford*, 12-354.]
7. **INSTRUCTIONS**; *Circumstantial Evidence.* Where the court, at the instance of the state, instructs the jury as to the right to convict upon circumstantial testimony, and thereafter gives all the instructions asked by the defendant in respect to such evidence, the latter has no cause of complaint that the first instructions failed to give any rules for weighing and determining the effect of circumstantial testimony, or to suggest the need of extra caution respecting such testimony.
8. ——— *Prima Facie Case; Presumption.* Where upon the whole testimony the state has made out a *prima facie* case, that is, has proven such a state of facts, as, unexplained, point to the defendant's guilt, and no

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explanations have been made, the jury is warranted in finding a verdict of guilty. The mere presumption of innocence does not overthrow the presumption from the unexplained facts.

9. **WEIGHT OF EVIDENCE; *Statements of Accused; Province of Jury.*** The jury is not bound to believe all the statements made by the defendant in explanation of his possession of recently stolen property, those in favor of as well as those against him, even though there is no direct evidence showing the falsity of the former. They are to consider all the statements, and give to each such credence as to them seems reasonable and just under all the circumstances of the case. [*Cullison v. Smith*, 20-36; *K. P. Rly. Co. v. Anderson*, 23-52.]
10. **INSTRUCTIONS—*When no Error to Refuse.*** An instruction which, though correct as an abstract proposition, seems likely without some explanation or qualification to mislead the jury, may properly be refused. [*U. P. Rly. Co. v. Fray*, 31-739; *Gregg v. Garverick*, 33-190.]

Appeal from Nemaha District Court.

INDICTMENT for grand larceny, found at the August Term 1875, charging that the defendant, at the county of Washington, "on the 8th of June, 1871, one bay gelding, four years old, about fourteen and one-half hands high, of the goods and chattels of one M. S., unlawfully and feloniously did steal, take and carry away," etc. The indictment also alleged that the defendant was absent from the state, and so concealed himself that he could not be found, from September 15th 1871, to June 14th 1875. A plea of former acquittal was filed. The record shows (and see 10 Kas. 630,) that defendant had been arrested in July 1871 upon a warrant issued by a justice of the peace, and had been recognized by the justice for his appearance at the October Term 1871 of the district court; that at said term an information was filed by the county attorney, but defendant failed to appear, and that at the April Term 1874, the county attorney entered a *nolle*, the defendant being still absent, and still failing to appear. The proceedings taken on said plea of former acquittal are fully stated in the opinion. Subsequently defendant pleaded "not guilty," to the indictment, and a trial was had at the August Term 1875. Verdict, guilty, and defendant was sentenced to the state prison for the term of three years. From this sentence and judgment he appeals.

J. G. Lowe, and Joseph Sharp, for appellant.

J. W. Rector, county attorney, for The State,

The opinion of the court was delivered by

BREWER, J.: Defendant was convicted in the district court of the crime of grand larceny. From that conviction he brings this appeal. Several questions are presented and discussed by counsel for appellant.

I. A plea of *autrefois acquit*, was made, and it is alleged that the court erred in refusing to submit the issue tendered thereby to a jury. A demurrer to this plea was filed by the county attorney, which was overruled. He then filed a denial of the plea, and upon that issue the court, after refusing to call a jury, heard testimony and decided against the defendant. We think the court should have sustained the demurrer, that the plea, as filed, showed no case of *autrefois acquit*, and that therefore there was no question of fact to be submitted to any triers. The plea, after alleging a prior information for the same offense, states:

“And the said defendant further alleges that at the said April Term 1874 of the said district court, * * * the said district court, by its order and judgment, upon the motion of J. W. Rector, county attorney for said Washington county, and prosecuting said information in behalf of the said state of Kansas, dismissed and forever discharged the said defendant from prosecution on said charge of feloniously stealing,” etc.

This shows no trial, no impanneling of a jury, no proceeding other than the filing of an information, and a *nolle prosequi*. It does not appear that the defendant was ever acquitted, was ever in jeopardy. A *nolle prosequi*, prior to the impanneling of a jury, is no bar to a subsequent prosecution. 1 Archbold Cr. Pr., (Waterman's Notes,) p. 368, and cases cited; 1 Wharton's Cr. Law, 7 ed., p. 544, and cases cited in note. So that the court should have sustained the demurrer to the plea; and any subsequent proceedings thereon, even though they were irregular, wrought no prejudice to the substantial rights of the defendant. It may be stated that the testimony subsequently offered on the trial of the plea showed just what the plea alleged, a *nolle prosequi*, and nothing more.

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II. It is claimed that the court erred in admitting the testimony of the prosecuting witness, and of the sheriff, as to admissions made by the defendant. So far as the testimony of the sheriff is concerned, it was admitted without objection, and it is too late now to object that no proper foundation therefor was laid. As respects the testimony of the prosecuting witness, while it appears that the defendant was in custody, that quite a crowd was collected in front of the building where the defendant then was, and that one at least of the crowd was threatening mob violence, it does not appear that any of these threats were heard by the prisoner, and it does appear that no inducements, promises, or threats of any kind whatever were made to defendant, or that anything was done or said to influence him to make the statements he did make. Under these circumstances there was no error in admitting the testimony. *The State v. Reddick*, 7 Kas. 143.

III. It is insisted that the testimony of one or more of the witnesses who saw defendant in company with another man, shortly after the larceny, in possession of some horses, did not sufficiently identify such horses as the ones that were stolen. But this is an objection going, not to the competency of the testimony, but to its weight, and was a matter for the consideration of the jury. The simple fact, if that was all, that the defendant was seen in possession of horses shortly after the larceny, even without any identification of the animals, was a fact which the court might properly admit in evidence, leaving the effect of it to be considered by the jury under proper instructions.

IV. The remaining objections are to the instructions. Of these, three were given at the instance of the state, two as asked by defendant, and two asked by defendant with some modification, though in what the modification consisted, does not appear. The court, in addition, gave a general charge. Five instructions asked by defendant were refused. The three instructions given at the instance of the state, counsel for appellant claims to be erroneous, but fails to point out any specific error in either. He quotes from Roscoe's Cr. Evidence, that "The utmost caution should be used in the application of cir-

cumstantial evidence," and also says that "in criminal cases the establishment of a *prima facie* case only does not take away the presumption of the innocence of the defendant, nor shift the burden of proof." This is the only specification of error. And, so far as this goes, we see nothing of which defendant can rightfully complain. True, the instruction bearing upon circumstantial evidence is brief, and in general terms, suggesting no need of extra caution, and giving no rules for weighing and determining such evidence. But it is unquestionably correct as far as it goes, and the court afterward, and at the instance of defendant, enlarged upon this matter, and gave all the instructions thereon asked by defendant. In reference to the other suggestion of the learned counsel, while it may be true that in the progress of the trial the *onus probandi* is not shifting backward and forward, and that the state must upon the whole testimony establish its case, yet if, upon the whole testimony, the state has established a *prima facie* case, that is, has proven such a state of facts as, unexplained, point to the defendant's guilt, and no explanations have been made, the jury is warranted in finding a verdict of guilty. The mere presumption of innocence does not overthrow the presumptions from the unexplained facts. We do not think the instructions inconsistent with these views.

The instructions refused were properly refused. Two of them were to the effect that, unless the state had shown the statements of defendant concerning his connection with the property to be false, they must acquit. We do not suppose the court was bound to single out a single matter, such as the truth or falsity of defendant's statements, and direct the jury as matter of law that the verdict should hinge thereon. The jury were to consider all the testimony, the manner of the larceny, the conduct as well as the statements of defendant, and from them all determine the question of guilt.

A third instruction refused was, that the jury must believe all the statements of defendant, those in his favor as well as those against him, unless the state had shown by the evidence that the former were false. This would be apt to mislead the jury, and induce the belief that there must be some direct testimony

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showing the falsity of defendant's statements, or else that they must be accepted as true. It would be invading the province of the jury, for they are to determine how much credence shall be given to each and all of the statements of defendant. Some may seem to them so improbable that, though there be no direct testimony showing their falsity, they may properly disbelieve them.

The fifth instruction refused was to the effect that if the proof showed the larceny of a horse, the jury must acquit, inasmuch as the indictment charged the larceny of a gelding. We think there was no error in refusing this instruction in the unqualified condition in which it was asked. Our statute, it is true, specifically mentions "horse, mare, gelding, colt," etc.; and the indictment charged the larceny of a gelding. But still, in common talk, the terms, "horse" and "gelding" are used interchangeably. The first question asked the prosecuting witness was, "Did you have a bay gelding stolen about the 1st of June 1871?" And the answer was, "I did." Subsequently he spoke of the animal as a "horse," as did the other witnesses. Now it seems to us, that an instruction which might seem to the jury to compel them to give to the word "horse," as used by the witnesses, an arbitrary technical meaning, instead of its common signification, might mislead them. We do not mean to hold, under our statute, that proof of the larceny of a stallion will sustain an indictment charging the larceny of a gelding. But where an instruction attempting to distinguish between the two classes of animals, and, using the terms "horse" and "gelding," ignores the fact that in common parlance the terms are used interchangeably, and seems calculated to compel the jury to give to the term "horse," as used by the various witnesses, a signification not intended by them, the court may properly refuse it. For an instruction, however correct, should not be given if, without qualification, it is likely to mislead.

Upon all the points therefore made by counsel for appellant, we think the ruling of the court must be sustained, and the judgment will be affirmed.

All the Justices concurring.

Woolley v. Van Volkenburgh.

H. F. WOOLLEY v. P. VAN VOLKENBURGH.

1. PROTEST DAMAGES—*When Recoverable*. Protest damages are recoverable in this state only when protest is legally necessary to fix the liability of some party to the note or bill. [*German v. Ritchie*, 9-106; *Cramer v. Eagle Mfg. Co.*, 23-399; *Noyes v. White*, 9-640; *Curtis v. Buckley*, 14-450.]
2. LIABILITY OF GUARANTOR; *Protest not Necessary*. Protest is not necessary in order to fix the liability of a guarantor; [*Brenner v. Weaver*, 1-488; *Fuller v. Scott*, 8-25;] hence, in an action by the payee of a note against the maker and a guarantor, protest damages are not recoverable.

Error from Saline District Court.

ACTION by *Van Volkenburgh* and four others, as partners, against the maker and guarantors of the following promissory note:

\$425.88.

SALINA, KANSAS, Nov. 8, 1872.

Six months after date, we promise to pay to the order of P. Van Volkenburgh & Co., four hundred and twenty-five 88-100 dollars, at the Bank of D. W. Powers & Co., Salina, Kansas, value received.

H. F. WOOLLEY.

On the back of said note was the following indorsement: "We guarantee the payment of the within promissory note," which indorsement was signed, "H. B. MERRILL, M. S. PRICE, Z. W. MORROW, C. POST." At the March Term 1874 the plaintiffs had judgment for \$425.88 principal, \$85.50 interest, \$25.55 protest damages, and \$5.12 protest fees—total, \$492.05. The defendants made no answer, nor appearance, in the district court, but they now allege error in the allowance of the protest damages and fees, and bring the case here for review.

J. G. Mohler, for plaintiffs in error.

McClure & Humphrey, and *Clough & Wheat*, for defendants in error.

The opinion of the court was delivered by

BREWER, J.: But a single question is in this case. The action was on a promissory note, brought by the payees against the maker and four guarantors. The payees claimed and re-

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covered protest damages. Were they entitled thereto? We think not. Protest damages are recoverable only when protest is legally necessary to fix the liability of some party to the note or bill. *German v. Ritchie*, 9 Kas. 106. But notice of non-payment is not necessary in order to charge a guarantor. It is said by Edwards in his work on Notes and Bills, page 242, after quoting from Chitty on Bills, that, "It is plain from the cases cited by him, as well as from the American authorities, that notice to the guarantor is not a term or condition of the contract; but only a mode of showing that the party guaranteed has taken the proper steps to enforce or secure payment of the principal debt, * * * and that the guarantor of the bill is no party to the instrument, and is not by the custom of merchants entitled to notice of the dishonor." See also 2 Parsons on Notes and Bills, 137. Our statute defining the parties who are liable for protest damages does not mention guarantors. It speaks of "drawers, indorsers, makers, and obligors." (Gen. Stat. 116, §§ 14, 15.) We think therefore that there was error in awarding protest damages and fees. It is well settled that any error apparent in the final judgment of a district court may be corrected by suit in error in this court, although no exception was taken thereto by the party complaining, and no appearance by him at the trial and judgment, and no motion made to set aside the judgment.

The judgment of the district court will be modified by striking out the protest fees and damages. The costs of this court will be divided.

All the Justices concurring.

JOHN W. THOM v. W. D. DAVIS.

1. **MOTION FOR NEW TRIAL; Newly-Discovered Evidence.** Where a motion for a new trial is made on the ground of newly-discovered evidence, and overruled, without all the evidence before us the supreme court cannot say that the newly-discovered evidence is not merely cumulative. (10 Kas. 81, 639.) [*Bartlett v. Feeney*, 11-593.]
2. **PRACTICE, SUPREME COURT.** Where counsel fail to specify any matter as error, and the supreme court perceives no error in the record, the judgment of the court below will be affirmed. [*Hutchinson v. Bain*, 11-234 *Powers v. Kindt*, 13-74; *State v. Jennerson*, 14-133.]

Error from Ottawa District Court.

At the April Term 1874 of the district court, in an action to foreclose a mechanic's lien, *Davis* recovered judgment against *Thom* for \$149.23, and obtained a decree for the sale of certain real property. *Thom* moved for a new trial on the ground of newly-discovered evidence, but the transcript does not contain any evidence offered to support said motion. The motion was overruled, and *Thom* brings the case here.

Case of Putnam, for plaintiff in error.

The opinion of the court was delivered by

VALENTINE, J.: From an inspection of the record, we have been unable to find any error in this case. The entire brief of the plaintiff in error reads as follows: "The plaintiff in this case believes the law of this case to be settled in the following cases: 10 Kas. 81; 10 Kas. 639." The plaintiff in error is correct. The two cases referred to do settle the principal questions that might be raised in this case, and they settle such questions against the plaintiff in error. As there is no error apparent on the record, the judgment of the court below will be affirmed.

All the Justices concurring.

BOAZ W. WILLIAMS v. NELSON HILL.

EVIDENCE; RECORDS; *When Record-Copy of Deed is Admissible.* The common-law rule in reference to the conditions upon which copies of instruments may be admitted in evidence is changed by § 27 of chapter 22 of General Statutes, and §§ 11 and 12 of chapter 87 of the Laws of 1870, so as to admit the record-copy of a deed when it appears simply that the original is not in the possession or under the control of the party desiring to use it. [*Marshall v. Shibley*, 11-114; *Clark v. Lord*, 20-390.]

Error from Washington District Court.

EJECTMENT, brought by *Williams*, as plaintiff, to recover possession of a certain lot in the town of Washington. Answer, denial of plaintiff's title. Trial at the August Term 1874. Plaintiff showed title by regular conveyances in Strohm and Richards, and then offered the official record of the deeds from said Strohm and Richards to Price and others, (plaintiff's grantors,) coupling such offer with proof that said deeds from S. and R. to P. and others were not in his (plaintiff's) possession nor under his control. The record-copies were objected to by *Hill*, and the objection sustained. Finding and judgment for defendant, and plaintiff brings the case here on error.

J. D. Brumbaugh, for plaintiff.

J. G. Lowe, for defendant.

The opinion of the court was delivered by

BREWER, J.: The only question in this case is, whether the common-law rule in reference to the conditions upon which copies of instruments may be admitted in evidence, is changed by § 27 of chapter 22 of Gen. Stat., and §§ 11 and 12 of chapter 87 of the Laws of 1870, so as to admit the record-copy of a deed when it appears simply that the original is not in the possession or under the control of the party desiring to use it. We think it is. The language of the statute is plain and unambiguous. It says that such record-copy "may be received in evidence in any court," and also that, when the "original is not in the possession or under the control of the party desiring

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to use the same, such record shall have the same effect as the original." And being merely a matter of evidence, we think it clearly within the power of the legislature to alter and modify the conditions upon which secondary evidence of the contents of written instruments may be admitted.

The judgment will be reversed, and the case remanded with instructions to grant a new trial.

All the Justices concurring.

THE STATE OF KANSAS V. JOSEPH STILLWELL.

GAMBLING; *Gambling Device; Betting on Cards.* Where, under § 240 of the act relating to crimes and punishments, which makes it unlawful for any person to bet upon a gambling device, or to bet upon any game played by means of any such gambling device, an indictment was drawn charging substantially as follows: The grand jurors "find that J. S. is guilty of the crime of gambling, for that the defendant did play cards for money, checks, and other valuable things, all of which is contrary to the statute," etc.; and the indictment did not in any other manner allege that the defendant bet on said cards, or that he bet at all, or that said cards were a gambling device, or that the defendant bet on a gambling device, or that he bet on any game played by means of a gambling device, held, that the indictment was and is insufficient, and that the court below did not err in quashing it. [*State v. Hardin*, 1-474; *Rice v. State*, 3-142.]

Appeal from Greenwood District Court.

AN indictment was found by the grand jury, in the following words:

STATE OF KANSAS, GREENWOOD COUNTY:

In the district court of Greenwood county, for the April Term in the year 1875.

THE STATE OF KANSAS

vs.

JOSEPH STILLWELL.

} Indictment for Gambling.

The jurors of the grand jury of the state of Kansas, duly drawn, sworn, and charged to inquire of offenses committed within the said county of Greenwood, in the name and by the authority of the state of Kansas, do present and find, that

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Joseph Stillwell is guilty of the crime of gambling, for that the said defendant, in said county of Greenwood, did, on the first day of July 1874, in a certain frame building on lot 7, block 18, in the city of Eureka, play cards for money, checks, and other valuable things, all of which is contrary to the statute in such case made and provided.

Subsequently, and at said April Term 1875, the district court, on defendant's motion, quashed said indictment, and *The State* appeals.

W. C. Huffman, for The State.

R. M. Ruggles, for the defendant.

The opinion of the court was delivered by

VALENTINE, J.: This was a criminal prosecution. The prosecution was commenced under § 240 of the crimes act. (Gen. Stat. 370.) This section provides, that any person who shall bet at or upon any gambling device, or shall bet upon any game played at or by means of any such gambling device, shall be deemed guilty of a misdemeanor, and be punished by fine not exceeding one hundred dollars nor less than ten dollars. The indictment in this case charges substantially as follows: The grand jurors "find that Joseph Stillwell is guilty of the crime of gambling, for that the said defendant * * * did * * * play cards for money, checks, and other valuable things, all of which is contrary to the statutes," etc. The indictment is evidently defective. The offense intended to be charged was *betting on a gambling device*, or on a game played by means of such *gambling device*. But there is no allegation in the indictment that the cards used were a gambling device, and there is no allegation that the defendant bet on them, or that he bet at all. Now, cards are not necessarily a gambling device. They are indeed seldom used as such, but generally they are used merely as a source of amusement. If the cards in this particular case were a gambling device, the indictment should have so alleged. (*Rice v. The State*, 3 Kas. 142, 169; *The State v. Hardin*, 1 Kas. 474.) We do not wish however to be understood as approving the case of *The State v. Hardin*, to

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the extent that it goes. Cards may or may not be a gambling device, just as they are used, and intended to be used. A person may bet on a game of cards, without betting on a gambling device, or on a game played by means of a gambling device. Suppose that A. and B. play merely for amusement, with a deck of cards kept merely for amusement, and C. and D. bet on the game: would any one claim that C. and D. bet on a gambling device, or on a game played by means of a gambling device? And a person may play cards for money without betting on them. Suppose a person is hired to play cards for others to bet on, or for the purpose of showing his skill, or to teach others the tricks that may be performed with cards: would he not be playing for money, or for some other valuable consideration? It is easy enough to draw good indictments; and hence it is not necessary to prosecute any person on such an indictment as the one we now have under consideration.

The judgment of the court below must be affirmed.

All the Justices concurring.

In the case of *The State of Kansas*, appellant, *v. Alonzo Shewalter*, appellee, also brought here from Greenwood district court, the following opinion was filed:

VALENTINE, J.: Precisely the same questions are involved in this case as in the case of *The State v. Stillwell*, just decided; and hence the same judgment must be rendered in this case as in that. Judgment affirmed.

All the Justices concurring.

SAMUEL MINER v. LOUISA B. PEARSON, *et al.*

1. **ACTION ON NOTE; Default of Defendant; Judgment.** In an action against the maker of a note and mortgage, where the petition sets forth the facts in full, and asks for a personal judgment against such maker for the amount due on such note and mortgage, and the defendant is in default for want of an answer, it is error for the court in rendering the judgment not to render a personal judgment as prayed for in the petition. [*Brenner v. Bigelow*, 8-496; *Deitrich v. Lang*, 11-636; *Ames v. Brinsden*, 25-746.]
2. **MARRIED WOMAN; Personal Contract; Liability.** A married woman may, in this state, bind herself by her contracts to the extent of her separate property; and a personal judgment may be rendered against her which will reach any or all of her separate property not exempt from execution under the exemption laws. [*Deering v. Boyle*, 8-528.]

Error from Franklin District Court.

THE facts in this case sufficiently appear in the opinion. The district court, at the November Term 1871, upon defendants' default, gave judgment in favor of *Miner*, as plaintiff, against *Walter C. Pearson* only, one of the two defendants sued, and duly served. Because such judgment was not given against *both* defendants, the plaintiff brings the case here on error.

John W. Deford, for plaintiff.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by Samuel Miner against Louisa B. Pearson and Walter C. Pearson on a promissory note and a mortgage. The petition below alleged that both of the defendants executed said note and mortgage; and the copy of the note attached to the petition shows that both of the defendants executed the note, the name of Louisa B. Pearson being signed to the note first. It does not seem from the record that a copy of the mortgage was attached to the petition. The petition prayed for a personal judgment against both of the defendants, and that the land mortgaged be sold to satisfy such judgment. The defendants, although duly served with summons, made default by not filing any answer in the action. And by such default they admitted the truth of all

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the allegations of the plaintiff's petition. And therefore the court below should have rendered a personal judgment against both defendants for the amount of the note and mortgage, and should have rendered the further judgment that the land mortgaged should be sold to satisfy the debt. The court below rendered a judgment on the default, but in doing so it did not render any personal judgment against Louisa B. Pearson. Why this was so, the record does not show. But the plaintiff, in his brief, attempting to account therefor, says: "The court stating as a reason therefor, that Louisa B., being a *feme covert*, (wife to Walter C.) was not bound by her contracts set forth in the petition." Now the record does not show that Louisa B. Pearson was a *feme covert*, the wife of Walter C. Pearson, or the wife of any other person. But even if it did, still that would not be a sufficient reason for not rendering a personal judgment against her. A married woman may in this state bind herself by her contracts to the extent of her separate property. And a personal judgment may be rendered against her which will reach any or all of her separate property not exempt from execution under the exemption laws. *Deering v. Boyle*, 8 Kas. 525; *Wicks v. Mitchell*, 9 Kas. 80; *Going v. Orns*, 8 Kas. 85; *Monroe v. May*, 9 Kas. 466; *Knaggs v. Mastin*, 9 Kas. 532; *Faddis v. Woollomes*, 10 Kas. 56; *Larimer v. Kelly*, 10 Kas. 298; *Furrow v. Chapin*, 13 Kas. 107; *Tallman v. Jones*, 13 Kas. 438. There is no reason apparent in the record for the decision of the court below, and the reason suggested by counsel (which is not apparent in the record) is not a good one.

The cause will be remanded, with the order that the judgment be modified so as to correspond with this opinion.

All the Justices concurring.

JOHN PATTON V. ANTOINE FURTHMIER.

1. *GUARDIAN Ad Litem; When Error to Appoint.* Where a defendant is of age, and is under no legal disqualification, it is error to appoint a guardian *ad litem*, and thus oust him from the control and management of his defense. [*Fowler v. Young*, 19-150.]
2. ——— Where an action is commenced against a minor, and judgment rendered against him without the appointment of a guardian *ad litem*, and without his appearance at the trial, and thereafter, on his becoming of age, upon his petition the judgment is vacated and set aside, and the case set down for trial, it is error then to appoint a guardian *ad litem* and permit such guardian to take charge of and control the defense; and a judgment rendered in such trial against him by his next friend and guardian *ad litem* will be reversed.

Error from Miami District Court.

THE opinion contains a full statement of all facts necessary to an understanding of this case. The district court, at the September Term 1873, W. F., judge *pro tem.*, presiding, gave judgment in favor of *Furthmier*, and *Patton* brings the case here on error.

B. F. Simpson, for plaintiff in error.

Wagstaff & Massey, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: In 1868 an action was commenced by defendant in error before a justice of the peace against plaintiff in error and his father. In that action judgment was rendered against both defendants. This judgment was appealed to the district court, and upon a trial judgment was there rendered against plaintiff in error alone. During all these proceedings no guardian *ad litem* was appointed for plaintiff in error, and in the district court no appearance was made by him. Subsequently, and in 1871, plaintiff in error filed his petition to have this judgment set aside, alleging that he was a minor during all those proceedings, that no guardian *ad litem* had been appointed, that he was absent at the time of the trial in the district court, and that he had a valid defense, etc., and that he

had since become of age. On the hearing of this petition the court found all its allegations to be true, and set aside the judgment. Thereafter the original case coming on for trial, the defendant in error moved for leave to amend his bill of particulars by inserting in lieu of the name of plaintiff in error alone, his name by a guardian *ad litem*, which motion was sustained, a guardian *ad litem* appointed, who appeared, accepted the appointment, and filed his answer, and thereafter the trial, verdict and judgment were against the plaintiff in error by his next friend and guardian. To reverse this judgment this proceeding in error has been brought, and the error alleged is the appointment of a guardian *ad litem*, and permitting him to answer and take charge of the defense of the plaintiff in error. We think the objection well taken. When a party is of age, and under no legal disqualification, the proceedings must be against him, and he cannot be ousted from the control and management of his defense. The fact that at the commencement of these proceedings he was a minor, and that then a guardian *ad litem* ought to have been appointed, does not justify the appointment of one after he has become of age and is entitled to the control and management of his defense. It stood as though he had been of age at the commencement of the proceedings. He and his property are responsible for any judgment that may be rendered against him. He certainly, therefore, unless under some legal disqualification, should be allowed to take such measures as his judgment dictates are best to protect his interests; and to take this right from him, and commit it to the discretion of another, who at the best cannot have the same personal interest that he has, is doing him a manifest wrong.

For this error the judgment must be reversed, and the case remanded for a new trial.

All the Justices concurring.

LEVI E. WARD V. HENRY W. BAKER.

COURTS OF OTHER STATES; *Powers and Jurisdiction; Presumption.* It will be presumed, in the absence of evidence to the contrary, in favor of courts of general jurisdiction of sister states, that they have the authority they assume to exercise, and that the modes of procedure pursued by them, though different from those established by the laws of this state, are authorized by the laws of the states in which they act. [*Butcher v. Bank of Brownsville*, 2-70; *Dodge v. Coffin*, 15-277; *Haynes v. Cowen*, 15-637.]

Error from Coffey District Court.

ACTION by *Baker* on a judgment rendered on the 17th of August 1868 by the supreme court of Chautauqua county, state of New York, in an action then pending in said court in favor of *Baker* as plaintiff, and against *Ward* as defendant. The petition set forth a copy of said New York judgment, which shows that the same was entered by the clerk in vacation, pursuant to the following statement, which was signed and verified by *Ward*, to-wit:

(*Title.*) "I, Levi E. Ward, authorize judgment by confession, without action, to be entered against me in favor of Henry W. Baker for \$434.22, for the following cause: On the 6th of March 1865, at Sinclairville, the plaintiff indorsed for my accommodation a promissory note made by me, and dated on said 6th of March 1865, payable to the order of Henry W. Baker at the Jamestown Bank, for the sum of \$850, and use, and delivered the same to me. Said note having become due and owing, and not paid by me, the same was paid by the said Henry W. Baker, plaintiff, to the owner and holder thereof; and there remains unpaid from me to the said Baker on account of the payment by him of said note, and interest on said note, the sum of \$434.22 aforesaid."

The transcript of said judgment is authenticated by the certificate of J. R. R., clerk, and by the further certificate of "Joseph Miller, presiding justice of the Fourth Judicial Department of the State of New York, composed of Allegany, Chautauqua, Cattaraugus, Erie, Genesee, Niagara, Orleans, and Wyoming," that J. R. R. "is the clerk of the supreme court of the county of Chautauqua, that the seal by him affixed to the foregoing certificate is the seal of said court,

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and that this attestation of the said record is in due form." These certificates are dated June 25th 1873. Trial at the May Term 1874 of the Coffey district court. The defendant objected to the introduction in evidence of the transcript of said New York judgment, "for that the same is irrelevant, incompetent and immaterial." Objection overruled, and transcript admitted, and defendant excepted. Judgment in favor of *Baker* for \$593.30 and costs, and *Ward* brings the case here in error.

A. M. F. Randolph, Silas Fearl, and Ruggles & Sterry, for plaintiff in error,

Stephen H. Allen, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: The questions in this case have already been decided by this court in the recent cases of *Dodge v. Coffin*, and *Haynes v. Cowen*, 15 Kas. 277, 637, and no further opinion is necessary. For reasons given in the opinions in those cases, this judgment will be affirmed.

All the Justices concurring.

A. L. NICCOLLS v. BENJ. ESTERLY.

WITNESS; EVIDENCE; *Transactions with Deceased Joint Contractor and Partner; Waiver.* While a party may not under § 322 of the civil code testify in his own behalf as to any transaction had personally by him with a deceased partner or joint contractor in the absence of his surviving partner or joint contractor, when such surviving partner or joint contractor is an adverse party, yet, if he is called by such adverse party to testify as to a part of any such transaction, he may, at his own instance, and in his own behalf, testify as to the whole of such transaction.

Error from Franklin District Court.

ESTERLY brought suit against *Niccolls* on a note given for \$240, dated October 15th 1870, signed by Geo. H. Stewart,

A. L. Niccolls, and S. B. McCord. Plaintiff claimed a balance of \$161.07. Answer, that Stewart was the principal debtor, and that he (Stewart) had paid said note in full. Trial at the November Term 1874. Finding and judgment in favor of the plaintiff for \$117.75, and *Niccolls* brings the case here. The proceedings and alleged errors sufficiently appear in the opinion.

John W. Deford, for plaintiff in error.

The opinion of the court was delivered by

BREWER, J.: This was an action brought by defendant in error upon a note executed jointly by plaintiff in error, and S. B. McCord and Geo. H. Stewart. The answer of plaintiff in error alleged payment in full made by Geo. H. Stewart, principal on the note. It appeared that Stewart had died prior to the commencement of the action. Two questions are presented: First, that the finding was against the evidence; and second, that there was error in the admission of testimony.

Under the well-settled rules of this court, we cannot disturb the judgment on the first question presented. The testimony of Esterly was clear and positive, and according to it a balance still remained due. While there was contradictory testimony, still there was not such overwhelming contradiction as compelled a different finding.

The other question is thus presented by counsel in his brief:

Plaintiff Esterly then testified *in his own behalf*, as follows: "*Question by Plaintiff's Counsel.*—State for what purpose the \$150 mortgage, given in evidence by the defendant, was given to you by Geo. H. Stewart?" [The defendant objected to this question, that it was incompetent by virtue of the provisions of § 322 of the civil code, and was irrelevant and immaterial, which objections the court overruled, and defendant excepted.] "*Answer.*—The mortgage was given to me by Mr. Stewart, as collateral and additional security to the note in suit. The deed, read in evidence by the defendant, was taken in consideration of the credit of \$75 indorsed on the note sued on. It was agreed between Mr. Stewart and myself, that the deed should be given me for the \$75, and the \$200 consideration named in the deed was not the true consideration. [To the

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admission of the above evidence of Esterly, the defendant objected, that it was incompetent by virtue of § 822 of the civil code. The court overruled the objection, and defendant excepted.] "I never had any conversation with Mr. Stewart, in the presence or hearing of his wife, as to the amount to be indorsed on the note in consideration of said deed. I was not present when the deed was made, and don't know where it was made."

That portion of the section referred to which bears upon the question provides, that a party shall not be competent to testify "to any transaction had personally by such party with a deceased partner or joint contractor in the absence of his surviving partner or joint contractor, when such surviving partner or joint contractor is an adverse party." This language seems applicable to the case at bar, and to render the testimony offered incompetent; and so we should be constrained to hold but for what had previously transpired. The burden of proof being, under the pleadings, upon the defendant, he opened the case, and called, as his first witness, the plaintiff Esterly, who testified:

" * * * After this, Mr. Stewart brought me the note now in suit here, which I accepted, and gave up the old \$240 note, and released the mortgage securing it. Sometime afterward he gave me another note for \$150, secured by mortgage." [Here a mortgage-deed, of which a copy is annexed, marked A, and made a part of the "case-made," was handed to the witness.] "This is the mortgage given to secure the \$150 note. Afterward, Mr. Stewart and his wife conveyed the property described in this mortgage, to me." [Here a deed of conveyance, of which a copy is annexed, marked B, and made a part of the "case-made," was placed in the hands of the witness.] "This is the deed of conveyance just mentioned. Those above named are all the notes, deeds or mortgages, I ever got from Stewart."

Now the testimony of the plaintiff in his own behalf was in reference to the same transactions of which he had testified at the instance of defendant. And while, if the defendant had so chosen, none of this testimony could have been admitted, yet, having interrogated the plaintiff concerning these matters, and having obtained some of the facts concerning them, he could not thereafter object to the plaintiff's giving all the facts. By

introducing part, he opens the door to all. Just as a party may not introduce his own statements in his own behalf, yet if his adversary draws out part of a conversation he may introduce the balance. The principle is general, that where a particular witness, or a certain kind of testimony, may be excluded, if the party who has the right to insist upon the exclusion waives that right, and himself calls the witness, or introduces the testimony, he cannot, after he has obtained what he desires, insist upon the exclusion, so far at least as to prevent a full development of the matters which he has partially presented.

These being the only matters presented by counsel, and in them appearing no error, the judgment will be affirmed.

All the Justices concurring.

MARTIN MCCARTY v. JOHN GORDON.

1. **LICENSE; Sale of Liquors, Where Made; Order.** Where M., doing business in Leavenworth, upon samples there shown him by G., a wholesale liquor-dealer in St. Louis, orders a bill of liquors from G., which liquors upon such order are selected from G.'s stock of goods in St. Louis and shipped to M. at Leavenworth, *held*, that the sale was made in St. Louis, and that it was not necessary for G. to have a license to sell liquor from the authorities of Leavenworth. [*Haug v. Gillett*, 14-140; *Williams v. Feiniman*, 14-288; *Snider v. Koehler*, 17-432; *Gill v. Kaufman*, post, 571.]
2. **SALE BY SAMPLE; Place of Sale.** The fact that it was expressly agreed between the parties that, in case the liquors sent did not correspond in quality or quantity with the samples shown, and the bill ordered, M. might refuse to receive them, and might return them to St. Louis at the expense of G., will not change the place of sale to Leavenworth. [*Gill v. Kaufman*, post, 571.]
3. **PAYMENT, on General Account, Where Sales are Partly Legal and Partly Illegal.** When in an action brought by G. to recover of M. for six barrels of whisky sold as above, no special findings of fact are made, but only a general finding for plaintiff, and where it appears from the testimony of defendant that one of such barrels was found upon arrival in Leavenworth to be inferior to the sample, and thereupon said defendant refused to receive it and notified the plaintiff thereof, and the latter requested

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the defendant not to return the barrel, but to wait until plaintiff should come to Leavenworth, and that upon the coming of the latter to Leavenworth a new contract was made by which this barrel was sold and delivered to defendant in Leavenworth for less than the original price, and where it appeared from the account that the several barrels differed in the number of gallons and the price per gallon, and there was nothing to show which one of the barrels was thus sold, and where it also appeared that the defendant had made upon the account, and subsequent to the delivery of the liquors, payments more than enough to pay for any one barrel, without specifying to what such payment should be applied, *held*, that a general finding in favor of the plaintiff for the entire unpaid portion of the account would not be set aside. [*Shellabarger v. Binns*, 18-345.]

Error from Leavenworth District Court.

ACTION by Gordon on an account for the sale of six barrels of whisky, amounting to \$547.48, on which payments had been made and credited to amount of \$229.50, leaving a balance of \$317.98, for which plaintiff demanded judgment. Answer, first, a general denial; second, that said sales of liquor were made in Leavenworth, and plaintiff had no license from the city of Leavenworth authorizing the selling of liquors. Trial by the court without a jury, at the February Term 1874. Finding and judgment for plaintiff. *McCarty* brings the case here on error.

Taylor & Gilpatrick, for plaintiff in error.

H. Miles Moore, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: The action below was for liquors sold and delivered by defendant in error to plaintiff in error. The case was tried before the court without a jury. No special findings of fact were made, and no exceptions to the introduction of testimony. So that the only question presented for our consideration is, whether the evidence is sufficient to sustain the judgment. It appears that Gordon, the plaintiff below, was a wholesale liquor-merchant in St. Louis; that the liquors were sold and delivered to McCarty. The special defense was, that plaintiff had no license to sell liquor in the state of Kansas,

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and that the liquors were sold in Leavenworth. On the contrary, the testimony shows simply that orders were taken in Leavenworth for the goods, which orders were filled in St. Louis, and the goods shipped therefrom to plaintiff in error. This brings the case clearly within the cases of *Haug v. Gillett* and *Williams v. Feiniman*, heretofore decided by this court; (14 Kas. 140, 288.) But it is said that there is this difference, that here the goods were sold by sample, and that it was expressly agreed that the goods were not to be received and accepted by McCarty unless they "proved identical with the order given, in quality and in quantity," and that he "reserved the right to reject the liquors, so ordered and sent, for any deficiency in quality or quantity; and in case of such deficiency to return the goods to plaintiff." We cannot see that this difference is material. The express contract was no more than the one the law would imply from a sale by sample. It is always understood that a party purchasing by sample is under no obligation to receive the goods sent unless they correspond with the sample, and are equal to the quantity ordered. The case of *Brothby v. Plaisted*, 51 N. H. 486, (also a liquor case,) is exactly in point, and sustains the views we have expressed.

Again, it is urged that, though these principles may be applicable to most of the account, yet as to one barrel of whisky the circumstances of the sale make a very different case, and show a sale in Leavenworth. It appears from the testimony of McCarty that one barrel of whisky that was shipped to him was inferior to the sample, and that he refused to accept it, and so notified plaintiff; that upon plaintiff's request it was not re-shipped to St. Louis, but held in Leavenworth until plaintiff came, and that plaintiff in Leavenworth made a new contract with him, and sold and delivered the whisky at twenty-five cents a gallon less than the price originally charged. Conceding, for the purposes of this case, that this shows a sale in Leavenworth, we are still constrained to sustain the judgment, and for two reasons: The account is for six barrels of whisky, each containing a different number of gallons, and at various prices per gallon. Now we are not informed by the testimony which barrel it was that was so sold, and there is nothing in

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the account, or the testimony, upon which we could base even a reasonable guess concerning it. Again, the defendant has paid in different sums an amount far exceeding the price of any one barrel. It does not appear that these payments were made as payments for any particular barrel, but simply on account of the entire debt. But they were so paid that no barrel was delivered without subsequent payments large enough to more than equal its price. So that if the debtor had not applied the payment to the purchase of any particular barrel, and the creditor had applied it to the one sold in Leavenworth, it would have more than paid therefor. Now in view of these facts, and inasmuch as the court made no special finding of facts, but only a general finding for plaintiff, it does not seem to us that we can hold that there is error apparent in the record.

The judgment must be affirmed.

All the Justices concurring.

E. F. BOTKIN, *et al.*, v. A. LIVINGSTON.

1. **AGREEMENT; Collateral Undertaking to Pay Damages.** An agreement as follows: "This agreement, made and entered into this 1st of April 1870, between A. L., party of the first part, and E. F. B., and others, parties of the second part, witnesseth, that in consideration of one dollar this day paid to said parties of the second part by said first party, and in further consideration that the said party of the first part will permit the Gulf Railroad Company to build and complete the said road through the northwest quarter of section 5, township 34, range 24 east of the 6th principal meridian, without any hindrance or obstruction whatever, the said parties of the second part hereby agree to pay to the said party of the first part forthwith, on demand, all damages which the commissioners of Cherokee county may assess to be done to said land by the building of said railroad through said premises, without any appeal whatever," is a valid and binding contract. [*Botkin v. Livingston*, 21-232.]
2. **WRITTEN INSTRUMENT; Proof of Execution; Waiver.** Where an instrument is offered in evidence, and the opposite party objects to its reception, and names one ground of objection, which is overruled, and fails to object on the ground that the execution is not proven, he cannot thereafter be heard to say that the execution was not proven. [*Ferguson v. Graves*, 12-43; *K. P. Rly. Co. v. Cutler*, 19-87; *Edmondson v. Beale*, 27-657.]
3. **DEMAND; When Action Accrues.** Under the contract above set out, before any right of action accrued, demand must have been made, and made after the assessment of damages by the commissioners. [*Pratt v. Brockett*, 20-201.]

Error from Cherokee District Court.

ACTION by *Livingston* on an agreement set out in *hæc verba* in the opinion. Answer, general denial, verified by affidavit. Trial at the August Term 1878. Judgment in favor of *Livingston* for \$377.40, and costs, and defendants bring the case here on error.

A. W. Rucker, for plaintiffs in error.

J. N. Ritter, and J. R. Hallowell, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This was an action in the district court of Cherokee county upon the following bond or agreement:

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THIS agreement made and entered into this 1st day of April, 1870, between Abraham Livingston, of Cherokee county, Kansas, of the first part, and E. F. Botkin, W. A. Botkin, W. B. Spencer, H. A. Hanford, J. E. Williams, Robt. McGarvin, J. F. Gibbs, G. W. Hedge, John Cahl, and Joseph Benoist, of Baxter Springs, Cherokee county, Kansas, of the second part, witnesseth: That in consideration of one dollar, this day paid to said parties of second part by said first party, and in further consideration that the said party of the first part will permit the Missouri River, Fort Scott & Gulf Railroad Co. to build and complete the said road through the northwest quarter of section 5, township 34, range 24 east of sixth principal meridian, without any hindrance or obstruction whatever, the said parties of the second part hereby agree to pay to the said party of the first part, forthwith on demand, all damages which the commissioners of Cherokee county may assess to be done to said land by the building of said railroad through said premises, without any appeal whatever.

E. F. BOTKIN.	ABRAHAM LIVINGSTON.
W. B. SPENCER.	W. A. BOTKIN.
J. E. WILLIAMS.	H. A. HANFORD.
J. F. GIBBS.	ROBT. MCGARVIN.
JOHN CAHL.	G. W. HEDGE.
	JOSEPH BENOIST.

Judgment was rendered in favor of Livingston against all of the other parties, five of whom took proper exceptions, and bring the case here on error.

It is insisted that this agreement is void for uncertainty, because the "time for the performance of its conditions, the county in which the land is situated, and the parties to assess the damages, are not mentioned, and because the matters and things to be done are entirely too indefinite; and the power given too unlimited." The objections are not well taken. No time being specified, the law will imply a reasonable time. The land is sufficiently identified by section, township, and range, and by the line of the railroad. The assessors of the damages are expressly named. And the obligation of the parties is specific, definite, and limited.

Again, it is insisted that the instrument is void for want of consideration. On the contrary, a double consideration is ex-

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pressed. First, a small money-consideration, and then a stipulation to make no hindrance or obstruction to the building of a railroad through certain lands. This does not, as counsel seems to think, refer to "violent, illegal, and forcible resistance and obstruction;" but to a legal and peaceable resistance, by appeal from the assessment of damages, and application to the courts for injunction, which often hinder if they do not finally prevent the construction of a road.

Still, again, it is insisted that the execution of the instrument is denied under oath, and that there was no proof of its execution. But the only objection made when the instrument was offered, was, that "it showed no liability on the face thereof." If a party fails to object to the introduction of an instrument on the ground that its execution is not proven, he cannot thereafter raise the question. He has waived that point. The court is under no obligation to make an objection for him. It is enough if it rules on the questions presented.

Again, it is objected that there was no proof of demand, and that the obligation is only to pay upon demand. It is doubtless true, that a promise to pay a specific sum, primarily the debt of the promisor, on demand, is treated as a promise to pay generally, and that an action may be maintained thereon without proving any prior demand. This, though it seems at variance with the expressed obligations of the parties, is the settled law. (Though see *Carter v. Ring*, 8 Camp. 459; *Simpson v. Routh*, 2 Barn. & Cress. 685; 1 Chitty's Pl. 830.) "But," as said by Mr. Justice BRONSON, "it is otherwise when a person undertakes for a collateral matter, or as surety for a third person. There, if the agreement be that he will pay on request, the request is parcel of the contract, and must be specially alleged and proved." *Nelson v. Bostwick*, 5 Hill, 89. Or, as said by Mr. Justice COWEN in the same case, "a bond to pay a precedent debt on demand is satisfied by the commencement of the suit itself, which is considered a sufficient demand; but in case of any agreement to pay a sum on demand or on request, not itself due independently of the contract, the terms of the contract must be pursued." This it seems to us must be treated

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as an undertaking for a collateral matter. In case of the condemnation of the right of way for the use of a railroad, the latter is the debtor to the land-owner. The appropriation is to its use, and it must pay for such appropriation. This obligation is to pay such debt. The parties contract to pay no other or different sum. True, it does not in terms recite a promise to pay, if the railroad company does not; and it is not, in form, the contract of principal and surety. It reads as a principal promise. But still it must be construed with reference to the extrinsic facts upon which it is based. The promisors could not initiate the condemnation proceedings. This must be done by the railroad company. And when the condemnation is had, it is the company which owes the debt. If it pays, all right of action on this undertaking is discharged. Nothing more can be recovered of these promisors. The amount is not to be paid twice. Whether this obligation was assumed at the request of the company, does not appear; and whether, if assumed without such request, and then paid, the payors would have any claim on the company, is a question not involved in this case, and therefore not necessary to determine. It is clearly however a promise to pay the debt of another, and therefore an undertaking for a collateral matter. We think therefore a demand was necessary. This was alleged, but after a careful reading of the testimony we do not find that one was proven. The only testimony bearing on this matter is thus stated: "J. R. H. being duly sworn said that he recognized the signature of W. A. B. and W. B. S., and had talked with them about the bond, and that he had talked with Jos. Benoist and R. McG., and each had paid a part of said bond, and acknowledged their execution thereof, and that he had made demand of said Benoist and McG., W. A. B., and J. C., before the commencement of this suit, for the amount due, but *before* this assessment was made." Now a demand before a right to make it exists, amounts to nothing; and the only demand shown is one before the assessment had determined what damages, if any, had been sustained. A demand *after* the assessment, and before the commencement of the action, was essential to a right of recov-

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ery. For a lack of this, the judgment must be reversed, and the case remanded with instructions to grant a new trial.

All the Justices concurring.

SHOEMAKER, MILLER & Co. v. WM. A. SIMPSON, et al.

1. PERSONALTY; *Where Attached to Land Without Owner's Consent.* An owner of personal property cannot, against his will, be deprived of the title to such property by having it attached, without his consent, to the real estate of another, by a third person, where such personal property can be removed from such real estate without any great inconvenience, and without any substantial injury to the real estate. [*Redlon v. Barker*, 4-445; *Eaves v. Estes*, 10-314; *Lanowe v. McKinnon*, 19-408; *O. B. Rly. Co. v. Fritz*, 20-430; *McDonald v. Shepherd*, 25-112; *Comm'r's Rush Co. v. Stubbs*, 25-322.]
2. REPLEVIN; *When Demand is Unnecessary.* Whenever one person obtains possession of the personal property of another without the consent of the owner, and then, without any right which the law will recognize, asserts a claim to the property inconsistent with the owner's right of property and right of possession, the possession of such person will immediately become illegal and wrongful, and no demand for the property will be required to be made by the owner before he commences an action of replevin for the recovery of the same, although the possessor thereof may ever so honestly entertain the belief that his claim to the property is both legal and just. [*Dickson v. Randal*, 19-212; *Seip v. Tilghman*, 23-289; *Stone v. Bird*, post, 488.]

[Mr. Justice BREWER dissents from the second proposition of the syllabus, and corresponding portion of the opinion, pp. 52, 53, 54.]

Error from Douglas District Court.

REPLEVIN for 26 bars of railroad iron, brought by *Shoemaker, Miller & Co.* as plaintiffs, against *Wm. A. Simpson*, and two others. The opinion, *infra*, contains a full statement of the facts and proceedings. Trial by the court, without a jury, at the June Term 1871. Findings and judgment in favor of the defendants, and plaintiffs bring the case here for review.

J. P. Usher, for plaintiffs, submitted, that as the iron was

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not so affixed to defendants' freehold that it could not be removed without injuring the freehold, and as it was not placed upon the premises by plaintiffs, or with their knowledge or consent, and as it had been removed by the defendants before the action was brought, the plaintiffs had not lost their right of property, nor their right to the possession. The whole law upon this subject is laid down in the American notes to the case of *Elwes v. Mawes*, 2 Smith's Leading Cases, 248, which establish the following propositions: 1st.—If a chattel is annexed to the freehold so as to become a part of the realty, it may be severed from the freehold and reinvested with the character of personal property by the act of the owner of the land. 2d.—The intention of the person by whom the annexation is effected is the paramount consideration; and if the intention was not to incorporate the article or structure permanently with the inheritance, but only for a temporary use, without regard to increasing the value of the land upon which the chattel is placed, and it can be removed without injury to the land, it is not a fixture, and may be removed by the owner; and if the removal is resisted he may bring trover or replevin for the article. 3d.—Although a chattel may have become a fixture, nevertheless, if it be afterward severed from the freehold it again becomes a chattel, and may be recovered in replevin by the rightful owner. 4th.—There must not only be an annexation to the freehold, but the thing annexed must be adapted to the purposes of the freehold; and unless both conditions unite, such chattel does not become incident and appurtenant to the real estate. If it is attached merely for a temporary purpose or the more complete enjoyment and use of it as a chattel, then it remains a chattel. *Hellaway v. Eastwood*, 6 Excheq. 295; *Voorhies v. Magennis*, 48 N. Y. 278; *Potter v. Cromwell*, 40 N. Y. 288; *Teaff v. Hewitt*, 1 Ohio St. 511; *Fryatt v. Sullivan*, 5 Hill, 116; 17 Vt. 583; 33 N. H. 66.

2. No demand was necessary, because, first, defendants' possession never was lawful, as they took by the act of a wrongdoer; and secondly, even had they been entitled to a previous demand, they have waived it by setting up title in themselves.

Brief of Defendants.

10 Mich. 357; 3 Hill, 880; 20 Mich. 104; 35 Ill. 417; 21 Ark. 422; 84 Miss. 385; 24 Iowa, 322.

Nelson Cobb, W. W. Nevison, and S. A. Riggs, for defendants:

Chattels annexed to real estate become a part thereof, and the owner of the soil, by virtue of the annexation, becomes the owner of the fixture. "It is a maxim of great antiquity, that whatsoever is fixed to the realty is thereby made a part of the realty to which it adheres, and partakes of all its incidents and properties. By the mere act of annexation, a personal chattel immediately becomes part and parcel of the freehold itself." "Every case in which there is a right of severing a thing from the freehold by virtue of the law of fixtures, is considered as an exception to this general rule." Amos & Ferrard on Fixtures, 9, 10; 6 Pacific Law Reporter, 62; 1 Central Law Journal, No. 11, page 124; 15 Ind. 142; 2 Kent's Com. 362, 363.

2. A railroad is real estate, and rails of iron laid down in the construction of the road are thereby changed to real estate. *Galveston Rld. Co. v. Cowdry*, 11 Wallace, 464, 482; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Strickland v. Parker*, 54 Me. 263.

In Amos & Ferrard on Fixtures, page 13, it is said: "In Brooke's Abr., Tresp., it is laid down, that if a piece of timber that had been illegally taken from J. S. has been hewed, trespass does not lie against J. S. for retaking it; but if a piece of timber, which was illegally taken, have been used in building or repairing, this, although it is known to be the piece which was taken, cannot be retaken, the nature of the timber being changed, *for by annexing it to the freehold it became real property.*" Here there is no intimation that the timber might be removed if it could be done without injury to other parts of the realty. But the doctrine is put squarely on the ground that it is realty. The same authority, on the same page, says: "Other and more recent authorities afford some singular illustrations of the principle under consideration. In Lord Raymond, p. 738, is the

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following case: "*Sparks v. Spicer*, (Mich., 10 Will. III;) Per Holt, C. J. If a man be hung in chains upon my land; after the body is consumed, I shall have gibbet and chain. Said upon a motion for a new trial." These ancient authorities, we believe, have not been judicially controverted. And it is hardly credible that the gibbet and chain above mentioned, was intended as a permanent improvement to the realty on which it was erected. Nor is it credible in any case that a trespasser makes annexations with a view to improve the realty.

8. Nor did the disannexing of the iron by Simpson divest him of title thereto. There is no doctrine known to the law by which the owner loses title to real estate by converting it into personalty. If Simpson owned the iron as a part of the realty, he might use it as he chose without losing his title. Owning of the realty, which he owned in fee, he owned the iron by the same title; and such title implies an absolute right to use and dispose of it at will. 6 Gray, 536.

4. The possession by Simpson of the iron, even if he were not the owner, was in every view innocent, it having been placed upon his land in his possession without his agency. And where the possession of the defendant is innocent, a demand must always precede an action of replevin. Where one has acquired such possession without any unlawful act on his part, and holds it, honestly believing he has a right to hold it, it should be demanded of him before putting him to the cost of an action. And such we think is the great preponderance of authority. *Newman v. Jenne*, 47 Maine, 520; *Barrett v. Warren*, 8 Hill, 348; *White v. Brown*, 5 Lansing, 78.

The opinion of the court was delivered by

VALENTINE, J.: This was an action of replevin brought by Shoemaker, Miller & Co. against Wm. A. Simpson and others, for the recovery of twenty-six bars of railroad iron. The facts, stated briefly, are substantially as follows: Originally Shoemaker, Miller & Co. owned a large lot of railroad iron (including said twenty-six bars) at the state line, near Wyan-

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the case.

dotte. They intended to use said iron in building a railroad, which they had previously agreed to build for the Kansas Pacific Railway Company, (then Union Pacific Railway Company, Eastern Division,) from Junction City, westwardly. They employed said Kansas Pacific Railway Company to transport said iron from the state line westwardly to the place where they expected to use it. At the same time William A. Simpson (one of the defendants) owned certain town lots in the city of Lawrence, on the north side of the Kansas river, and between the said river and the Kansas Pacific Railway. Previously a railroad track had been constructed across said lots from the Kansas Pacific Railway to said river. But at this time, the iron which had originally been put on said track had been removed therefrom, and only the road-bed and cross-ties then remained. About this time the Kansas Pacific Railway Company, or its agents, took said twenty-six bars of iron from the iron of Shoemaker, Miller & Co. at the state line, transported them to Lawrence, and then spiked them down on the said cross-ties on the lots of said William A. Simpson. This was done by the Kansas Pacific Railway Company, or its agents, for the temporary purpose of obtaining some ninety car-loads of sand from the Kansas river, and it was intended to remove said iron as soon as the sand was obtained. This was all done without the knowledge or consent of either Shoemaker, Miller & Co., or said Simpson. The railway company had however taken other iron from Shoemaker, Miller & Co. for which they subsequently settled, but the parties never settled for this particular iron, and Shoemaker, Miller & Co. objected to the railway company taking or using their iron in any such manner. Afterward, said Simpson through his agents removed said twenty-six bars of iron from his said lots, claiming the same to be his own. Shoemaker, Miller & Co. then commenced this action, and replevied said twenty-six bars of iron from said Simpson and his agents, the other defendants. The action was tried in the court below by the court without a jury. The court made separate and special findings of fact and of law. Upon these findings the court rendered judgment for the defendants and against the plaintiffs.

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We think the court below erred. We know of no way by which an innocent person can be permanently and legally deprived of his property against his will, by the wrongs and trespasses of others, so long as it remains within the power of such innocent person to reclaim his property without committing any serious or substantial injury to the person or property of any other person.

1. Personal property: when it does, and when it does not, become part of the realty.

In the present case the plaintiffs committed no wrong; and they never consented that their property should be taken from them, or used in the manner that it was used. The railway company committed the first wrong by taking and using the property of the plaintiffs in the manner they did. They committed a wrong against the plaintiffs by taking their iron without their leave, and also committed a wrong against defendants by putting the iron on defendants' land without defendants' leave. But the defendants committed the second wrong by attempting to profit from the wrongs of the railway company, and by attempting to make the iron of innocent parties their own. And the wrong of the defendants was even greater than that of the railway company. The railway company attempted to deprive the plaintiffs of their property temporarily only. But the defendants attempted to deprive the plaintiffs of their property forever. But the wrongs of the railway company and the defendants, combined, can hardly cause the property of the plaintiffs to become the property of the defendants. The theory upon which the defendants claim that the property of the plaintiffs became their property is as follows: The said iron was spiked down to said cross-ties. It then became a part of the realty; and as the defendants owned the realty they also owned the iron. And they further claim that the subsequent removal of the iron from said cross-ties did not have the effect to change the property back from themselves to the plaintiffs. The whole question in this case therefore depends upon whether said twenty-six bars of iron became a part of the defendants' real estate as between the plaintiffs and the defendants. If it did not become real estate at all, or if it did not become real estate as between the

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plaintiffs and defendants, then the plaintiffs must recover. It being real estate as between the defendants and the railway company, or as between the defendants and every other person in the world except plaintiffs, would not enable the defendants to recover. Now we suppose, that where one person or one corporation owns both the road-bed of a railroad and the iron attached to it, the iron is unquestionably a part of the realty. And where a trespasser, not owning the road-bed, attaches his own iron to the road-bed, the iron immediately becomes a part of the realty, and belongs to the owner of the road-bed. But neither of these cases is the present case. It is sometimes very difficult under the peculiar circumstances of a particular case to determine whether a particular thing is a part of the realty or not. It does not depend upon one fact alone, but generally upon several facts. And among these facts are those of attachment to the soil, the intention of the parties, and those facts which enter in to show where the equities and justice of the case are. Even the nature and extent of the attachment have much weight in determining whether a given thing is a part of the realty or not. Even a trespasser may place his personal property on the soil of another, where no connection exists, without it becoming real estate, or without it becoming the property of the owner of the soil. While on the other hand, the owner of the soil might even steal the personal property of another, and so incorporate it into his real estate that it would become a part thereof, and could never be reclaimed by the owner. And between these two extremes there are infinite degrees and modes of attachment and connection of various things with the soil. Where the connection is slight, property is often considered personal property; whereas, if the connection were close and intimate it would be considered real estate. But the other facts have a controlling influence in determining whether a given thing is a part of the realty or not. A key to the door of a house is a fixture, and a part of the realty, although at the time it may not be at or near the premises to

which it belongs. While on the other hand, annual crops, and a nursery of young trees raised for sale, may not be a part of the realty, but only chattels, although most firmly and intimately attached to the very soil itself. Even dwelling-houses, or indeed anything placed by men upon the soil, if they can be again removed, either in bulk or in pieces, may under some circumstances be only chattels, although they may be ever so firmly attached to the soil. The intention of the parties is one of the strongest elements in determining questions of this kind. This is often exemplified as between landlord and tenant, but it is not confined to them. *Haven v. Emery*, 38 N. H. 66; *Dame v. Dame*, 38 N. H. 429; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Wagner v. C. & T. Rld. Co.*, 22 Ohio St. 563; *Hines v. Ament*, 43 Mo. 298; *Fuller v. Tabor*, 39 Me. 519. And so have equitable considerations a strong influence in determining questions of this kind. In equity, money is often considered as land, and land as money. In Wisconsin it has been held, "that where rails have been placed along the line of an intended fence for the purpose of being laid into the fence, though not actually applied to that use, they pass by a deed of the land, there having been a manifest appropriation to the use of the land." (*Conklin v. Parsons*, 1 Chandler, 240, 244.) While in Missouri it has been held that where a fence was put on another's land, through a mistake of the boundary lines, the fence remained the personal property of the person who put it there. (*Hines v. Ament*, 43 Mo. 298. See also, *Fuller v. Tabor*, 39 Me. 519.) The Wisconsin and Missouri decisions are probably both correct. In the present case the connection between the iron and the real estate to which it was attached is not very close or intimate. The iron may be removed without substantial injury to either the iron or the real estate. And railroad iron, fastened down to the road-bed, as this was, does not necessarily become a part of the real estate. It may remain personal property. (*Hunt v. Bay State Iron Co.*, 97 Mass. 179; *Haven v. Emery*, 38 N. H. 66.) It was never the intention of the plaintiffs that this iron should become a part of the de-

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defendants' real estate. Indeed, no person ever had any such intention except the defendants themselves. The plaintiffs never intended to give this iron to the defendants. They never intended to abandon it to any person who might take possession of it. They never committed any trespass or wrong toward the defendants. And it would be against justice and equity to deprive them of their property. The defendants seem to specially rely upon the case of *Sparks v. Spicer*, 1 Lord Raymond, 788. This case was decided one hundred and seventy-eight years ago. The entire report of the case reads as follows: "SPARKS *vers.* SPICER; Mich.: 10 Will. III; Per Holt, Chief Justice. If a man be hung in chains upon my land; after the body is consumed, I shall have gibbet and chain. Said upon a motion for a new trial." Now the gibbet and chains probably belonged originally to the county, or the public; and it is probable that when a man was hung, the public never intended to reclaim the gibbet and chains, but intended to wholly abandon them to the owner of the land. This may have been so by special statute, or by special custom; and in either case it would prove nothing for the defendants. The report of the case certainly does not pretend to promulgate the doctrine, or even intimate, that the gibbet and chains would become real estate. The report does not show whether the consent of the owner of the land that the man might be hung on his land, should first be obtained, or not; but in any case, the putting of the gibbet and chains on the land would be the voluntary act of the owner of the gibbet and chains, through its agents, the public officers, and therefore such owner should abide by the consequences of its own acts, whatever they might be. A wrongdoer may lose his personal property by voluntarily attaching it to the land of another. A person not a wrongdoer, may, by his own consent, lose his personal property by attaching it or allowing it to be attached to the land of another. A person may even lose his personal property by wholly abandoning it to any person who may pick it up, although it may never be attached to any person's real estate. And an innocent person may some-

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times against his consent lose his personal property by the same being incorporated into the real estate of some other person, so that it cannot be separated without great inconvenience and loss. But we do not think that any innocent person can be deprived of the title to his personal property against his consent by having it attached without his consent to the real estate of another by a third person, where such personal property can be removed without any great inconvenience, and without any substantial injury to the real estate.

There is one other question involved in this case, presented by the defendants for our consideration. The plaintiffs did not make any demand for the property in controversy before they commenced this action; and the defendants now claim

2. When demand
is necessary.

that because of such want of demand the plaintiffs cannot maintain their action. Now, a demand of the property before commencing an action of replevin is necessary only where the possession of the property by the defendant is rightful, or at least not wrongful, and where a demand is required to terminate such rightful possession, or to convert what was previously an innocent possession into a wrongful one. A demand never was necessary in a replevin action where the possession of the property by the defendant was already wrongful without a demand. And all that is necessary to make the possession of the property of another wrongful in law, is, that the possession be without the authority of the owner, and inconsistent with his rights. We think it may be laid down as a rule, that whenever one person obtains the possession of the personal property of another without the consent of the owner, and then without any right which the law will recognize, asserts a claim to the property inconsistent with the owner's right of property and right of possession, the possession of such person will immediately become illegal and wrongful, and no demand for the property will be required to be made by the owner before he commences an action of replevin for the recovery of the same, although the possessor thereof may ever so honestly entertain the belief that his claim to the property is both legal and just. An innocent owner of property is

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not to be subjected to additional inconveniences and burdens, merely because some other person may be innocent and ignorant. The innocence and ignorance of the person in possession of another's property cannot in any manner abridge the rights of the owner thereof. The owner of property who has the present and existing right of possession is not to be postponed on account of the ignorance or innocence of some other person who claims adversely to him. Nor is such owner, if he commences an action of replevin for his property, bound to tender an issue, or to litigate a question, founded merely upon the ignorance or innocence of the party who claims adversely to him. These views we think are sustained by the great weight of authority: *Trudo v. Anderson*, 10 Mich. 357; *Ballou v. O'Brien*, 20 Mich. 304; *Clark v. Lewis*, 35 Ill. 417; *McNeil v. Arnold*, 17 Ark. 155; *McDonald v. Smith*, 21 Ark. 422; *Galvin v. Bacon*, 11 Me. 28; *Newell v. Newell*, 34 Miss. 386; *Smith v. McLean*, 24 Iowa, 322. The last two cases decide that a defendant, by pleading title in himself, waives any right that he might otherwise have to claim that a previous demand should have been made for the property. Of course, replevin could not be maintained against a person who came innocently into the possession of the property, who never claimed any interest in the same, and who never disputed the owner's right thereto. But if sued he should disclaim, and not set up title and right of possession in himself, as the defendant did in this case. With respect to the question of a necessity for a demand, where the defendant has come into the possession of the property with the consent of the owner, and then wrongfully claims the property as his own, we have not expressed any opinion, and shall not do so in this case. In the present case the defendants did not come into the possession of the property with the consent of the owners; and after they got possession of it they claimed it as their own; and after this suit was commenced they set up in their answer an affirmative claim of title and right of possession in themselves; and they obtained a judgment to that effect in the court below. We think no demand was necessary in this case. Or at least we think there was no necessity for

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the plaintiffs, on the trial, to show by evidence that a demand was made for the property by the plaintiffs before the suit was commenced.

The judgment of the court below will be reversed, and cause remanded with the order that the judgment be rendered on the findings of the court below in favor of the plaintiffs, and against the defendants.

KINGMAN, C. J., concurring.

O. P. NICHOLS v. WILLIAM H. OVERACKER, *et al.*

1. JUDGMENT; *When Error to Set Aside.* In an action on a note and mortgage, when a personal judgment has been regularly and properly rendered against the defendant for the amount of the note, and also a judgment that the mortgaged property be sold to satisfy such personal judgment, it is error for the court, at the next term of the court, to set aside such personal judgment, without there being any sufficient reason therefor, although it might be proper under the circumstances of the particular case, to set aside the balance of the judgment for the purpose of allowing another defendant to come in and litigate other questions with respect to the mortgaged property. [*George v. Hatton*, 2-333; *Hill v. Williams*, 6-17; *McLaughlin v. State*, 17-283; *Anderson v. Beebe*, 22-768; *Meizell v. Kirkpatrick*, 25-13.]
2. HOMESTEAD; *Mortgage by Husband alone, for Purchase-Money.* Where a husband and wife are occupying a certain piece of land as their homestead, but without having any title thereto, and N. loans to the husband a certain sum of money with the understanding and agreement that said money should be used in purchasing said land, and that the husband shall then give his note and mortgage on the land to N. for such money, and such money is so used, and the land is purchased therewith, and then the husband executes the note and mortgage as agreed, but the wife does not join in the execution of either, nor does she give her consent thereto, and she has no interest in the land except as the wife of her husband and as an occupant with him of the land: *Held*, That the loaning of the money, the purchasing of the land, and the giving of the note and mortgage, are not separate and independent transactions, but are parts and

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portions of one single and entire transaction; that they were all done in and about the purchase of said land, and to accomplish that purpose; that the obligation to repay the money is an "obligation contracted for the purchase of said premises" within the meaning of §9 of art. 15 of the constitution, and therefore, that there is no homestead-exemption law as against the enforcement of such obligation. [*Pratt v. Topeka Bank*, 12-570; *Ayers v. Probasco*, 14-177; *Andrews v. Alcorn*, 13-351.]

Error from Montgomery District Court.

FORECLOSURE of mortgage, brought by *Nichols* against *Wm. H. Overacker* and *Sarah E. Overacker*. The facts and proceedings in the district court are fully stated in the opinion. Trial and judgment at the August Term 1873. The plaintiff, *Nichols*, brings the case here for review.

Chas. J. Peckham, for plaintiff.

Stillwell & Baylies, for defendants.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by *Nichols* against *William H. Overacker* and *Sarah E. Overacker* on a promissory note and a real-estate mortgage executed by said *William H.*, alone. The petition of the plaintiff undoubtedly stated a good cause of action as against said *William H.*, but it did not state any cause of action as against the other defendant. The petition, besides being an ordinary petition on a note and mortgage as against *William H. Overacker*, also alleged that the consideration for said note and mortgage was money loaned by the plaintiff to said *William H.* for the purpose of enabling him to purchase, and to obtain title to, the land for which said mortgage was given, and that said land was so purchased with said money. But there is no allegation in the petition as against the defendant *Sarah E.* The prayer of the petition was for a personal judgment against said *William H.* for the amount of the note, and for a further judgment against both of the defendants that said land should be sold to satisfy said personal judgment. The defendant *William H.* filed an

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answer to this petition, substantially admitting the plaintiff's cause of action, but also pleading usury. The plaintiff replied to this answer by filing a general denial. The defendant Sarah E. did not at this time file any pleading. Said reply was filed March 28th 1873. The next term of court commenced April 7th 1873. At this term of court, and on May 2d, this case was tried, and judgment was rendered; but all this was done in the absence of both defendants. The judgment was rendered in accordance with the prayer of plaintiff's petition. At the next term of the court, and on August 7th 1873, said judgment was set aside. The plaintiff in error claims that the court below erred in setting aside the personal judgment rendered against William H. Overacker. We think the court did so err. No good reason has been shown why said personal judgment was set aside, and indeed we might also say that no reason of any kind has been given. We think said personal judgment should be restored. For the purposes of this case we shall assume that the balance of the judgment was properly set aside, although there might have been a grave question raised even as to this. Afterward the defendant Sarah E. Overacker filed an answer in the action. She admitted that said William H. executed said note and mortgage, as alleged in the plaintiff's petition. But she alleged that said William H. and herself were husband and wife; that when said note and mortgage were executed, and since, hitherto, her husband and herself occupied said mortgaged property as their homestead, that she never joined in the execution of said note or mortgage, or gave her consent thereto, and she denied everything in the plaintiff's petition which she did not specifically admit, and she then closed her answer with a prayer that said mortgage be declared null and void. The plaintiff replied to this answer, admitting that the defendants were husband and wife, that said land was their homestead, and denied all the other allegations of the answer, and then prayed for a judgment as prayed for in his petition. A trial was had upon these pleadings. The parties submitted the case to the court without a jury. The parties agreed upon the evidence, and submitted it to the court; but

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the court, upon the objections of the defendants, held that that portion of the evidence favorable to the plaintiff was irrelevant, immaterial, and incompetent, and excluded it, to which ruling of the court the plaintiff excepted. From said agreed statement, and the pleadings, it appears that the facts are substantially as follows: On August 29th 1871, the defendants were husband and wife, occupying said land as their homestead. They had no title however to the same. And as the defendant William H. desired to obtain the title, the plaintiff on that day loaned to said William H. \$210, with the understanding and agreement between the parties that said money should be used to purchase said land, and that William H. should then execute said note and mortgage to the plaintiff therefor. The money was so used; the land was purchased with said money, and the note and mortgage were given accordingly. The note and mortgage were given for the sum of \$800, due in one year, with interest at the rate of twelve per cent. per annum. The sum of \$90 was added to the sum of \$210 as interest for the first year, making the whole amount \$890, as expressed in the note and mortgage. All this was done August 29th 1871. The defendant Sarah E. did not have anything to do with these transactions. And she never had any interest in said land except by virtue of being the wife of said William H., and an occupant of the land with him. He was the owner of the land, and held the title thereto after he purchased it with the plaintiff's money. The court below on this second trial rendered a personal judgment in favor of the plaintiff and against the defendant William H. Overacker for the sum of \$210 and costs, but rendered no judgment for a sale of the mortgaged property. On the contrary, the court rendered judgment that said mortgage was void, and that the defendant Sarah E. Overacker recover from the plaintiff her costs.

We think that the judgment of the court below was erroneous. It is true, that a mortgage given by the husband alone on the homestead for any ordinary debt, is void; and no judgment for any ordinary debt can be a lien on the homestead. But we have no law which exempts premises held as a home-

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stead from sale "for the payment of obligations contracted for the purchase of said premises." The constitution expressly says that "No property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon." (Const., art. 15, § 9.) Of course, an obligation for the purchase-money is no more a lien on property held as a homestead than it would be upon the property if it were not held as a homestead, but it may be just as much a lien. The matter simply stated is this: There is no homestead-exemption law as against obligations contracted for the purchase-money. As to such obligations, the rule is just the same as if no exemption-law had ever been adopted. And land held as a homestead is, with respect to such obligations, governed by just the same rules as if it were not a homestead. Now, were said note and mortgage given for the purchase-money? We think they were. The loaning of the money in this case, the purchasing of the land, and the giving of the note and mortgage, were all merely parts or portions of one single and entire transaction. The different parts were not separate and independent transactions in and of themselves. The loaning of the money was not a separate and independent transaction. It was loaned for a particular purpose had in contemplation by both of the parties. It was borrowed and loaned with the intention by both of the parties that it should be used in purchasing said land, and it was so used. The borrowing and loaning of the money was simply a part of one common or general purpose, of which the purchase of the land was another part, and the giving of the note and mortgage still another part. All were parts of a general purpose, of which the main object was the purchase of said land. All were done in and about the purchase of said land, and to accomplish that purpose. And all contributed thereto. Without the money, the land could not have been purchased. Obligations of the kind we are now considering certainly come within the spirit of the provision of the constitution above quoted. The spirit of that provision is, that no man shall enjoy property as a homestead, or an im-

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provement thereon, as against the just claims of the person who procured it for him. This is highly equitable and just. These views we think are sustained by decisions in other states under similar homestead-exemption provisions. *Austin v. Underwood*, 37 Ill. 438; *Magee v. Magee*, 51 Ill. 500; *Allen v. Hawley*, 66 Ill. 168; *Lassen v. Vance*, 8 Cal. 271; *Carr v. Caldwell*, 10 Cal. 380; *Hopper v. Parkinson*, 5 Nevada, 233; *Lane v. Polier*, 46 Georgia, 580; *Hawks v. Hawks*, 46 Georgia, 204. In this state we have no vendor's lien created by mere operation of law. The only lien in this state, that might with any degree of propriety be called a vendor's lien, is a lien reserved to the vendor by the parties at the time of the sale. Hence, a claim for purchase-money stands no higher than any other claim, except that as against it no homestead-exemption can be interposed. As against it, there is no homestead-exemption law.

The personal judgment in this case against William H. Overacker, for the amount of the note and mortgage, and costs, should be restored. This judgment should be declared a lien upon the mortgaged property to the extent of \$210, and interest at the rate of 12 per cent. per annum from the time the money was furnished, and necessary costs of suit, and that the land be sold to satisfy such lien. The defendant William H. did not prove usury at the time the judgment was properly rendered against him, and the defendant Sarah E. did not plead it. We do not wish to be understood as deciding any question in this case except such as are expressly decided.

The judgment of the court below will be reversed, and cause remanded for further proceedings in accordance with this opinion.

All the Justices concurring.

WILLIAM CROWELL, *et al.*, v. IDA WARD.

ACTION ON GUARDIAN'S BOND; *In what Name to be Prosecuted.* A person, after arriving at full age, may maintain an action in his or her own name, against his or her former guardian and the sureties on the guardian's bond, for a breach of the conditions of the bond, although the bond was executed in the name of the state of Kansas as obligee.

Error from Miami District Court.

ACTION by Ward, in her own name as plaintiff, against Crowell and two others, on a bond given by Shively as guardian, and executed by the other defendants as sureties. The defendants demurred to the petition, alleging that plaintiff had no legal capacity to sue on said bond in her own name, and that the action should have been in the name of the state. The district court, at the December Term 1873, overruled the demurrer, and gave judgment for plaintiff. The defendants bring the case here on error.

B. F. Simpson, for plaintiffs in error.

W. R. Wagstaff, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by Ida Ward against W. T. Shively, William Crowell, and A. G. McKinsie, for the breach of the condition of a guardian's bond. Shively was the guardian. Crowell and McKinsie were the sureties on the bond, and Ida Ward was the minor under guardianship. She is now, and was at the commencement of this suit, of full age. The bond was executed in the name of the state of Kansas as obligee. It is now admitted by the parties that the only question involved in the case is, whether Ida Ward can maintain this action in *her own name*, or whether she must prosecute the same in the name of the state. At common law, all actions on penal bonds had to be prosecuted in the name of the obligee. This was not always so in equity, and it is not generally so un-

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der our statutes. In this state the rule is, that actions must be prosecuted in the name of the real party in interest. (Civil Code, § 26.) Every assignee of a chose in action must now sue in his own name. In this state we hear nothing of "John Doe," and "Richard Roe," for in our action of ejectment the real party in interest must sue in his own name. (Code, §§ 595, 26, 11.) In an action of mandamus, or *quo warranto*, an individual person can no longer sue in the name of the state; but he must prosecute his action in his own name. (*The State v. Jefferson Co.*, 11 Kas. 66; Civil Code, § 654; Laws 1871, page 277, § 2; *The State v. Bartlett*, 13 Kas. 102.) Even a married woman may now sue separately, and in her own name. (Gen. Stat. 563, § 3; Civil Code, § 29.) Indeed, she must do so if she is the only party in interest. And for breaches of officers' bonds, executors' bonds, and administrators' bonds, any person injured may sue in his or her own name, although such bonds are executed in the name of the state as obligee. (Gen. Stat. 468, § 183; Civil Code, § 686.) We would therefore expect to find by an examination of the laws that any person injured by a breach of a guardian's bond would have a right to sue therefor in his or her own name. Such a mode of procedure would certainly seem to come within the spirit of the laws of Kansas. The statutes do not define who shall be the obligee of a guardian's bond. They provide that "Guardians appointed to take charge of the property of the minor must give bond, with surety, to be approved by the court, in a penalty double the value of the personal estate, and of the rents and profits of the real estate of the minor, conditioned for the faithful discharge of their duties as such guardian, according to law." (Comp. Laws, 577, § 6; Gen. Stat. 513, § 7.) The bond in this case was executed in the name of the state as obligee. Such a bond we think is valid. But it might also be valid if it were executed in the name of the court, or the minor, or some one else, as obligee. The statute also provides with reference to guardians, that "A failure to comply with any order of the court in relation to the guardianship shall be deemed a breach of the conditions of the guardian's bond, which may accordingly be put in suit by any one

aggrieved thereby, for which purpose the court may appoint another guardian of the minor, if necessary." (Comp. Laws, 578; § 18; Gen. Stat. 515, § 19.) If the minor has become of full age, as in this case, he or she may prosecute the action. But if the minor is still a minor, then "the court may appoint another guardian of the minor" to prosecute the action for him or her. The words, "which may accordingly be put in suit by any one aggrieved thereby," contained in the foregoing statute, must mean, in the light of all the other statutes, that the breach of the condition of the bond may "be put in suit by" and in the name of "any one aggrieved" by reason of such breach. If they do not mean this, and if such aggrieved person must sue in the name of the state, then we should have a strange and anomalous exception to our general mode of procedure. And it would be an exception to our general mode of procedure, not only without any good reason therefor, but against reason. The petition in this case alleges that the guardian failed to comply with an order of the probate court previously made requiring the guardian to pay over to the plaintiff the sum of \$4,231.29, an amount previously found to be due the plaintiff on final settlement. But suppose the plaintiff has no right to sue in her own name in this action: then how can she obtain her rights? There is no provision anywhere to be found in the statutes giving her or any one else any right to use the name of the state in suing on a guardian's bond. Indeed, no private action of any kind can be prosecuted in the name of the state. Actions prosecuted in the district court in the name of the state are prosecuted by the county attorney, and they should be public actions. (Gen. Stat. 284, § 136.) Actions prosecuted in the supreme court in the name of the state are prosecuted by the attorney general. (Gen. Stat. 986, § 64.) And they also should be public actions. Public actions and private actions are intended to be kept separate, in this state. Public actions may be prosecuted in the name of the state, county, or other public corporation. But private actions must be prosecuted in the name of the person beneficially interested therein. We except the actions given by chapter 79 of the laws of 1871. These

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actions are *quasi* public, *quasi* private, and come under no rule. The progressive spirit of the present age is to separate public rights from private rights, public actions from private actions, and to give to every person of full age and sound mind a right to sue and be sued in his or her own name, and to make each person responsible for his or her own acts. It would be a retrograde movement toward the dark ages to require that a private person, for a private wrong, in which the state has no interest, should prosecute his or her action to enforce such right or redress such wrong in the name of the state.

The judgment of the court below is affirmed.

All the Justices concurring.

R. F. G. KSHINKA, *et al.*, v. E. H. CAWKER.

INSTRUCTIONS—*To be Considered, must be made Part of the Record.* Instructions not embodied in a formal bill of exceptions, nor signed by the judge of the court below as provided by statute, nor embodied in a case made for the supreme court as provided by statute, form no part of the record, and will not be considered by the supreme court. [*Gallaher v. Southwood*, 1-143; *McArthur v. Mitchell*, 7-173; *Moore v. Wade*, 8-381; *Scott v. McKinstry*, 27-163.]

Error from Mitchell District Court.

ACTION by Cawker against Kshinka and two others. The petition alleged that plaintiff and defendants had executed their certain joint note for \$300, and interest, which plaintiff had paid; that the amount so paid by him, including interest, was \$387.84; that said sum was the joint debt of plaintiff and defendants, and he claimed to recover from defendants three-fourths of said sum, \$290.88. Answer, general denial, and that defendants were sureties on said note for plaintiff. Trial

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at the March Term 1874. Verdict and judgment for plaintiff, and defendants bring the case here. The errors complained of are stated in the opinion.

R. C. Clark, and Smith & Knight, for plaintiffs in error.

Horace Cooper, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: The plaintiffs in error claim that the court erred in giving the first and second instructions to the jury, and in refusing to give the third instruction asked to be given by the plaintiffs in error, defendants below. The defendant in error claims that no error is shown by the record. Indeed, the defendant in error claims that the greater part of what the plaintiffs in error file in this court as the record of the case, is no part of the record whatever. We think no error is shown, for various reasons. The supposed record does not purport to contain all the instructions given, and hence we cannot consider the one refused. (*Ferguson v. Graves*, 12 Kas. 39.) The first instruction given was not excepted to, and hence we cannot consider it. (*Wyandotte v. Noble*, 8 Kas. 444; *Norton v. Foster*, 12 Kas. 45.) But none of the instructions given or refused are made a part of the record of the case. "Instructions copied into a transcript, without having been made part of the record in the court below, are not part of the record in this court, and cannot be examined." (*McArthur v. Mitchell*, 7 Kas. 173.) Even "entering instructions upon the journal, and noting the exceptions thereto, does not make them a part of the record." (Same case.) "Instructions not embodied in a formal bill of exceptions, nor signed by the judge of the court below, as provided by statute," (code, §§ 276, 303,) nor embodied in a case made for the supreme court, as provided by statute, (code, §§ 546 to 549; Laws of 1871, p. 274,) "form no part of the record, and will not be considered by the supreme court." (*Moore v. Wade*, 8 Kas. 381.) And "a paper found in the record, purporting to be a bill of exceptions, if not signed by the judge, cannot be noticed

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by the supreme court." *Waysman v. Updegraph*, McCahon, 89. See also Gen. Stat. 686, Code, § 303. It is also necessary that a case made for the supreme court should be signed by the judge of the court below. (Code, § 548; Laws of 1871, p. 274.) In the present case the instructions, or a portion of them, are found in the transcript brought to this court, but they are not signed by the judge of the court below, and they are not even embodied in any paper or proceeding signed by the judge of the court below. At what time they were filed in the case, is not shown. A bill of exceptions must be filed during the term, to be of any force or value. Code, § 300; *Gallaher v. Southwood*, 1 Kas. 143.

The judgment of the court below will be affirmed.

All the Justices concurring.

C. HALLOWELL V. W. D. MILNE.

1. **CONDITIONAL SALES; *When Title Remains in Vendor.*** When goods are sold at a fixed price to be paid thereafter, and delivery is made upon the express condition that until the price is paid the title is to remain in the vendor, payment is a condition precedent, and until made the property is not vested in the purchaser; the latter cannot, by a sale to even a *bona fide* purchaser, divest the title of the original owner. [*Sumner v. McFarlan*, 15-600; *Owens v. Hastings et al.*, 18-446; *Hall v. Draper*, 20-137; *Lynds v. Winkler*, 23-697.]
2. ——— Where by express agreement between S., the owner of a wagon, and R. and H., the owner of the wagon sells it, receiving in payment therefor the note of R., with H. as security, and the title of the wagon is to pass to and remain in H. until the payment of the note by R., and the wagon is delivered to and used by R., *held*, that the latter has no title to the property until the payment by him of the note, and that until that time he cannot, by sale to even a *bona fide* purchaser, divest H. of the title.
3. **REPLEVIN; *Several Chattels; General Verdict; Error; Practice.*** Where in an action of replevin for the possession of several separate chattels, tried before a jury, a general verdict is returned and judgment rendered in favor of the plaintiff for the possession of all the chattels, and

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it appears that the district court erred in its instructions as to the validity of the plaintiff's title to one, but committed no other error, this court must set aside the entire verdict and judgment, and remand the case for a new trial, and cannot divide the judgment, and, reversing as to the one chattel concerning which the error was made, sustain it as to the others. [*Holton v. McPike*, 27-286.]

Error from Washington District Court.

REPLEVIN, brought by *Milne*, as plaintiff, and as owner of the property, to recover the possession of a span of mules and a double-wagon. *Hallowell*, defendant, claimed title in himself. Trial at the December Term 1874. The facts, and the instructions complained of, appear in the opinion. Verdict for plaintiff, and the defendant brings the case here on error.

J. W. Rector, for plaintiff in error.

Joseph G. Lowe, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This was an action of replevin for the possession of a wagon and team. The testimony disclosed these facts: One George W. Reedy occupied a farm of plaintiff in error as a tenant, and had in his possession this team and wagon. He took them to Missouri and there sold them to defendant in error. And the question presented was, as to Reedy's title, and right to sell. So far as the team is concerned no point is made by counsel for plaintiff in error, further than that the verdict is against the evidence. But as to the wagon, he claims that an instruction given was erroneous. It appeared that the wagon was bought from one Snyder by Reedy; that in payment therefor Reedy gave his note, with Hallowell as security, and that this note had never been paid by Reedy. There was testimony tending to show that this was the entire extent of the transaction as between these three parties. There was also testimony tending to show that Hallowell declined to sign the note as surety until he was protected, and that by agreement between the three the title in the wagon was to pass to Hallo-

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well and remain in him until the note was paid by Reedy. Upon these facts, at the instance of plaintiff, the court gave this instruction:

"If the jury find that Geo. W. Reedy purchased the wagon in question of T. B. Snyder, and that defendant Hallowell was security for said Reedy to said Snyder for the payment of the purchase-money for said wagon, then they will find for plaintiff; and it can make no difference whether said Hallowell was to own said wagon until the same was paid for or not, provided said Reedy retained possession of said wagon."

It also, at the instance of defendant, gave this instruction:

"If the jury find from the evidence that Reedy bought said wagon, and that Hallowell went on the note as security on condition that Reedy was to deliver the wagon to him to remain Hallowell's property until Reedy paid said note, then said sale was only conditional, and the wagon remained Hallowell's property until Reedy paid said note."

The instruction first quoted plaintiff in error insists was erroneous; and with this we are inclined to agree. By the mere signing the note as surety, of course Hallowell obtained no interest in or title to the property; and whether the note was paid or not, Reedy would have had full power to sell and pass a good title. But something more is involved here. By agreement the title was to pass to Hallowell, (at least that is the assumption in the instruction,) and so remain until the price was paid. The consideration for such agreement was ample, and the power to make it unquestioned. The transaction is the same as though Hallowell had owned the property in the first place, and delivered it to Reedy upon an agreement that the title should pass to him when (and only when) he paid the price therefor. It is no more nor less than a conditional sale. The vital question in all such cases is, the location of the title. Here it was located in Hallowell; and Reedy not having it, could not (Hallowell being guilty of no laches) transfer it to one, even though he were an innocent purchaser. We have had the question of conditional sales recently before us in the case of *Sumner v. McFarlan*, (15 Kas. 600,) and no further comment thereon is needed. See also Benjamin on Sales, Am. ed., § 320, and notes.

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This case having been tried by a jury, and a general verdict rendered, we cannot permit the judgment to stand as to part of the property, and reverse it as to the rest, but must simply remand the case with instructions to grant a new trial.

All the Justices concurring.

PATRICK MUGAN V. TIMOTHY HALEY.

1. PLEADING; *Allegations of "Time."* An omission, in a bill of particulars for work and labor, to state the time at which the work sued for was done, is not a fatal defect, or one sufficient to justify this court in reversing a judgment rendered thereon. [*Bactus v. Clark*, 1-303.]
2. MOTION FOR NEW TRIAL; *Newly-Discovered Evidence; Competency; Materiality; De Minimis.* H. sued M. before a justice of the peace for work and labor, claiming \$39. Judgment was rendered in his favor. Upon appeal by defendant to the district court, and trial there by a jury, they found in his favor for \$23.55. Upon the trial he testified to working at an agreed price of \$1.50 per day. The defendant conceding that such was the first agreement, testified that by a subsequent arrangement plaintiff was to receive but one dollar per day, and that 34½ days' work was under the new arrangement. Upon this plaintiff and defendant were the only witnesses. Upon the plaintiff's testimony he was entitled to a verdict for the full amount of his claim. Upon the defendant's testimony he had overpaid the plaintiff. The verdict was general, so that except for the difference between the amount of the claim, and that of the verdict, there was nothing to show whether the jury believed the testimony of the plaintiff or that of the defendant upon this matter. Defendant made a motion for a new trial, claiming that since the trial he had ascertained that there was a witness by whom he could prove that plaintiff at two different times stated that he was receiving only one dollar a day. He did not disclose how he had found out this witness, nor was there anything tending to show whether or not the situation of the witness and his relation to the matter in controversy were such as to have required the defendant, in the exercise of due diligence, to have made previous inquiry of him as to his knowledge of the facts in the case: *Held*, That in view of the fact that two trials had already been had, each resulting in favor of the plaintiff, that the amount to be affected by the new testimony was small, that it was at least doubtful whether the jury

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did not find the fact to be as it was claimed this testimony would show it to be, and that it was not clear, even if they did not so find, that a subsequent jury would with the new testimony find a different verdict, this court will not reverse the action of the district court refusing a new trial.

Error from Douglas District Court.

ACTION by *Haley*, to recover for work and labor. Trial and judgment for plaintiff at the October Term 1874. *Mugan* brings the case here on error.

A. J. Reid, for plaintiff in error.

David C. Beach, and *J. Jay Buck*, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This was an action for work and labor, brought before a justice of the peace, and taken on appeal to the district court. In both courts judgment was rendered in favor of the plaintiff, defendant in error. Three questions are raised by counsel for plaintiff in error. He insists that the bill of particulars is fatally defective, in that it gives no dates, and specifies no time during which the plaintiff was working for defendant, but simply asks judgment for a certain amount "for work and labor done and performed by plaintiff for defendant, at the special instance and request of defendant, and for which defendant promised to pay." No objection was made to the pleading in the district court. No motion to make it more definite and certain; and no objection to the introduction of evidence under it. And it was decided in the early case of *Backus v. Clark*, 1 Kas. 303, that even in a petition an omission of any allegation of *the time* when the work was done, was not a fatal defect.

A second point made is, that the verdict was contrary to the evidence. Each party was his own principal witness. Each had some slight corroboration. And a verdict either way, upon such conflicting testimony, would be conclusive upon this court. True, the plaintiff appears to have been an

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ignorant man, and to have kept no book account of the number of days' work, or the payments made, while the defendant presented an itemized account showing every day's work, and every payment made; and so his testimony upon the record seems clearer, more definite and precise. But the jury do not seem to have fully credited his statements, and we cannot say that they were bound to believe him, and disbelieve the plaintiff. Perhaps the very particularity of his account may have justly excited suspicion.

But the principal question arises on the overruling of the motion for a new trial. One of the grounds therefor was newly-discovered evidence. Upon the trial plaintiff testified that defendant was to pay him \$1.50 per day for certain work. The defendant, conceding that such was the original agreement, testified that subsequently a new arrangement was made by which the plaintiff was to work for \$1 a day; and according to his account there were $84\frac{1}{2}$ days' work under this new arrangement. This would make a difference of \$17.25. The plaintiff claimed \$39, but the jury only found in his favor \$23.55. Upon this question there was no testimony other than that of the two parties. As newly-discovered evidence defendant claimed that since the trial he had ascertained that one Cassiday would testify that plaintiff had upon two different occasions told him that he was receiving only \$1 a day for his work. He testifies that he did not know of this testimony before the trial. It does not appear how he obtained the knowledge of this testimony, nor whether the situation and relation of the witness to the matters in issue were such that due diligence would have compelled inquiry of the witness as of one likely to know something about the case. But conceding the matter of diligence, it does not seem to us that we are justified in reversing the ruling of the district court refusing a new trial. In the first place, it would seem probable that the jury had given credence to the testimony of defendant upon this very point. For according to the testimony of the plaintiff he was entitled to a verdict for the full amount claimed, and a trifle more. Deducting the \$17.25

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and allowing interest as claimed would make the amount very nearly that of the verdict. As the verdict was general, we cannot of course know that this was the matter upon which the jury found for less than the claim, but it at least seems quite probable from the testimony. The instructions are not preserved in the record, and perhaps they were so strong and direct upon this matter that the court was clear in the belief that this was the very matter upon which the jury found less than the plaintiff's claim. Again, the amount to be affected by this new testimony is small. True, it is more than one-half the amount of the verdict, but the amount in controversy is small. This is a matter which the court may properly take into consideration in determining a question like this. There is no certainty that with this testimony a subsequent jury would find differently. The expense of a new trial, both to the public and the parties, would probably exceed the amount affected by the new testimony. It is for the interests of the public, as well as of the parties, that the litigation cease. We do not decide that this testimony is strictly cumulative, and therefore not of a character to justify the granting of a new trial, but we do hold that in this case, after two trials have been had, where the amount affected by the new testimony is small, and where it is at least uncertain whether the jury did not find the fact to be as it is claimed this testimony would show it to be, and where it is not clear that, even if they did not so find, a subsequent jury would, with the new testimony, find a different verdict, this court will not say that the district court abused its discretion in refusing to grant a new trial.

The judgment will be affirmed.

All the Justices concurring.

JESSE GEORGE V. THE TOWNSHIP OF OXFORD.

MUNICIPAL BONDS, *Issued under Special Act; Requirement of Act Must be Complied with.* Where an act of the legislature was passed March 1st 1872, which took effect March 21st 1872, authorizing a certain township to issue bonds upon condition that a majority of the electors of the township should first vote for their issue at an election to be held for that purpose, and such act provides among other things that "*the time and place of holding said election shall be designated by the said trustee, treasurer and clerk, (or any two of them) by giving at least thirty days' notice by posting written or printed notices thereof in three of the most public places in said township, and the election is held on April 8th, only eighteen days after said act took effect, and the bonds are issued on April 15th, only twenty-five days after the act took effect; and all this is shown on the face of the bonds, held, that both the election and the bonds are void; that sufficient time did not elapse after the act took effect and before the election was held and the bonds issued; and that no person can be an innocent purchaser of said bonds.*"

Original Proceedings in Mandamus.

ON the verified petition of *George*, showing that he was the owner and holder of two bonds (Nos. 11 and 12,) and the coupons thereof, of a series of twenty bonds of \$500 each, issued by *The Township of Oxford*, in Sumner county, April 15th 1872—that the coupons on said bonds which became due and payable October 15th 1874 remained unpaid, and the proper officers of said Oxford township neglected and refused to levy a tax on the taxable property of their said township to pay said coupons, an alternative writ of mandamus was allowed by this court, and issued August 5th 1875, returnable August 28th, commanding the said township, and the proper officers thereof, to proceed at once to levy and collect a tax sufficient to pay in full the amount due said *George* upon said coupons, or to show cause before this court, why they refuse to do so. The following is a copy of one of said bonds:

Statement of the Case.

No. 11.

\$500.

OXFORD TOWNSHIP BRIDGE BOND.

COUNTY OF SUMNER, STATE OF KANSAS.

THE Township of Oxford, in the County of Sumner, and State of Kansas, hereby promises to pay to _____, or bearer, the sum of Five Hundred Dollars on the 15th day of April 1882, with interest thereon at the rate of ten per cent. per annum, payable semi-annually on the 15th day of October and April of each year, upon the presentation of the coupons therefor hereto attached. Both principal and interest payable at the American Exchange National Bank in the city of New York.

This bond is one of an issue of Ten Thousand Dollars made for the purpose of aiding in the building of a bridge across the Arkansas river at the Town of Oxford, in the County of Sumner, and State of Kansas; and in pursuance of an act of the legislature of the State of Kansas, entitled "An act authorizing the Trustee, Treasurer and Clerk, (or any two of them,) of the township of Oxford, county of Sumner, and state of Kansas, to subscribe for stock in the Oxford Bridge Company to the amount of Ten Thousand Dollars to aid in the construction of a bridge across the Arkansas river, at Oxford, in said county and State, and to issue the bonds of said township in payment thereof," approved March 1st, 1872; and in pursuance of a vote of the qualified electors of said township, had at an election held therein on the 8th day of April 1872, which said election resulted in a majority of 112 in favor of issuing said bonds in a total vote of 140. The faith of said township, and the receipts for toll of said bridge, are pledged to the payment of this bond and interest.

In testimony whereof, the Township Trustee, Clerk and Treasurer of said township, have caused this bond to be issued, duly signed, attested, and countersigned, this 15th day of April, 1872.

GEORGE T. WALTON, *Trustee*.

Attest: JOHN H. FOLKS, *Clerk*.

Countersigned—T. E. CLARK, *Treasurer*.

The defendant showed cause, alleging that said bonds were issued without warrant or authority of law; that the act of the legislature referred to in said bond, and alternative writ of mandamus, is repugnant to the constitution, and void; that no notice was given by the trustee, treasurer and clerk of said township, to the electors thereof, of the time, place, and purpose of the election referred to in said bonds; that said bonds were issued within a less period than thirty days from the time when said act took effect; that said bonds were made and issued in payment for a subscription of \$8,300 made by the trustee, treasurer, and clerk of said township to the capital stock of the "Oxford Bridge & Ferry Company;" and that said "Oxford Bridge & Ferry Company" was and is a private corporation, engaged in building and maintaining a toll-bridge, and running a toll-ferry across the Arkansas river, at the town of Oxford. At the hearing of plaintiff's motion for a peremptory mandamus, in October 1875, it was agreed by the parties,

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that the election was held and resulted as recited in the bond, but that there was no record evidence that any notice of said election had been given, and that said "Oxford Bridge & Ferry Company" was and is a private corporation, as alleged in defendant's return.

Thomas George, for plaintiff:

The ultimate object to be attained, as shown by both the title and the body of the act cited in the bonds, (Laws of 1872, p. 320,) is one and the same thing, namely, the construction of a bridge across the Arkansas river at the town of Oxford in Sumner county. The act is not repugnant to § 16 of art. 2 of the constitution. Nor is said act repugnant to § 17 of art. 2 of the constitution. The act is not a "special law," within the meaning of that section; and the legislature is the judge whether the purpose could or could not be better accomplished by a general law. 1 Kas. 178; 11 Kas. 23.

But it is claimed that said act is unconstitutional for the reason that it provides for the levy and collection of taxes in aid of a private purpose. Is it possible, that a bridge built across the Arkansas river, and used by the public at will, is not a public benefit? Undoubtedly the legislature that passed this act considered that the public would be benefited by the construction of said bridge, or it never would have provided for the levy and collection of taxes for the purpose of assisting in its erection. And the result of the vote cast at the election held under and by virtue of said act shows that the people of the township sought to be taxed considered the erection of said bridge a public benefit. To make a tax-law unconstitutional on the ground last mentioned, it must be apparent at first blush that the community taxed can have no possible interest in the purpose to which their money is to be applied. (2 Coler's Law of Municipal Bonds, 312, § 17; 16 Wall. 698.) Bridges are not private affairs. They are public improvements, and it is the right and duty of the state, county or township to advance the interest and promote the welfare of the people by making or causing them to be made at the public expense. But if a state

Brief of Defendant.

declines to make a desirable public improvement, she may permit it to be done by a company; and the fact that it is made by a private corporation does not take away its character as a public work.

The defendant contends that said bonds and coupons were issued without authority of law, for the reason that the provisions of the law under which they were issued, were not complied with, in this, that they did not give notice of the time and place of holding the election provided for by said law. The notice of the time and place of holding said election was not just such a notice as should have been given; yet, after the electors of said township met pursuant to the notice given, and proceeded to hold an election for the purpose mentioned in said act, and a great majority of the votes cast at said election being in favor of said "bridge and bonds," (and that *all* the electors of said township were present and voted at said election is not denied by the defendant,) and the bonds issued in pursuance of said election, and the bonds and coupons negotiated, and into the hands of innocent parties, it is *too late* to object to the irregularity in giving notice of the time and place of holding said election.

J. Wade McDonald, for defendant:

1. The special act of the legislature approved March 1st 1872, and referred to in the alternative writ, and on the face of the bonds, as the foundation for their issue, is unconstitutional, and an attempt to extend the legislative power beyond its rightful limits. The "Oxford Bridge Company" is a private corporation, operated for private gain; and the power of taxation cannot be exercised or used in aid of private purposes. Sedg. on Const. & Stat. Law, 533; Dillon Munic. Corp. § 455; *Citizens' Loan Assoc. v. City of Topeka*, 20 Wall. 655; *National Bank v. City of Iola*, 9 Kas. 689; *Leavenworth Co. v. Miller*, 7 Kas. 479; *Clark v. Des Moines*, 19 Iowa, 199.

Said act is also invalid, because the subject thereof is not stated in the "title." (*Comm'rs of Sedgwick Co. v. Bailey*, 13

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Kas. 600.) The title *permits a subscription*, to the stock of a certain company, and the issue of the bonds of the township in payment for such subscription; while the purview of the act authorizes and *directs* the issue of the bonds of the township to the amount of ten thousand dollars, as a *donation*, for a certain purpose.

Said act is also a special law, and is repugnant to §17 of art. 2 of the constitution.

2. There was not a sufficient compliance with the provisions of said act, (ch. 158, Laws of 1872,) on the part of the trustee, treasurer and clerk of the defendant township, as was necessary in order to vest in them the authority to issue said bonds. Sec. 5 of said act provides, that *before* any bonds should be issued under said ch. 158 the question of issuing bonds should be submitted to the electors of the township at an election to be held for that purpose, and that *thirty days'* notice of such election should be given by a majority of the officers named. This was not done. The act was approved March 1st, to take effect on its publication. It was published March 21st. The election was held April 8th, and the bonds were issued April 15th. There was therefore no power to issue the bonds, and they are void. *Hoppel v. Brown Township*, 13 Ohio St. 311; *Beckel v. Union Township*, 15 Ohio St. 437.

3. The subscription, in payment for which these bonds were issued and delivered, was made to the capital stock of the "Oxford Bridge & Ferry Company;" and this of itself is quite enough to invalidate the bonds. If a subscription was in any event authorized by the statute, it was authorized to be made to the "Oxford Bridge Company"—and to no other company or corporation. The "Oxford Bridge & Ferry Company" is not in law the "Oxford Bridge Company," and hence the subscription was unauthorized, and the bonds issued in payment therefor are void. *Lewis v. Comm'rs of Bourbon Co.*, 12 Kas. 186; *Marsh v. Fulton Co.*, 10 Wall. 676.

4. The plaintiff is not an innocent purchaser without notice. The recitals on the face of the bonds are notice of their invalidity, so plain "that he who runs may read." The recitals

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on the face of the bonds, refer, first, to the act of the legislature, claimed as the foundation for the proceedings, which resulted in their issuance; and next to the date of the election pursuant to the result of which they purport to have been issued, and show also that the bridge, in aid of the construction of which they were issued, was a toll-bridge. Any purchaser of these bonds, or the coupons belonging to them, is undoubtedly chargeable with notice of the full text of the law under which they purport to have been issued; and if such purchaser omits to ascertain whether in fact there ever was such a law, and if so, then whether it was in force and of effect during the pendency of the proceedings resulting in the issuance of the instruments which depend upon it for their validity, he certainly so omits at his peril. 12 Kas. 186. Each and every irregularity in the issue of these bonds appears of record upon the face of the public records of said township and county. No notice of the election was given; the election was held on the *eighteenth* day after said statute was first published, and said bonds issued on the *twenty-fifth* day after said act took effect.

The opinion of the court was delivered by

VALENTINE, J. : Passing over all preliminary and minor questions, the main question presented to us in this case is, whether certain bonds issued by the township of Oxford, in Sumner county, to the "Oxford Bridge & Ferry Company," a private corporation of said township, are valid. Said bonds show upon their face that they were issued on April 15th 1872, "in pursuance of an act of the legislature of the state of Kansas, entitled 'An act authorizing the trustee, treasurer, and clerk (or any two of them) of the township of Oxford, county of Sumner, and state of Kansas, to subscribe for stock in the Oxford Bridge Company to the amount of ten thousand dollars, to aid in the construction of a bridge across the Arkansas river at Oxford in said county and state, and to issue the bonds of said township in payment therefor,' approved March 1st 1872;

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and in pursuance of a vote of the qualified electors of said township had at an election held therein on the 8th day of April 1872." Said act took effect March 21st 1872. (Laws of 1872, pp. 320, 321.) It provides for issuing "the bonds of said township to the amount of ten thousand dollars, for the purpose of aiding in the building and constructing a bridge across the Arkansas river at the town of Oxford in said county and state;" (§1.) But *to whom* the bonds were to be issued, is not designated in the act. And the body of the act does not anywhere provide for subscribing for stock in the "Oxford Bridge & Ferry Company," or in any other company or corporation. The title of the act mentions the "Oxford Bridge Company." Said act also provides that, "Before any of the bonds hereinbefore mentioned shall be issued, the question of issuing said bonds shall be submitted to the legal voters of said township at an election to be held for that purpose, which said election shall be conducted in all respects in conformity with the general election laws of this state. The time and place of holding said election shall be designated by the said trustee, treasurer and clerk (or any two of them) by giving at least thirty days' notice by posting written or printed notices thereof in three of the most public places in said township;" (§5.) Now the election to determine whether the bonds should be issued or not was in fact held on the 8th day of April 1872, only eighteen days after the act authorizing the issue of the bonds took effect; and this is shown upon the face of the bonds. The notices of the election were in fact given only from March 24th 1872 to the day of election, only fifteen days instead of thirty, as the act prescribes; but this is not shown on the face of the bonds. And the bonds were in fact issued on April 15th 1872, only twenty-five days after the act took effect; and this is shown on the face of the bonds. We do not mean that the time when the act took effect is shown on the face of the bonds, but it is shown on the face of the bonds under what act, and under what election, the bonds were issued, and when the election was held, and when the bonds were issued; and every one having anything to do with the bonds is required to know when the act under

which they were issued took effect, and therefore what time elapsed after the act took effect till the election was held and the bonds issued. Now we think the election under which the bonds were issued was void. First, because sufficient time had not elapsed after the act took effect, and before the election was held; second, because sufficient notice of the election had not been given, and could not have been given, after the act took effect and before the election was held. And we think the bonds are void because no sufficient or valid election was held authorizing their issue. The legislature evidently intended that no bonds should be issued unless an election authorizing their issue should first be held. The legislature evidently intended that no such election should be held within less than thirty days after the act should take effect; and the legislature evidently intended that no such election should be held unless "at least thirty days' notice" thereof should first be given. The bonds were, in this case, issued in less than thirty days after the act authorizing their issue took effect. As we have already stated, the bonds do not show upon their face that the township board did not at least thirty days prior to said election call the election and give notice thereof. But even if they had done so, their action in that respect would have been void. Thirty days prior to said election there was no law in force authorizing the township board to call an election for any such purpose, or to give any notice of such an election. There is no room therefore for any innocent or *bona fide* purchaser of the bonds to suppose that the election was legally called, or that the proper notices thereof were legally given. And as this is an election that depends for its validity upon being legally called, and upon legal and proper notice thereof being given for at least thirty days prior to the election, and as these things were not done, the election must be held to be invalid. This is wholly unlike an election where the object of the election and the time and place for holding the same are all fixed by law. There the election is valid, although a notice required by law may not be given. In such a case the electors are presumed to know the law. They are presumed to know what is to be

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of the cause, where he is tried, convicted, and sentenced: *Held*, That the judgment of the district court will not be reversed merely because of such failure to make such order.

9. AGE AND SIZE OF DECEASED; *Evidence; Competency*. When the defendant is charged with the offense of murder in the second degree, and the evidence shows that the defendant killed the deceased with a piece of fence rail, it is error for the state to show among other things that the deceased was a man about sixty years of age and about five feet and six or seven inches high. [*Wise v. State*, 2-419.]
10. INSTRUCTION; *Testimony of Corrupt Witness; Province of Jury*. It is error for a court to instruct the jury that, "If any witness has willfully testified falsely as to any material fact in the case, then the jury should disregard all the testimony of such witness." [*Shellabarger v. Nafus*, 15-547; *Higbee v. McMillan*, 18-133; *A. T. & S. F. R. R. Co. v. Reford*, 18-251; *Garrin v. Jennerson*, 20-373; *Greer v. Higgins*, 20-425. *Contra*, *Campbell v. State*, 3-488; *Hale v. Rawallie*, 8-136; *State v. Horne*, 9-131; *Russell v. State, ex rel.*, 11-322; *Gannon v. Stevens*, 13-461.] Even where a witness has testified willfully, corruptly and falsely to a material fact in a case, still the question as to whether the jury should disregard the whole of his testimony should be left entirely to the jury themselves. But still, where such erroneous instruction was given and not excepted to, the supreme court will not consider the error.
11. INSTRUCTION; *Res Gestæ; Continuous Act; Lapse of Time*. Where evidence was introduced on the trial of Isaac Potter for murder in the second degree, showing that George Potter, at Brack's corner, in the presence and hearing of the defendant said "that he wanted to kill the old man, (meaning the deceased,) that that was his intention," and shortly afterward George and Isaac Potter followed the deceased, each armed with a piece of a fence rail, and Isaac did then and there "kill the old man," *held*, that it was not error for the court to refuse to instruct the jury, "that unless they find from the evidence that in the altercation at Brack's corner George Potter was aided, counseled or abetted by Isaac Potter in what he did, they cannot take said altercation at Brack's corner, or any acts, words or conduct of George Potter into consideration in determining the guilt or innocence of defendant."
12. ——— *Questions of Fact; Province of Jury*. Where there is sufficient evidence introduced to prove that the defendant, who is charged with murder in the second degree, is guilty as charged, although some of this evidence is contradicted by other evidence, it is not error for the court to refuse to instruct the jury that, "under the evidence in this case they cannot convict the defendant of murder in the second degree." It is the province of the jury to weigh the contradictory and conflicting evidence.
13. VERDICTS—*May be Corrected in Criminal Cases*. Where a jury, in a case of murder in the second degree, return a verdict as follows—"We, the jury

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find the defendant guilty as charged," it is not error for the court, after being informed by the jury that they intended to find the defendant guilty of murder in the second degree, to allow the verdict, with the consent of the jury, to be amended so as to read as follows—"We, the jury, find the defendant guilty of murder in the second degree, as charged in the information."

Appeal from Leavenworth District Court.

INFORMATION for murder in the second degree, filed originally in the district court of Atchison county, where a trial and conviction were had. The defendant appealed to this court, when such conviction was reversed and a new trial ordered. (*The State v. Isaac Potter*, 18 Kas. 414.) After such reversal a change of venue was taken from Atchison county to Leavenworth county. The proceedings subsequent to the order changing the place of trial, and the errors complained of on this appeal, are fully stated in the opinion, *infra*. Another case growing out of the same homicide also came to this court on appeal from Atchison district court, and was heard and decided here at the last term. (*The State v. George Potter*, 15 Kas. 302.) Full statements of the facts will be found in the reports referred to—18 Kas. 414, and 15 Kas. 302. The present conviction was had at the May Term 1875 of the Leavenworth district court, and the defendant brings the case here on appeal.

Horton & Waggener, and *C. F. Cochran*, for appellant:

At the June Term 1874 of the district court of Atchison county an information was filed against Isaac Potter, George Potter, and Walter Boyle, charging them with murder in the second degree, in the killing of Jacob B. Keeley. A separate trial was had, and Isaac Potter convicted of murder in the second degree, and sentenced to imprisonment for the period of ten years, from which judgment and sentence he appealed to this court. The court here reversed said judgment, and granted a new trial. At the November Term 1874 a change of venue was ordered by the district court of Atchison county

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in a case of "The State vs. Isaac Potter," on an information for *manslaughter*, to the criminal court of Leavenworth county. At the May Term of the district court of Leavenworth county, (the criminal court of said county having been abolished,) Isaac Potter was tried on a copy of the information certified from Atchison county, and convicted of murder in the second degree, and sentenced to the penitentiary for ten years, from which judgment and sentence he now appeals to this court.

1. The court erred in not sustaining the challenge of defendant to the entire array of jurors, as the same was not a "jury of the county or district in which the offense was alleged to have been committed." Const., Bill of Rights, § 10; *Wheeler v. The State*, 24 Wis. 52; *Osborn v. The State*, 24 Ark. 629; *State v. Denton*, 6 Coldw. (Tenn.) 539.

2. It was improper for the court to admit evidence as to the age, size and strength of the deceased. This was not necessary to prove any ingredient of the alleged crime. It could serve no purpose but to prejudice the minds of the jury against defendant. The state could with as much reason introduce evidence as to the good character of the deceased, as to introduce evidence of the deceased's want of ability to make, or to resist, an assault, before defendant's defense had been disclosed. The reasons for such rules are obvious. "Such testimony tends to distract the minds of the jury from the principal question, and should only be admitted when absolutely essential to the discovery of the truth." *The State v. Potter*, 13 Kas. 424.

3. The court erred in its charge, that the jury should disregard *all* of the evidence of any witness who had willfully testified *falsely*. *Shellabarger v. Nafus*, 15 Kas. 547.

4. The court erred in refusing to give instruction No. 23, asked for by defendant. It will be seen by an examination of the testimony, (all of which is preserved in the transcript,) that all of the witnesses agree, that in the altercation at Brack's corner, between George Potter and the deceased, (which was the inception of the difficulty that terminated so unfortunately,) that Isaac Potter, the defendant here, in no manner counseled,

aided or abetted George Potter in what he did. To say the least, there is evidence tending to show that Isaac Potter took no part in that disturbance. On what hypothesis the court refused this instruction we are unable to see. That the defendant was prejudiced by such refusal of the court, there can be no question, for if Isaac Potter was bound by the acts and conduct of another, in which he took no part in any manner whatever, it was useless for him to make any defense.

We also insist that the court erred in refusing to give instruction No. 25, asked for by defendant. We insist that there is an entire absence of testimony tending to show the defendant guilty of murder in the second degree; and while we do not desire to reflect upon the jurors before whom he was tried, we feel perfectly justified in claiming to this court that defendant was so convicted through prejudice, and not from the testimony.

5. The motion for a new trial should have been sustained for the errors of law hereinbefore pointed out, and because the verdict is not sustained by sufficient evidence.

6. The court erred in overruling the motion in arrest of judgment. The district court of Leavenworth county had no jurisdiction of said case. The pretended order for a change of venue from the district court of Atchison county was made in a case with the following title, viz.: "The State of Kansas v. Isaac Potter.—Information for *Manslaughter*." There is no pretense that the transcript discloses any order for a change of venue in any case against Isaac Potter for *murder in the second degree*. The words "Information for Manslaughter," are used to designate *the case transferred*, and form a part of the order and record; yet the court assumed to put defendant upon trial for murder in the second degree, over the objections of defendant. It may be claimed that this was a clerical mistake, or error. Is there anything in the record upon which to base such a claim? Clearly not. Is there anything in the record here presented that justifies this court or the court below in saying that there was only one case pending in the district court of Atchison county against Isaac Potter, and that that was an information for murder in the second degree? Does

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the record disclose any order for a change of venue from the district court of Atchison in a case against Isaac Potter on an information for "murder in the second degree?" If the record does not disclose this jurisdictional fact affirmatively, has the court a legal right to assume it?

Did the district court of Leavenworth county, from this state of the record, have jurisdiction to try defendant for murder in the second degree? What is jurisdiction? "The power to hear and determine a cause is jurisdiction." 6 Peters, 691, 709. "To have jurisdiction in a criminal case, is to have power to inquire into the facts, to apply the law, and to declare the punishment in a regular course of judicial proceeding." 3 Metcalf, 460, 462. If a change of venue was granted in a case of "The State vs. Isaac Potter, in an information for Grand Larceny," would the court to which a change of venue was granted have authority to place him upon trial for murder, simply from the fact that other papers filed in the case showed that he had been charged with murder? The only way the district court of Leavenworth county can acquire jurisdiction of a criminal case on a change of venue from another district is from the order granting such change, exclusively and alone. The record must show jurisdiction affirmatively. Nothing can be taken by intendment.

7. The statute authorizing a change of venue was not complied with. See §§ 173 to 179, criminal code. The pretended order granting a change of venue, is assumed to have been made upon the affidavit of B. P. Waggener; but we submit that said affidavit did not authorize the judge of the court to enter the order that was entered. A defendant in a criminal case may have it removed to another county in the same judicial district, whenever it shall appear that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against him that a fair trial cannot be had therein; (Crim. Code, § 171;) but cannot have the cause removed to another district, unless the inhabitants of the *entire district* are so prejudiced that he cannot have a fair trial in the district; (Crim. Code, § 175.) The application, if made by

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defendant, must be by petition, setting forth the facts upon which the application is made, which must be made to appear by affidavits to the satisfaction of the court; (Crim. Code, §177.) In this case nothing of this kind was done or attempted. The court, as shown by the affidavit, stated the case would be transferred to Leavenworth county, but no order of that kind was entered. On the 27th of January 1875, said affidavit was filed, upon which the judge on that date entered the order *nunc pro tunc*. The record shows that the order was entered December 12th 1874, but the order itself shows it was made upon an affidavit that was not made until January 28th 1875. Upon this statement of facts as shown by the record, we claim, that the court had no authority under the sections above referred to, on its own motion, on account of prejudice existing against defendant which would prevent his having a fair trial in Atchison county, to remove said case to Leavenworth county in the First Judicial District. We also claim, that the order granting a change of venue is an absolute nullity, and conferred no jurisdiction upon the district court of Leavenworth county. That the requirements of a statute authorizing a transfer of a case from one court to another must be strictly observed, and everything necessary to pass jurisdiction thereunto must appear in the record. (*Sweepson v. Cole*, 18 Fla. 335.) We further claim, that, if we concede for the sake of argument, that the court in ordering a change of venue complied with the statute authorizing such a change, we contend that the statute is in conflict with §10 of the Bill of Rights, wherein it is provided that in all prosecutions the accused is entitled to a "trial by an impartial jury of the county or district in which the offense is alleged to have been committed." The only authority the court or judge has to order a change of venue on his own motion is derived from §§178, 179 of the crim. code. And the wisdom of the section of the constitution above referred to is forcibly illustrated in the case at bar. The defendant made no application to remove his trial beyond the Second Judicial District, and the record fails to

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show that the judge of that district was in any manner disqualified; yet of his own motion, as stated in his order, he removes the trial to another district on account of the bias and prejudice of the inhabitants of the county of Atchison. *Wheeler v. The State*, 24 Wis. 52; *Osborn v. The State*, 24 Ark. 629.

8. But it may be claimed that the record does not show that defendant objected to such order being made, and has by reason thereof, waived his right to object after the order is made. It will be observed that the record does not show that the defendant was present when the order was made. We claim that the defendant must be present in court whenever any proceedings or acts are had or done, and this must appear affirmatively. An order of this kind cannot be made in the absence of the accused. *Ex parte Bryan*, 44 Ala. 402; 46 Ala. 227; *Dougherty v. Commonwealth*, 69 Penn. St. 290; *State v. Bray*, 67 N. C. 283; *Stewart v. State*, 7 Coldw. (Tenn.) 338; *Mauere v. The People*, 43 N. Y. 1.

The case of *Wheeler v. The State*, 24 Wis. 54, is certainly conclusive on the question of waiver. The second change of venue was granted on the application of the defendant herself, and the court says that "the prisoner, whose appearance was compulsory, cannot be held to have waived her rights by any steps taken by her after the removal for the purpose of defending herself as far as she might be able." We contend that a defendant in a criminal case cannot waive any of his legal and constitutional rights. 18 N. Y. 135; 8 Ohio St. 640.

9. The record shows that the defendant was in prison in Atchison county, and has never been released therefrom since his arrest; and at the time the order for a change of venue was made, he was in actual custody and confinement. The court, in the order, directs the clerk to "forthwith prepare a full transcript of this cause and forward the same to the clerk of the criminal court of Leavenworth county," but in no manner makes any order in compliance with § 186 of crim. code. The record presents the strange anomaly of the defendant being confined in jail in Atchison county on a charge of murder in

the second degree (from which the record fails to show that he has been removed,) and being on trial, and personally present, in Leavenworth county, at the same time, on a change of venue on an information for manslaughter. This state of facts can only be reconciled upon the theory that the defendant is possessed of that attribute of ubiquity peculiar only to omnipotence; yet upon such a record, defendant has been convicted of murder in the second degree, and is now in the penitentiary.

10. The court erred in receiving the verdict in the manner it did, over the objections of defendant.

Aaron S. Everest, for The State:

1. The challenge made by the defendant to the *array* of the jury, was indefinite, and in no manner pointed out the objections thereto. The reasons assigned, "That the same did not constitute a constitutional jury, and were not a jury of the county or district where the offense is alleged to have been committed," would not in any manner convey even an impression to the court below that any irregularity existed in the transfer of said case. The records show that no such objection was made or pointed out to the court below, nor its attention called to any such question. We do not think that kind of practice will admit of the appellant now assigning as error what was never presented to or passed upon by the court below. We do not understand that the statute provides for any such ground of challenge; and if we resort to the practice at common law, we find that it recognized two principal grounds of challenge to a jury, one being to the *array*, by which it means the whole jury as it stands arrayed in the panel; and this challenge, as recognized by the practice in this country, was based on the partiality or default of the sheriff, coroner, or other officer that made the return, or summoned the jury, and such challenge was required to be made in writing. We do not believe that this court will adopt the action of the defendant in seeking to question the regularity of the transfer by a challenge to the *array* of the jury, as correct practice, founded upon pre-

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edent, or justice to a court who is to pass upon a question thus presented. We do not understand that our code in any manner recognizes the practice of a challenge to the array of the jury. If so, certainly not for the reasons assigned, or in the manner in which it was sought to be done by the defendant in the court below.

2. There was no error in permitting the question to be asked as to the apparent age of the deceased. Nor did the answer of the witness prejudice any substantial right of the defendant. The testimony elicited merely went to the identification of the deceased, and we do not think that the minds of the jury were in any manner, by reason thereof, diverted from the principal question in the case. Such questions and testimony cannot possibly have the remotest connection with any matters connected with the character of the deceased, or with the principles enunciated by this court in the case of *The State v. Potter*, 13 Kas. 424.

3. No error was committed in refusing to give instruction No. 28, asked for by defendant, when taken in connection with the entire charge and instructions given in the case. And we also claim that upon a full examination of the charge of the court, and the instructions given to the jury, that no error was committed in refusing to give instruction No. 25, asked for by defendant.

4. Neither do we think this court is called upon by any principle of law to examine the volume of evidence to ascertain, (in a case of conflicting testimony, and especially when, as in the case at bar, the defendant himself admits, in open court, upon the trial of the action, that Jacob B. Keeley died from the effects of the fatal blow inflicted by defendant,) whether, if this court had been jurors upon the trial, they might have arrived at a different verdict. That the defendant killed Keeley on the 24th of June 1874, may be taken as established; and that such killing was shown from the facts and circumstances to constitute murder in the second degree, is no longer a subject of discussion.

5. There was no error in overruling the motion in arrest of judgment. This court having decided that the information charged the defendant with murder in the second degree, we suppose from the fact that in the order for change of venue an indorsement was made by some person of the words "Information for manslaughter," it cannot be said to be any error affecting the substantial rights of the accused. The prisoner was tried upon that information, and this court will not presume error, or that any other information than the one disclosed in the record had ever been filed against the defendant. The papers transmitted upon the change of venue clearly indicated the offense with which the accused stood charged.

6. We think that the spirit of the statute authorizing a change of venue, when viewed in the light of the attending circumstances disclosed by the record, was complied with. The record shows that it was made upon the application of defendant's counsel, and it was on their application that a change of venue was granted, and for the further reason that it was within the personal knowledge of the court that the defendant could not have a fair trial in the county of Atchison. . It was perfectly proper for the court to have the order for change of venue entered *nunc pro tunc*. 4 Ala. 231.

7. In the absence of any affirmative showing to the contrary, it will be presumed that the defendant was present during the proceedings complained of. 17 Iowa, 18; 2 G. Greene, 270; 14 Mich. 300; 19 N. Y. 549; 23 Ind. 24. But in any event, we claim that the defendant was bound by the acts of his counsel. *People v. Rathburn*, 21 Wend. 509; *The State v. Montgomery*, 2 Kas. 263. The presumption is that the court did its duty. But we do not understand that it is absolutely necessary for the defendant to have been personally present: 19 Iowa, 447; 17 Cal. 389. But can the defendant, after conviction, under our criminal procedure, raise the question (for the first time) as to the legality of the transfer by a motion in arrest of judgment? Motion in arrest of judgment in criminal cases is now governed wholly by statute, and embraces only the two points therein enumerated. *Dillon v. State*,

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9 Ind. 408; *Guy v. State*, 1 Kas. 448, 452, 453; *Montgomery v. State*, 3 Kas. 263, 274, 275.

8. As to the point of the competency of the defendant to waive compliance with the statutory provisions for a change of venue, we suppose it is too late to question at this day that a defendant may waive a statutory right in a criminal proceeding. And we understand that this court has decided that the defendant in a criminal case may, by his conduct, waive the right of arraignment and plea, especially in cases where it appears that the defendant was present in person and by counsel, announced himself ready for trial upon information, and submitted the question of his guilt to the determination of the jury: *The State v. Cassidy*, 12 Kas. 550; *The State v. Lewis*, 10 Kas. 157; *Hensche v. State*, 16 Mich. 46; 30 Ind. 266; 18 Ind. 389.

9. If we should admit for the purpose of this argument, that technically construed, the grounds upon which said change of venue was granted, did not, under the provisions of the statute, provide for such change to be made to the district court of a county outside and not within the judicial district of the court granting such change, still we contend that, as the change was procured by the defendant, at his request, and for his own benefit, and to a court having competent jurisdiction of that species of offenses of which the defendant was charged, it is not such irregularity as can be taken advantage of by the appellant for the first time after trial and verdict. We understand the principle of law well settled, that a prisoner cannot complain of proceedings beneficial to him, and in compliance to his request. *Nash v. State*, 2 G. Greene (Ia.) 286. And we understand the law to be that an irregularity in a proceeding in a criminal case would be waived by failing to object, and submitting to a trial and verdict. *Harriman v. State*, 2 G. Greene, 270.

The appellant, now, after waiting and taking the chances of an acquittal or conviction, asks the court to repudiate what has been done at his own request and for his benefit. Such a

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practice is not to be commended, and it cannot be supposed that an experiment of this kind will be successful, unless this court should deem itself bound by some controlling and absolute rule of law, for, after taking the chances for a successful issue, the defendant should not be permitted to repudiate the proceedings, and avail himself of the chances of a more favorable result hereafter. The real question, we apprehend, for this court to decide is, does the record disclose any errors, defects, or exceptions, which affect the substantial rights of the accused? If not, this court will give judgment without regard to any technical errors, defects, or exceptions appearing in the record. *Crim. Code*, § 293; *Laurent v. The State*, 1 Kas. 413; *Morton v. The State*, 1 Kas. 468; *Miller v. The State*, 2 Kas. 174.

The opinion of the court was delivered by

VALENTINE, J.: This was a criminal action for murder in the second degree. The prosecution was instituted in Atchison county, and was removed therefrom on a change of venue to Leavenworth county, where the defendant was tried, convicted and sentenced to ten years' imprisonment in the penitentiary. The defendant now appeals to this court. This is the second time that this case has been in this court. (*The State v. Potter*, 13 Kas. 414.)

The first supposed error complained of by the defendant is the removal of the cause from Atchison county to Leavenworth county. The record upon this subject shows among other things the following proceedings had in the district court of Atchison county, to wit:

"Upon application of the defendant, by his counsel Horton, Waggener, and Cochran in open court, it was ordered by said court, that the defendant, Isaac Potter, be granted a change of venue for his trial herein to the criminal court of Leavenworth county, it being within the knowledge of this court that prejudice against him exists which would prevent his having a fair trial, in said county of Atchison; there also

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having been two trials of this same offense, convictions in both cases. The application for removal having been made by defendant in open court, thereupon the court on its own motion, and for the reason aforesaid, and within his knowledge, does grant the change of venue in said case; and the clerk will forthwith prepare a full transcript of the case and forward the same to the clerk of the criminal court of Leavenworth county."

It will be seen from the foregoing that the defendant did not only fail to make any objection to the change of venue, but that the change was actually made upon his application, and at his request. After said change of venue was granted the district court of Leavenworth county became the successor of the criminal court of Leavenworth county: (Laws of 1875, page 125;) and this cause was then taken by statute to said district court. The case was there regularly called for trial, the defendant and his counsel being present. The defendant did not then raise any question as to the jurisdiction of the court, but on the contrary moved for a continuance of the case until the next term of the court, and filed affidavits in support of his motion. The state then agreed that the affidavits should be read in evidence, on the trial, as the depositions of the alleged absent witnesses; and the case was not continued. A jury was then impaneled. The defendant then "challenged the array of jurors, and each and every one of them, for the reason that the same did not constitute a constitutional jury, and were not a jury of the county or district where the said offense was alleged to have been committed." But again the defendant failed to raise any question as to the jurisdiction of the court. The state then introduced its testimony. The defendant objected to the same, and to different parts thereof, for various reasons, among which was the following: "that the said court had no jurisdiction of the person of the said defendant, or the subject-matter of said case." This was the first time that the question of jurisdiction was raised. "But [even then] no objection was made or pointed out to said court as to any irregularity in the transfer of said case from the said

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1. Change of
venue in crim-
inal cases.

county of Atchison to this [Leavenworth district] court; nor was the attention of said court called to any irregularities therein at said time," or at any other time, before the verdict was rendered, or even before a motion for a new trial was overruled. The first time that any question as to any irregularity was raised in taking said change of venue was by the defendant on a motion in arrest of judgment. It would seem that the defendant chose to experiment upon the chances for an acquittal, and if convicted then to experiment upon the chances for a new trial, before calling the attention of the court below to any irregularity in taking the change of venue. Now, if the taking of the change of venue were wholly void, then the defendant would have been safe in making such experiments; for if the taking of said change of venue had been void, then the district court of Leavenworth county would not have obtained any jurisdiction thereby to

2. Jurisdic-
tion.

try the cause; and if the district court did not obtain any jurisdiction of the cause, then the defendant could have raised the question of jurisdiction at any time in that court, or he could even have waited and then raise the question for the first time in this court. But if the taking of said change of venue were not wholly void, but merely irregular or voidable, then it would have been necessary for the defendant to raise any question as to the irregularity in taking the change at the earliest convenient opportunity. Now we do not think that the taking of said change of venue was wholly void, although it must be confessed that it was very irregular. But the irregularity was against the state, and not against the defendant. The order changing the venue should have been set aside on the motion of the state, if the state had asked for the same to be done. It might possibly have been set aside on the motion of the defendant, if he had asked that it should be done at any time before he made his motion for a continuance, or possibly at any time before the trial of the case was actually commenced. But it would have been beyond all reason for the court to have set aside the order granting the change after a trial had been completed, and the defendant

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found guilty. Even a defendant in a criminal case cannot trifle with the court in that manner. He cannot procure a change of venue irregularly, and then, when he is convicted, have the conviction set aside because of the irregularity. Or at least, he cannot have this done unless the order granting the change of venue is so entirely irregular as to be wholly void. In a case like the one we are now considering, the proceedings of the court granting the change should be construed liberally, so as not to hold the granting of the change void. That the district court of Atchison county had the power, on a proper application, and proper showing, to change the venue to Leavenworth county, there can be no question. The district court can change the venue in a criminal case on the application of the defendant in either of the following cases: "*First*, Where the judge of the court in which the cause is pending is near of kin to the defendant by blood or marriage. *Second*, Where the offense charged is alleged to have been committed against the person or property of such judge, or some person near of kin to him. *Third*, Where the judge is in anywise interested or prejudiced, or shall have been of counsel in the cause." (Criminal Code, § 173.) *Fourth*, "Whenever it shall appear, * * * that the inhabitants of the entire district are so prejudiced against the defendant that a fair trial cannot be had therein." (Criminal Code, § 175.) And, "Whenever it shall be within the knowledge of a court or judge that facts exist which would entitle a defendant to the removal of any criminal cause, on his application, such judge or court may make an order for such removal, without any [formal] application by the party for that purpose." (Criminal Code, § 178.) In the present case the defendant made the application for the removal, but it was informal, and even insufficient under the statutes. It was informal, because not in writing: (Criminal Code, § 177;) and it was insufficient, because the facts upon which it was founded did not entitle the defendant to have the cause removed to another district. (Criminal Code, §§ 174, 175.) Atchison county is in the second judicial district, and Leavenworth county is in the first.

⁴ Change from one district to another.

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The district court of Atchison county therefore erred in granting the defendant's application. But the error was against the state, and not against the defendant. The error was in his favor. And therefore he has no right to complain. But while the order granting the change was erroneous, it was not void. It was upon a subject over which the court had complete jurisdiction, and although erroneous is nevertheless valid until set aside or reversed by competent authority. The state has never asked to have it set aside or reversed; and the defendant cannot legally ask to have it so done, as the order was made on his application.

The defendant seems to claim that he could not waive his constitutional right to be tried "by an impartial jury of the county or district in which the offense is alleged to have been committed." This is a mistake. This right is merely a personal privilege, bestowed upon the accused, which he can waive or insist upon at his option. The constitution provides that, "In all prosecutions, the accused shall be allowed to * * * have * * * a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." (Const., Bill of Rights, § 10.) But the constitution nowhere provides that the accused shall in all cases, and under all circumstances, be tried by such a jury, and be tried in the county or district in which the offense is alleged to have been committed; nor does it anywhere provide that the accused shall not have the power to waive his said right or privilege. Said provision of the constitution does not pretend to confer power upon any tribunal, person, or body of persons. It is really only a limitation of the power elsewhere conferred by the constitution upon the government of the state to punish crime in the manner thought best by the law-making power of the state. The right to try, to convict, and to punish persons accused of crime, is conferred by other provisions of the constitution. And except for this provision, a law might be passed to try a defendant in a criminal action, even against his will, before any jury, and in any

a. Right of trial
by jury of
county or dis-
trict; waiver.

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part of the state. But with this provision, a defendant in a criminal action can be tried by any other jury, and out of the county and district where the offense is alleged to have been committed, only with his consent. It is too late now to suppose that any person of full age and sound mind cannot waive a merely personal right, or personal privilege, although such person may be a defendant in a criminal action, and although such right or privilege may be conferred upon him by the constitution. Of course, there are many rights conferred upon individuals from considerations of public policy which are not merely personal privileges, and which cannot be waived. But they are such rights as public policy requires to be exercised, and from the waiver of which the best interests of the public would be likely to suffer. They are conferred upon individuals for the benefit of the public, and not merely for the benefit of the individual. But such rights may be conferred by statute as well as by the constitution. We do not suppose that any one will claim that any question of public policy can enter in so as to affect the question we are now considering.

It is also claimed by the defendant, that whenever a court grants a change of venue in a criminal case the defendant must be present in the court in person; and that in the present case the defendant was not present in the court in person when said change of venue was granted. Now, it may certainly be questioned whether it is necessary for a defendant to be personally present in such a case. But even if it were necessary, we would presume in favor of the regularity and validity of the proceedings of the court below, where there is nothing to show the contrary, that the defendant was personally present in the court when said change of venue was granted. The language of the order itself, liberally interpreted, would lead to such a conclusion.

The defendant also claims that the order granting the change of venue is void, because at the head of the order, where it is entitled, it reads "Information for manslaughter," instead of "Information for murder in the second degree." There can be no question that the order was made

6. Presence of accused, at hearing of motion.

7. Mistake in title of motion.

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in this case, and the mere clerical mistake of the clerk in writing "manslaughter," instead of "murder in the second degree," cannot invalidate the order.

The defendant also seems to make a point upon the ground that the district court of Atchison county did not make any order, in accordance with § 186 of the criminal code, for the removal of the defendant to the jail of Leavenworth county. Now, as the defendant was personally present at the trial of his case in Leavenworth county, and has not shown that any inconvenience was caused by a want of said order, or that he ever asked for or desired any such order, we think that no substantial right of his was prejudicially affected by a want of such order. We suppose the failure to make the order was wholly immaterial.

The defendant claims that, "It was improper for the court to admit evidence as to the age, size, and strength of the deceased," and refers us to pages 25, 27 and 37 of the record. The only evidence found there, objected to, is evidence showing that the deceased was a man about sixty years of age, and about five feet and six or seven inches high. We see nothing very improper in this.

The defendant also claims that the court erred in instructing the jury that, "If any witness has willfully testified falsely as to any material fact in the case, then the jury *should* disregard all the testimony of such witness." This instruction was erroneous. (*Shellabarger v. Nafus*, 15 Kas. 547.) Even where a witness has testified willfully corruptly and falsely, to a material fact in a case, still the question as to whether the jury should disregard the whole of his testimony should be left entirely with the jury themselves. But the defendant did not object or except to the giving of said instruction; and hence he waived any error that may have been committed by the court in giving it. It may have been given for his benefit.

The defendant also claims that the court erred in refusing to give the 28d instruction asked for by the defendant, which instruction reads as follows:

"The jury are instructed that, unless they find from the evi-

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dence that in the altercation at Brack's corner George Potter was aided, counseled, or abetted by Isaac Potter in what he did, they cannot take said altercation at Brack's corner, or any acts, words, or conduct of George Potter into consideration in determining the guilt or innocence of defendant."

This instruction would have been very misleading and erroneous if given to the jury. The defendant Isaac Potter, and George Potter and Walter Boyle, were in one wagon, and the deceased, Jacob B. Keeley, and John Keeley, a son of the deceased, and Michael Brannon, were in another wagon. All were traveling in the same direction, Keeley's wagon behind. Keeley's wagon overtook Potter's wagon, and passed it. Afterward, Potter's wagon came up to Keeley's wagon at said Brack's corner. Here George Potter jumped out of Potter's wagon, picked up a stone about the size of two fists, threw it at Keeley's wagon, and hit the boy on the back of the head. Brannon testifies that then "George said he was very sorry he had hit the little boy; that he would not have hit him for ten thousand dollars; *that he wanted to kill the old man; that was his intention.*" Mr. Keeley, the deceased, was the only "old man" belonging to either party. Now, Isaac Potter was present, and unquestionably saw and heard all that was done and said at Brack's corner. Shortly afterward the Keeley party passed on. Afterward the Potter party followed and overtook them in Allbright's lane. Just before overtaking them however, each of the Potters (Isaac and George,) and Boyle, armed themselves, each with a piece of a fence rail, and after overtaking the Keeley party, Isaac Potter, who is now the defendant, did then and there "kill the old man," Jacob B. Keeley.

The defendant also insists "that the court erred in refusing to give the 25th instruction asked for by defendant," which instruction reads as follows:

"The jury are instructed that under the evidence in this case they cannot convict the defendant of murder in the second degree."

This instruction was unquestionably rightly refused. There was unquestionably sufficient evidence to prove the offense

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charged, and to sustain the verdict of the jury. Some of this evidence was however contradicted by other evidence; but we have nothing to do with weighing the contradictory or conflicting evidence introduced. That was for the jury.

The defendant also claims that "the court erred in receiving the verdict in the manner it did, over the objections of defendant." The jury returned the verdict in the following form, ^{12. Receiving and correcting verdicts.} to-wit: "We the jury find the defendant guilty as charged.—R. V. FLORA, Foreman." The court suggested that the verdict was informal, and permitted it to be amended so as to read as follows: "We the jury find the defendant guilty of murder in the second degree, as charged in the information.—R. V. FLORA, Foreman." Before the verdict was amended the jury, through their foreman, told the court that it was their intention to find the defendant guilty of murder in the second degree, and after the verdict was amended it was read to the jury, "and the jurors collectively answered that it was their verdict." The court offered to have the jury polled, but neither party desired it. This was all done in the presence of both the defendant and his counsel. We perceive no error in this.

We have now considered all the questions raised by counsel, and we perceive no error in the rulings of the court below sufficient to authorize a reversal of the judgment below. The case has been very ably presented to us on both sides, and we would refer to the authorities cited in counsel's briefs, and to the arguments of counsel, for a more elaborate discussion of some of the questions involved in the case than we have been able to present.

The judgment of the court below must be affirmed.

All the Justices concurring.

GRANVILLE M. LEWIS V. COMM'RS OF MARSHALL CO., *et al.*

1. ELECTION; BOARD OF CANVASSERS, *May be Compelled to Reassemble and Canvass Votes.* The court may by mandamus compel a board of canvassers, after it has made one canvass, declared the result, and adjourned, to reassemble and make a correct canvass of all the returns, if it appears that upon the first canvass it improperly rejected the returns from some of the election precincts, and refused to canvass them. [*Higley v. Arnold*, 13-367; *State v. Comm'rs Hodgeman Co.*, 23-264; *Morgan v. Comm'rs Pratt Co.*, 24-71; *Rice v. Stevens*, 25-302.]
2. DUTY OF CANVASSERS—*Ministerial, not Judicial.* Where returns are regular in form, and genuine, a canvassing board may not reject and refuse to canvass them on the ground that illegal votes had been received, or other frauds and irregularities practiced at the election. Such matters are to be inquired into by a tribunal for contesting elections, or in *quo warranto* proceedings. [*State, ex rel., v. Comm'rs Neosho Co.*, 6-524.]
3. ——— *Where Returns are Tampered With.* Where returns are duly prepared and signed by the proper officers, but thereafter and before they reach the office of the county clerk, are tampered with by unauthorized and outside parties, and changed as to the votes cast for the respective candidates for one office, and only so changed: *held*, that the canvassers should receive the returns and canvass the votes cast for candidates for the other offices. [*Russell v. State, ex rel.*, 11-308; *Hudson v. Solomon*, 19-177; *Jones v. Caldwell*, 21-186; *Privett v. Stevens*, 25-275.]

Original Proceedings in Mandamus.

LEWIS filed in this court his verified petition for a mandamus against the *Board of Comm'rs of Marshall Co.*, and *J. G. McIntire*, the *County Clerk* of said county. Said petition showed that *Lewis* was a legal elector of said Marshall county, and was eligible to the office of county clerk of said county; that at the general election held in said county on the 2d day of November 1875, he was a candidate for said office of county clerk, and received a majority of all the votes cast for such office, and was duly elected thereto for the regular term to commence on the second Monday of January 1876; that the defendant *McIntire* was also a candidate for said office; that there were and are twelve election precincts in said county, and no more; that the votes cast at said election for the plaintiff and for said *McIntire*, respectively, for said office, were as follows:

Statement of the Case.

In Guittard precinct,.....	for LEWIS,	72;	for McINTIRE,	119
Vermillion,.....	" "	125	" "	196
Elm Creek,.....	" "	29	" "	32
Noble,.....	" "	39	" "	31
Franklin,.....	" "	29	" "	27
Rock,.....	" "	12	" "	45
Marysville,.....	" "	162	" "	275
Wells,.....	" "	47	" "	46
Blue Rapids township,.....	" "	128	" "	84
Blue Rapids city,.....	" "	210	" "	37
Center,.....	" "	8	" "	80
Waterville,.....	" "	280	" "	91
Totals,.....	for LEWIS,	1136;	for McINTIRE,	1063

The petition alleged also that the poll-books and ballots were duly returned from all said precincts, to the county clerk of said county, and duly filed; that the board of county commissioners, constituting the board of county canvassers, met at the office of said county clerk on the 5th of November, for the purpose of opening and canvassing the returns made to said county clerk of the votes cast in said Marshall county for the several persons voted for for said office of county clerk, and for other offices to be filled at said election; that said county clerk met and was present with said canvassers at that time; that the returns from all the above-named election precincts were then on file, and were duly submitted to said canvassers; that said canvassers proceeded to and did open and duly canvass the votes cast for the several state, county and township officers voted for at said election at the several election precincts aforesaid, *except the returns from the precinct of Waterville*, and did thereupon, among other matters, determine that the plaintiff had received 856 votes, and that said *McIntire* had received 972 votes, for said office of county clerk, and that said *McIntire* had received the greatest number of votes for said office, and was duly elected thereto; that said determination was reduced to writing, and signed by said commissioners as canvassers, and attested by said county clerk, etc. The petition further alleged that *Lewis* was present at such canvass and determination, and asked and demanded of said canvassers that they canvass and include in their statement the votes cast at and returned from said precinct of

Waterville for said office of county clerk, but said commissioners fraudulently and wrongfully refused to do so, and did not nor would they count or canvass said returns, or declare the result of the election and vote in said Waterville precinct, in any manner, or for any person, or for any purpose whatever, but on the contrary wrongfully and fraudulently rejected the poll-book and tally-list from said precinct. Upon such petition an alternative writ of mandamus was issued, commanding and requiring the defendant commissioners immediately to reassemble at the proper place as a board of canvassers, and proceed to open the returns of the election held in said precinct of Waterville, and canvass said returns and add the votes cast for said *Lewis* in said precinct for said office of county clerk to the votes cast for him in each and every other precinct in said county for said office, and thereupon determine that the said plaintiff received the greatest number of votes for said office, and declare him elected to said office; and commanding and requiring the defendant *McIntire*, as county clerk, immediately after the canvass and determination so made by said commissioners, in pursuance of such determination, to make out and deliver to said plaintiff a certificate of his election to said office—or that said defendants respectively show cause, etc. Said writ was allowed and issued November 15th, and was returnable on the 8th of December 1875.

One of the commissioners, *Joseph C. Dickey*, chairman of the county board, answered, that he was, on said 5th of November, and has since been and still is, ready and willing to count and canvass the vote and returns from said Waterville precinct, but was and is prevented from so doing by reason of the action of the other two commissioners of said county. The other two commissioners, *Joseph Whitley* and *D. Q. Millett*, and the defendant *McIntire*, as county clerk, showed cause. They filed a joint answer, verified by *McIntire*, in which they allege that said *J. G. McIntire* was eligible to said office of county clerk at said election; that he was a candidate for said office, and was voted for by electors of said county, and that

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"the said *McIntire*, as appears from the returns of the judges of the election, duly certified and returned into the office of the county clerk of said county, and canvassed by the board of county commissioners, received a majority of all the votes cast at said election;" that said commissioners met at the proper time and place, "and then proceeded to open the several election returns which had been made to the office of said county clerk," and "did then and there declare and determine that the plaintiff had received 846 votes, and said *McIntire* had received 972 votes for said office," and thereupon determined that said *McIntire* was duly elected, etc. Said answer admitted that the "pretended election returns from said Waterville precinct were presented to the said clerk and commissioners; but defendants deny that they fraudulently and wrongfully refused to count or canvass said returns," etc. The answer then alleges that one H. S., and divers other persons to defendants unknown, entered into an unlawful and corrupt agreement and conspiracy to defeat the election of said *J. G. McIntire*, and to procure the election of said plaintiff; and that in pursuance of said agreement and conspiracy, that said H. S., J. W. S., C. B., E. C. W., and J. A. E., or some of them, with other persons to defendants unknown, on the morning of the election, and before the polls were opened in said Waterville precinct, met at the voting-place in said precinct, and placed in the ballot-box, "fraudulently and unlawfully, a large number of ballots," and that during the day "the persons above stated kept and had in their possession and control the said ballot-box, poll-books, and tally-sheets," etc.; that the "judges and clerks, or some of them, unlawfully and fraudulently received and deposited into said ballot-box over 100 fraudulent ballots." The answer also alleges that "a large number of the persons who voted at said Waterville precinct were voters in other counties of the state of Kansas than that of Marshall county." It also alleges that the "poll-books, tally-lists and ballots" sealed up by the judges of said Waterville precinct "to be delivered to the county clerk were never delivered to said county clerk at any time, but that other fraudulent and

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spurious poll-books, tally-lists, and ballots were returned to said county clerk by said persons, or some of them, and these are the returns which were submitted to the commissioners for canvass, and which plaintiff demanded that said commissioners should count in determining the result of said election."

No testimony was offered at the hearing in support of the defendant's answer. But the original poll-books of said Waterville precinct were produced, and given in evidence; and it appears from them, and from testimony given at the trial, that after the poll-books had been duly and properly signed, attested and sealed up by the judges of the election, and before they were delivered to the county clerk, some person had wrongfully and willfully opened them and changed the vote as cast and certified by the judges for one candidate for *county commissioner*, which alteration would have changed the result as to such candidate and office. No other change or alteration was made or shown. The commissioners, being advised of such alteration, rejected said poll-books entire, refusing to count any votes cast in Waterville precinct for any person for any office.

Martin & Case, for plaintiff.

Mann, and *Guthrie & Brown*, for defendants.

The opinion of the court was delivered by

BREWER, J.: This is an action of mandamus, to compel a correct canvass of the votes cast in the county of Marshall for the office of county clerk. Upon the canvass that was made the canvassers rejected the returns from Waterville township, and declared one J. G. McIntire elected. If those returns had been counted, the plaintiff would have received a majority, and been declared elected. Three questions are presented: First, will the court, after a canvassing board has made one canvass, declared the result, and adjourned, compel it, by mandamus, to reassemble and make a correct canvass on the ground that at the prior canvass it had improperly omitted to canvass all the returns? So said, if the returns are regular

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in form, and genuine, may the canvassing board reject and refuse to canvass them, on the ground that during the election fraudulent votes were received, and other irregularities practiced by the judges and clerks of election? And third, will the fact that, after the poll-books and tally-sheets have been properly prepared and signed, and before their delivery to the township trustee and county clerk, they are tampered with and changed by outside parties, so far as respects the votes for candidates for a single office, justify the canvassing board in rejecting the entire returns, and in refusing to count the votes cast for the candidates for the other offices?

The first question must be answered in the affirmative, and the other two in the negative. We are aware that the authorities are not uniform upon the first question. See on the one hand, *People v. Suprs. Green County*, 12 Barb. 217; and, as partially indorsing this view, *The State v. Berry*, 14 Ohio St. 815; and on the other side, *The State v. County Judge Marshall Co.*, 7 Iowa, 186; *The State v. Bailey, County Judge*, 7 Iowa, 390. The view taken by the Iowa court seems to be the correct one. It is the duty of the canvassers to canvass all the returns, and they as truly fail to discharge this duty by canvassing only a part, and refusing to canvass the others, as by refusing to canvass any. And it is settled by abundant authority, that where the board refuses to canvass any of the votes it may be compelled so to do by mandamus, and this though the board has adjourned *sine die*. *Hagerty v. Arnold*, 13 Kas. 367, is a case in point. The canvass is a ministerial act, and part performance is no more a discharge of the duty enjoined than no performance. And a candidate has as much right to insist upon a canvass of all the returns, as he has of any part, and may be prejudiced as much by a partial as by a total failure. The adjournment of the board does not deprive the court of the power to compel it to act, any more than the adjournment of a term of the district court would prevent this court from compelling by mandamus the signing of a bill of exceptions by the judge of that court, which had been tendered him before the adjournment. As a general rule, when a duty is at the proper time

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asked to be done, and improperly refused to be done, the right to compel it to be done is fixed, and is not destroyed by the lapse of the time within which in the first place the duty ought to have been done.

As to the other two questions, it is a common error for a canvassing board to overestimate its powers. Whenever it is suggested that illegal votes have been received, or that there were other fraudulent conduct and practices at the election, it is apt to imagine that it is its duty to inquire into these alleged frauds, and decide upon the legality of the votes. But this is a mistake. Its duty is almost wholly ministerial. It is to take the returns as made to them from the different voting precincts, add them up, and declare the result. Questions of illegal voting, and fraudulent practices, are to be passed upon by another tribunal. The canvassers are to be satisfied of the genuineness of the returns, that is, that the papers presented to them are not forged and spurious; that they are returns, and are signed by the proper officers; but when so satisfied, they may not reject any returns because of informalities in them, or because of illegal and fraudulent practices in the election. The simple purpose and duty of the canvassing board is to ascertain and declare the apparent result of the voting. All other questions are to be tried before the court for contesting elections, or in *quo warranto* proceedings. It must be borne in mind that the change in returns in this case was made after their execution by the proper officers, and before they reached the county clerk's office, was made by unauthorized and outside parties, and not by the election officers, and did not affect the number of votes cast and returned for this plaintiff, or his opponent. Under those circumstances we think the commissioners were not justified in refusing to canvass the returns from Waterville township, so far at least as respects the officers other than the one concerning which the tampering with and changing of the votes was had.

The peremptory writ must be awarded as prayed for.

All the Justices concurring.

SETH H. WOOD v. H. BARTLING, *Mayor, et al.*

JUSTICES OF THE PEACE; When Elected; When Term of Office Commences; Notice of Election. Where the time for holding elections for justices of the peace in cities of the second class is fixed by law for the first Tuesday of April of each alternate year, but the law does not prescribe whether such elections shall be held in the odd years or in the even years, and does not prescribe the years within which the terms of office of justices shall commence, but leaves the times for their election, and for the commencement of their terms of office to be ascertained from the time when the first election for justices of the peace was held in and by such city, and the law further requires that the mayor shall issue a proclamation giving at least ten days' notice of each election to be held in such city "announcing the offices to be filled" at such election; and where the mayor, previous to an election at which two justices of the peace should be elected, issues a proclamation announcing that one justice only is to be elected, and the electors receive no other sufficient notice that two justices should be elected; and the electors believe that only one justice is to be elected, and each elector votes for only one candidate for that office, held, that only one justice is elected at such election, although more than one candidate may have received votes for the office. [*Hale v. Evans*, 12-562; *Jones v. Gridley*, 20-584.]

Original Proceedings in Mandamus.

WOOD, as plaintiff, filed in this court his verified petition for a mandamus to compel the *Mayor and City Councilmen of the City of Topeka*, to enter of record the fact that plaintiff had been duly elected to the office of justice of the peace of said city at the city election held on the 6th of April 1875, and to cause such election of plaintiff to be duly certified by the city clerk to the county clerk of Shawnee county. The record shows that at said city election votes were cast and canvassed for the office of justice of the peace as follows: For Thomas Johnson, 655; for *Seth H. Wood*, 342; for Samuel S. Urmy, 324; for J. C. Chseney, 277. The mayor and council canvassed said votes on the 9th of April, and holding and deciding that one justice only was to be chosen at such election

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determined that Thomas Johnson had received the greatest number of votes cast for that office, and was therefore duly elected as such justice. *Wood* claimed that two justices were to be and were elected, and that as he had received the second highest number of votes he also was entitled to a certificate of election and to such office. An alternative writ was issued. The defendants showed cause—claiming, as they had before decided, that only one justice was to be chosen at such election, and, also, that notice for the election of one justice only had been given, and that the electors of said city respectively had voted for only one person for said office, instead of each elector voting for two persons as would have been the case if two justices were to have been elected.

Seth H. Wood, plaintiff, for himself.

B. J. Ricker, city attorney, and *David Brier*, for defendants.

The opinion of the court was delivered by

VALENTINE, J.: This is an action of mandamus to compel the mayor, council and city clerk of the city of Topeka to issue to the plaintiff a certificate of election showing that he was elected to the office of justice of the peace in and for the city of Topeka on the 6th of April 1875. All questions have been so arranged and disposed of by the parties that the only question for us to determine is, whether the plaintiff was duly elected to the office of justice of the peace or not. Involved in this question, however, are several others, which we shall consider as we proceed with this opinion. We think we may assume as among the established facts in this case, that there were two justices of the peace to be elected in the city of Topeka on the 6th of April 1875; that the mayor however issued his proclamation for the election of only one; that each elector voted to elect only one; that the electors did not in fact know that more than one was to be elected; that 1598 votes were cast for various candidates for that office, of which Thomas

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Johnson received 655 votes, Seth H. Wood, the plaintiff, received 342 votes, Samuel S. Urmy received 324 votes, and J. C. Chesney received 277 votes. The question is, whether upon these facts the plaintiff was duly elected to said office. The objections urged against his election are, that no notice was given or proclamation issued for the election of more than one justice of the peace, the electors believed that only one justice was to be elected, and they voted to elect only one—each elector voting for one person only for that office. Now it is true that the plaintiff knew before the election, and at the time thereof, that two justices were to be elected, and he told several other persons so, and he thinks that one or two ballots were cast at that election in the first ward with two names for the office of justice of the peace thereon; but still the agreed statement of facts shows that “the electors in casting their ballots for justice of the peace left the name of but one candidate on their tickets, and so each elector voted for but one person for said office of justice of the peace;” and the fact undoubtedly is, that the electors, with scarcely any exceptions, did not know or even suspect or imagine that more than one justice was to be elected at that election. The voters were of course mistaken in supposing that there was but one justice to be elected at that election, but the mistake was clearly one of fact, and not one of law. Justices of the peace are elected in this state each for a term of two years; but there is no law designating when their terms shall commence, or in what years they shall be elected to fill such terms, and these questions depend upon the facts of each particular case. They really depend upon what year the *first election* for justices of the peace within the particular city or township where the inquiry is made took place. For instance, the first election held in and for and by the city of Topeka for justices of the peace was on April 5th 1869: hence, the regular elections for that office in Topeka would be held in April in the years 1871, 1873, 1875, 1877, and so on, in every alternate year thereafter. But if the first election had been held in 1868, or in 1870, instead of in 1869 as it was held,

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then all the regular elections held thereafter would have been held in the even years, instead of in the odd years as now held. From this it will be perceived that the regular elections for justices of the peace may be held in the various cities and townships in the state in different years, and that no one can tell when a regular election for justices of the peace is to be held in any particular city or township, except from proof, or evidence, or knowledge of facts. This is not so with reference to state or county officers. With reference to them the law (Gen. Stat. 427, 428,) fixes absolutely and uniformly throughout the state the time for their election. And therefore, as all persons are presumed to know the law, all persons are presumed to know when a state or county officer is to be elected, although he may receive no notice thereof from any other source. (*George v. Oxford Township*, ante, 79.) The courts will take judicial notice when state and county officers are to be elected. (*Ellis v. Reddin*, 12 Kas. 306.) But courts cannot take judicial notice when justices of the peace are to be elected. Or rather, courts may take judicial notice that justices of the peace are to be elected in April of each alternate year, (in cities of the second class, and in townships also up to 1875,) for the law thus far prescribes; but the courts cannot take judicial notice as to which these alternate years are. Courts cannot judicially know, except from evidence, whether these alternate years are the odd years or the even years. And probably voters, who receive no notice, actual or constructive, cannot be required to know more in this respect than the courts. Under the laws of this state the mayor of each city of the second class, (and Topeka is such a city,) is required to issue a proclamation giving at least ten days' notice of each election, and "announcing the offices to be filled" at such election. (Laws of 1872, page 196, §17.) Now probably if such a notice were given the voters could not ignore the notice, and refrain from voting. Or, if the body of the voters were in fact to receive notice in any other manner, probably then they could not ignore it. Or, if sufficient facts should come to the knowledge of the body of the voters to put

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them upon inquiry, possibly they could not ignore the election. This has been so held where the election was held at the same time and place of some other election which called out substantially all the voters, and the matter was discussed among the voters, and a large proportion of them voted upon the subject. But none of the foregoing cases is this case. In this case the body of the voters had no notice from any source, and they did not participate in the election. That is, they had no notice of an election for *two* justices, and each elector voted for only *one* justice. In fact, the notices that they actually received, from whatever source they came, might almost be construed into an actual and affirmative notice that there would be an election for only one justice. The first election by the city for justices was in 1869. The regular election would therefore have been held every alternate year thereafter. But instead of an election coming only once in every two years, there has been an election for one or more justices held in Topeka every year since 1869. In 1870 one justice was elected. In 1871 two were elected. In 1872 one was elected, and one of those elected the year before held over. In 1873 one was elected, and the one elected in 1872 held over. In 1873 the mayor's proclamation was for the election of only one justice, and only one was voted for by each of the electors. In 1874 one justice was elected, and the one elected the year before held over. And the one elected in 1874 was elected and commissioned for two years, and he is now holding the office under that election. It will therefore be seen, that the whole city of Topeka has been laboring under a mistake as to the regular time for electing justices, and that the mistake originated at least as early as the spring of 1873. Now as this mistake is a mistake of fact, and not of law, we hardly think that it is sufficient to defeat the will of the voters. "The real will of the people" should generally "not be defeated by any informality." In the present case more than three-fourths of the electors voted against the plaintiff; and should less than one-fourth who voted for him override the will

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of the other three-fourths who voted against him? Under the circumstances of this case we think the law to be, that only one justice was elected, and that such justice was not the plaintiff. There was in fact no election for a second justice. It has been held in many cases that a mere want of notice will vitiate the election. (See authorities cited in case of *George v. Oxford Township*, ante, 80.) This is generally so where the law does not fix the time for holding the election. But even where the law does fix the time for holding the election, it has been held that if no notice was given as required by law, and no notice was in fact received, and the great body of the electors were misled by such want of notice, they believing that no such election was in fact to be had, and only about one-fourth of the electors voted at such election, and they voted for a single candidate, such election is void. *Foster v. Scarf*, 15 Ohio St. 532. See also *The State v. Gætz*, 22 Wis. 368, et seq. And it has several times been held, where a majority of the electors vote for an ineligible candidate, that the election is a nullity, although eligible candidates may also have been voted for. (*Saunders v. Haynes*, 13 Cal. 145; *State v. Giles*, 1 Chandler, 112; *State v. Smith*, 14 Wis. 497; *Commonwealth v. Chuley*, 56 Penn. St. 270; *People v. Clute*, 50 N. Y. 451; *State v. Swearingen*, 12 Geo. 23; *State v. Gastinel*, 20 La. An. 114; Opinion of Judges, 38 Me. 597, et seq.) The person receiving the highest number of votes in such a case is not elected because of his ineligibility; and no other candidate can be considered as elected, because a majority of the electors have expressed their will and determination that he should not be elected. This reasoning fits the present case. In the present case the electors chose to elect only one justice of the peace, and a vast majority of them voted against the plaintiff and for other candidates. The candidate elected received nearly twice as many votes as the plaintiff. In our opinion there was no election for a second justice of the peace. An election should therefore be held in April of the present year (1876) to elect another justice to fill the unex-

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pired portion of the term which should have commenced in April 1875.

Judgment in this case will be rendered for the defendants.

All the Justices concurring.

JOHN POLSTER, *et al.*, v. A. W. RUCKER, *et al.*

1. **PLEADING; Petition; Sufficiency; Objection after Verdict.** Where no objection is made to the sufficiency of a petition until after trial and verdict, the defect must be plain and in a vital matter, or it will be disregarded. [*Moore v. Wade*, 8-380; *Mitchell v. Milhoan*, 11-617; *Moody v. Arthur*, post, 419.]
2. ——— A petition which alleges that defendants "took from one C. B. the sum of \$114.53, and the said C. B. gave to the plaintiffs an order therefor, for value received, and that the said C. B. assigned to the plaintiffs his cause of action against the defendants," and also alleges nonpayment, and also that the district court, after the taking made an order directing one of the defendants to pay this money into court, that he did not pay the same as ordered, but took the order for review to the supreme court, giving an undertaking, signed by both defendants, conditioned to pay said sum of money into court if the order should be affirmed, that said order was affirmed, and still the money was not paid, will be held sufficient as against an objection presented for the first time after trial and verdict.

Error from Cherokee District Court.

ACTION by *Rucker & Bro.* plaintiffs, as assignees of Charles Beuro, to recover \$114.53, and interest. In 1871 *John Polster* caused Beuro to be arrested on a charge of grand larceny. When arrested Beuro had in his possession said sum of \$114.53, which was, by order of a justice of the peace, taken and delivered to *Polster*, the prosecuting witness. On trial in the district court Beuro was acquitted, and the court made an order that *Polster* redeliver said money to Beuro. (*Ex parte Polster*, 10 Kas. 204.) Beuro assigned his claim for the money

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to plaintiffs, and this action was against *John Polster*, and his surety *J. G. Polster*, to recover said sum. Answer, general denial. Trial, and judgment for plaintiffs, at April Term 1874. The defendants bring the case here.

John N. Ritter, for plaintiffs in error.

A. W. Rucker, and *W. C. Webb*, for defendants in error.

The opinion of the court was delivered by

BREWER, J.: The only question in this case is, whether the petition is sufficient to sustain the verdict and judgment. No objection was made to it until after the trial and verdict. An objection thus made will be regarded with little favor, and the defect in the petition must be plain, and in a vital matter, or it will be deemed to have been waived. *Mitchell v. Milhoan*, 11 Kas. 617. Unquestionably this petition is open to criticism, but still we think that it must be held sufficient. It alleges that defendants "took from one Charles Beuro the sum of \$114.53, and the said Charles Beuro gave to the plaintiffs an order therefor, for value received, and that the said Charles Beuro assigned to the plaintiffs his cause of action against the defendants." It also alleges nonpayment in whole or in part. Counsel contends that the presumption of law is, that this "money was taken rightfully and legally, and by authority, in the usual routine of business." It is true, there is no allegation that the money was wrongfully taken, or even that it was the money of said Beuro. But there is another presumption, that the possessor of personal property is its owner; and this money is shown to have been in the possession of Beuro. In other words, the petition shows Beuro in possession of money, and presumptively, therefore, the owner, and rightfully in possession; that this money is taken from him by defendants, and never returned. No authority for such taking is shown. Now after the trial, without any objection to the petition, we think the court ought not to set aside the entire proceedings because of a failure to allege that the money was taken wrong-

fully, and without authority. But beyond this, the petition alleges that the district court, after this taking by defendants, made an order directing John Polster to pay this money into court, that said Polster did not pay the money into court as ordered, but took the order to the supreme court, and gave an undertaking signed by both the defendants, a copy of which is attached to and made a part of the petition, conditioned to pay said sum of money into court if said order should be affirmed, that said order was affirmed, and that still said money has not been paid into court. This, while perhaps not exactly showing that the original taking was unlawful, clearly shows that the defendants have no longer any right to retain the possession and are guilty of a wrong in so doing.

We think therefore that the petition, as against any objection raised for the first time after trial and verdict, must be held sufficient, and the judgment will be affirmed.

All the Justices concurring.

W. L. CHALLISS V. A. T. & SANTA FE RAILROAD CO.

1. **TITLE OF RAILROAD COMPANY, to Lands Acquired for Right of Way.** The title acquired by railroad companies in condemnation proceedings, under chapter 124 of the laws of 1864, was an absolute title in fee simple, and not a mere easement. [Under Gen. Stat., only easement; *K. C. Rly. Co. v. Allen*, 22-285.]
2. ——— **Legislative Power; Ch. 124, Laws of 1864.** Said chapter 124 is constitutional; for in the exercise of its power to devote private property to public use, the legislature is the exclusive judge of the degree and quality of interest which are proper to be taken, as well as of the necessity of taking it.
3. **CONSTITUTIONAL LAW; Words Construed.** Sec. 4 of art. 12 of the constitution is not a grant of power to appropriate private property to public use, but a restriction upon the exercise of such power; and the term therein used, "right of way," is not used as defining the quantity of estate to be appropriated, but as meaning the right of passage, irrespective of the estate or title to be acquired.

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4. CONDEMNATION PROCEEDINGS; *Compliance with Statute; Title.* Where in condemnation proceedings under said law of 1864, the full legal notice was given, the affidavit of publication filed in the county clerk's office correct, and showing due and legal publication, the subsequent proceedings all regular, except that in copying into the record in the office of register of deeds the proof of publication a clerical mistake was made by which the first publication was made to have been on the 28th instead of the 25th, and so less than thirty days before the time fixed for the meeting of the commissioners, and where the damages awarded to the owner of a certain tract were paid to and accepted by him, and the road actually constructed and in operation through his land, although only a strip of about twenty feet in width was actually occupied by the railroad company, and the balance of the hundred-foot strip condemned was used by the previous owner for the same purposes as the remainder of his tract, and where after such condemnation proceedings and payment and receipt of damages, and during such occupation by said railroad company, said owner sells and conveys the entire tract by warranty deed: *Held*, That the purchaser acquires no title to any portion of the one hundred-foot strip.

Error from Atchison District Court.

PRIOR to and during the year 1864 one M. Yocum owned and occupied a certain quarter-section of land in Atchison county, one J. S. Yocum a certain eighty-acre tract, and one J. W. Baldwin a certain twenty-two acre tract. Through these tracts the right of way, one hundred feet wide, was laid off and condemned for the Atchison & Pike's Peak Railroad, was paid for, and the railroad constructed, as stated in the opinion, *infra*. Challiss purchased said three tracts of land from the Yocums and Baldwin in 1868 and 1869, taking general warranty deeds. In March 1872, upon due proceedings being had, upon the application of the *Atchison, Topeka & Santa Fe Railroad Company*, commissioners were duly appointed for the purpose and laid off a railroad route for said *A. T. & S. F. Rld. Co.* through Atchison county. Their report shows that they took from one of the three tracts of land above mentioned nearly three acres, from another nearly one acre, and also a strip of land from the 22-acre tract embracing forty feet. The land so taken and condemned for the *A. T. & S. F. Rld. Co.* lies within the right of

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way taken and condemned in 1864 for the Atchison & Pike's Peak Railroad Company, and is a portion of the right of way of the said A. & P. P. railroad, now the Central Br. U. P. railroad. In May 1872, Challiss claimed that he had an interest in the property lying within the right of way condemned for the Atchison & Pike's Peak Railroad, and again taken and condemned for the A. T. & Santa Fe Railroad Co., and he appealed from the determination of the said commissioners to the district court of Atchison county, upon the ground that the act of the legislature of March 1st 1864, (ch. 124, laws of 1864, p. 236,) relating to the mode by which railroad companies may acquire title to lands, was unconstitutional and void, and that under said act no proceedings could vest in a railroad company the title *in fee simple* to the land set apart and condemned for a right of way. The theory of Challiss' appeal, is set forth in the following instruction which was asked by him in the court below, and which was refused, namely:

"The jury are instructed that in 1864 and 1865 no valid law for the condemnation of land for the use of railroads then existed; and that said railroad (meaning the Atchison & Pike's Peak Railroad Co.) could not acquire any interest in said lands by virtue of the provisions of the act of 1864, further than the license to use such lands for its own purposes, after payment of damages therefor to the satisfaction of the other owner."

Trial at the March Term 1874 of the district court. Verdict and judgment for defendant, and Challiss brings the case here on error.

W. W. Guthrie, for plaintiff in error:

It was shown on the trial that Challiss had bought these tracts of land after the C. B. U. P. railroad had been built, and under *warranty deeds and covenants of full title*; that said C. B. U. P. railroad only had a single track, and Challiss occupied and cultivated his field on either side, less about 20 feet occupied by the railroad. That the location of defendant's road was eight feet from and one foot lower than the former road,

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and compelled plaintiff to abandon a part of his field in crop season, destroyed his farm crossings, and otherwise burdened the use of his farm, producing great damages to his *entire tract* in addition to the loss of the land taken by defendant, in all some \$1,200. Challiss as a purchaser had actual notice of claim of C. B. U. P. railroad only to the extent used, and only constructive notice as shown by records in the register's office at time of purchase. Besides this, no title as against such purchaser could be acquired under the act of 1864.

The condemnation proceedings were recorded in two sections, one filed October 9th 1864, in the county clerk's office, the other March 16th 1865; but this last was not dated till *March 17th*. The notice was for September 26th 1864, and the publication was recorded *as made from "August 28th to September 29th,"* and so stood until January 26th 1874, when the first date was changed to *August 25th*, on the margin of the record.

The court erred in instructing the jury, "that such records, with the testimony of witnesses, constituted a valid condemnation for a 100-foot strip"—thus instructing the jury that plaintiff had acquired *no title* by his purchase to any part of the 100-foot strip claimed by the C. B. U. P. Rld. Co. under such condemnation proceedings. Or, in other words, that the strip of 100 feet in width through the middle of plaintiff's 700-acre tract, taken under condemnation for "right of way" for a railroad, had become *in allodium* the property of such railroad company, and as such, thereafter to use in any manner and for any purpose desired.

1. On the questions presented in the record, the plaintiff in error submits: That a railroad corporation has not power under any law to take for "right of way" any other interest in lands than an *easement*. The right to appropriate private property for public use has always been limited to the actual necessities of such use. And the necessity which in one case will authorize the taking of an entire tract for a municipal almshouse in allodial title, will not in another case authorize the taking of a narrow strip out of a large tract for a "right of way" for the road of a private corporation. Neither reason

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nor necessity allows such a rule, nor is it asserted in *Heyward v. The Mayor, etc.*, 7 N. Y. 314, but is expressly denied. (Cooley Const. Lim. 533; 4 Ohio St. 308, 324; 1 Redf. Rld. Law, 250, 257, and notes; 50 Mo. 243.) But it is claimed that the C. B. U. P. Rld. Co. had the right to acquire the title to this 100-feet strip because its necessities for right of way so required, and afterward, by involuntary sale, to convey a part of it to defendant for a like use, or to an individual for any use such individual might desire; that is, that the power of eminent domain gives to a railroad corporation the right to acquire *land under claim of right of way* to hold and resell on speculation, and that such right is only limited by the greed of its corporators, and their ability to pay. We say the limit is the necessity for actual use, and that such use must be personal to the party taking. Private corporations do not take unusual powers by implication.

2. Any attempt at such legislation would be unconstitutional. Such an idea does not exist in the history of *private* corporations for the construction of road-ways; and, in this state, the appropriation of the *land* is not authorized—only the *right of way*—and thereby, by implication, the right beyond an *easement* is denied. Sec. 4, art. 12, constitution.

3. Nor is such a construction of § 4 of the act of 1864 authorized. All that such language implies is, “that such company shall thereafter have the full right to *use* such land for the purpose of a route for *its* railroad, or to whoever *such line of railroad* might be transferred.” In other words, the *condemnation of the right of way* for the railroad of *that* company or its successor, was alone authorized. And under the act of February 13th 1865, (Laws of 1865, p. 94, §§ 15 and 26,) the power to acquire lands is granted only to the extent of “right of way,” and “those granted to aid in construction of such roads.” This act of 1865 was the first general act authorizing incorporation of railroad companies, and it makes the difference in tenure of lands, held in *Land v. Coffman*, 50 Mo. 243.) And see 12 N. Y. 121; 2 Iowa, 302; 31 Me. 217; 3 Vt. 393.)

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4. Challiss' land was subjected to an additional burden; and therefor he was entitled to recover damages against defendant, which had imposed such burden; and it was error to refuse his instructions asked on this point: *Mifflin v. Railroad Co.*, 16 Penn. St. 182, 190; *Blake v. Rich*, 34 N. H. 282; *Imlay v. Railroad Co.*, 26 Conn. 249, 253. Defendant was an independent organization, with its road at a different grade, which destroyed plaintiff's farm crossings, thus doing him a special damage.

5. The proceedings of the C. B. U. P. Rld. Co. were only valid when recorded in the office of register of deeds; (§ 4, acts of 1864;) and only *as recorded*, were notice to plaintiff as the purchaser of these lands. As recorded, "they were so irregular that no rights could be founded upon them." *Akin v. Davis*, 11 Kas. 580, 592; *Ellis v. Pacific Rld. Co.*, 51 Mo. 200. There was neither 30 days' notice, nor recording within 10 days.

6. The acceptance by the plaintiff's grantors of damages under such proceedings would only operate as a *license* to the C. B. U. P. Rld. Co., and possession thereunder would be notice to a subsequent purchaser only to extent of *actual occupancy*. The rule which applies in case of possession under an unrecorded deed does not apply to possession under a mere license. And plaintiff was entitled to recover damages for the strip taken, under the general rule of *full compensation*.

7. The publication notice as found of record in the register of deeds' office, could not be impeached as against a *bona fide* purchaser. Nor was the original report evidence, where the record in the register's office existed. Nor of the proceedings had in the treasurer's office on such report; at least, until its loss had been shown. The payment of damages by defendant in error to the C. B. U. P. Rld. Co. was no evidence in Challiss' action to recover damages; if this was his land, such payment would not defeat his claim; and if not his, then he failed in his case.

Horton & Waggener, for defendant in error:

The A. & P. P. Rld. Co. acquired title in *fee simple* for itself and its successors and assigns of the lands now claimed by Challiss under the condemnation proceedings had in accordance with ch. 124, Laws of 1864. Said act of 1864 is constitutional, and vested a fee-simple title in railroad companies which proceeded under its provisions. Laws of 1864, pp. 236, 238; 3 Paige's Ch. 45 to 76; 1 Kernan, 308; 2 id. 190; *Peoria & R. I. Rld. Co. v. Birkett*, 62 Ill. 332; *State v. Rives*, 5 Iredell, 397; *Heyward v. Mayor of N. Y.*, 3 Selden, 314; *Moore v. City of New York*, 4 Sanford, 456; *Nicoll v. N. Y. & Erie Rld. Co.*, 12 N. Y. 121. The right of the legislature, in the absence of a constitutional restriction to that effect, to condemn the fee for the purposes of a railroad, cannot be well questioned. It is not less a legislative function to determine what estate in point of duration the public exigency requires to be condemned, than to determine the existence of the public exigency which requires the condemnation of any estate. 2 Dev. & Bat. 467; Pierce on Am. Rld. Law, 161.

The quantity of estate in land taken in condemnation for acquisition of right of way which is vested in railroad companies is not uniform in all states. In Illinois some of the charters vest the fee simple in the company, while others provide that the company is merely authorized to enter upon and take possession of and use the land. In North Carolina the fee simple is vested in the company. In New Hampshire and Iowa, and some other states, railroads have only an easement in the land, and do not hold the estate in fee simple. Pierce Am. Rld. Law, 160, 161; 5 Iredell, 307; 3 Selden, 314; 4 Sandf. 456. In 1864, the legislature of the state of Kansas provided that railroad companies could acquire title in fee simple to lands, and in so doing exercised a right which cannot be at this date well questioned. In *De Varaigne v. Fox*, 2 Blatchf. 95, it was held that where the statute conferred the right to take the fee of land, and it was taken upon compensa-

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tion accordingly, the court will not construe the grant a conditional fee or usufruct, leaving a possible reverter to the original proprietor, but will regard the entire property as vested in the grantee forever. In the present case the county commissioners understood when they were condemning the lands of the grantors of the plaintiff in 1864 and 1865, that the railroad company were to have the title in fee simple to the lands set apart for the right of way, and must necessarily in their appraisal of the value of the lands taken, and in their assessment of damages therefor, have given to said grantors full compensation for the land taken *in fee*; and the grantors of the plaintiff must have accepted the moneys so paid to them in 1865 and 1866, in full satisfaction of the estate *in fee* for the lands so set apart and appropriated for said company. And it would seem, upon general principles, that the grantors of Challiss should be estopped from claiming any interest in the land after having received compensation therefor with the understanding that they had transferred to the said railroad company fee-simple title for the same. If his grantors are estopped from claiming any interest in the land after having accepted the payment of the awards made, then of course Challiss could have no better claim or interest in said lands than his grantors. An acceptance of the amount of the value of the land, whether by taking the amount agreed upon by the parties, or fixed by the commissioners, or the court, is an acquiescence in the taking of the land as much as if the owner had conveyed the same lands to the railroad company by deed. 9 Wis. 450 to 485.

The plaintiff, at the time he obtained his deed of the Yocums and Baldwin, could have ascertained from the records in the clerk's office in Atchison county that due proceedings had been taken to have the premises mentioned in said report condemned under the law of 1864, and that a strip of land 100 feet in width had been appropriated for the right of way of the railroad company; and the records in the register's office showed that the moneys for such right of way had been depos-

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ited with the county treasurer, or paid to the owners thereof; and upon inquiry the plaintiff could have ascertained without any difficulty that his grantors had received full payment for the fee of the said 100 feet of land so appropriated for said right of way. And in addition to this record notice, the said A. & P. P. Rld. Co., now called the Central Branch U. P. Rld. Co., was running and operating its road over and upon the said right of way at the time of plaintiff's purchase. In view then of the public records of the condemnation proceedings had for said right of way, and of the possession of such right of way by said railroad at the date of the purchase under which plaintiff claims, the plaintiff had full and complete notice of the title of said railroad company to the lands which he was about to purchase. The original report of condemnation of 1864 and 1865, on file in the office of the county clerk was presented in evidence. The register's books, showing the same to have been duly recorded, with the exception that in the proof of notice of publication, the register had recorded 8 for 5, was also introduced. The fact that the register of deeds had copied August "28th," for August "25th," and that such record remained unchanged until January 26th 1874, could not have really prejudiced the rights of the plaintiff. The register's office showed that payment of the assessment damages by the railroad company, and the original papers on file in the office of the county clerk showed that notice of condemnation proceedings had been published for 30 days; and the records of the county clerk's office are as much public records as the records in the office of the register of deeds. These facts, and the further fact that the railroad company was operating its road, not only put plaintiff upon inquiry as to the title of said company, but gave him actual knowledge of the fact that 100 feet had been duly condemned through the parcels of land he was buying, and that the railroad company had paid the money for a title in fee therefor.

The opinion of the court was delivered by

BREWER, J.: In 1864-5 the A. & P. P. Railroad Co. instituted condemnation proceedings, under the law of 1864, to obtain the right of way through certain tracts of land in Atchison county. And the two principal questions in this case are as to the validity of those proceedings, and as to the quantity of title transferred by them, if valid, to the railroad company.

We will consider the latter question first. Chap. 124 of the laws of 1864, entitled "An act to enable railroad companies to acquire title to lands for railroad purposes," prescribes the steps to be pursued in these condemnation proceedings; and in § 4 it is provided that, "to such portions of such ^{1. Title to lands acquired for right of way.} road * * * title in fee simple shall vest in such company, its successors and assigns." This language is plain, and susceptible of but one construction. The clear intent of the legislature was, that the railroad companies should acquire a perfect and absolute estate, and not simply an easement. This being the clear meaning of the statute, the power of the legislature to enact it is challenged. It is said that "the right to appropriate private property to public use has always been limited to the actual necessities of such use," and that an easement is all that is necessary to secure to the railroad company the fullest possible enjoyment of the land for its purposes. All this may be true; but the question of necessity is one for the legislature and not for the courts. It is said by Cooley in his work on Constitutional Limitations, p. 558, that ^{2. Legislative power; constitutional law.} "It seems, however, to be competent for the state to appropriate the title to the land in fee, and so to altogether exclude any use by the former owner, except that which every individual citizen is entitled to make, if in the opinion of the legislature it is needful that the fee be taken." True, in a note he says, "We think it would be difficult to demonstrate the necessity for appropriating the fee in the case of any thoroughfare; and if never needful, it ought to be held incompetent." But notwithstanding this suggestion in the

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note, we think the doctrine of the text fully sustained by the authorities. *Moore v. City of New York*, 4 Sandf. 456; *Heyward v. Mayor of New York*, 3 Seld. 314; *Reesford v. Knight*, 1 Kernan, 308; *Beekman v. S. & S. Rld. Co.*, 3 Paige, 75; Pierce on Am. Rld. Law, 151; *Hallerman v. Penn. Cent. R. R.* 50 Penn. St. 425; *Waterworks Co. v. Burkhart*, 41 Ind. 364; *Dingley v. City of Boston*, 100 Mass. 544; *Brooklyn Park Comm'rs v. Armstrong*, 45 N. Y. 234; *Foster v. N. J. Rld. Co.*, 3 Zab. 227; *P. & R. I. Rld. Co. v. Birkett*, 62 Ill. 322; *Ral. & G. Rld. Co. v. Davis*, 2 Dev. & Bat. 451; *State v. Rives*, 5 Iredell, 297; *De Varaigne v. Fox*, 2 Blatch. C. C. 95. In this last case the law is thus stated: "In the exercise of its power to devote private property to public use, the legislature are the exclusive judges of the degree and quality of interest which are proper to be taken, as well as the necessity for taking it."

Again, it is urged by counsel, that, as our constitution recognizes the granting of the right of way, it by implication forbids the acquisition of anything beyond the mere right of ^{a. Right of way. Constitution construed.} way. Sec. 4 of art. 12 of the constitution reads: "No right of way shall be appropriated to the use of any corporation until full compensation," etc. We cannot give to this the force that is claimed. The right of eminent domain is not granted by this section. That right is one of the powers inherent in the state, as the representative of the public; and this section operates only as a restriction upon this power. If the term, "right of way," is here used in its restricted, technical sense, as referring simply to a mere easement, it would have the power to take the fee unrestricted in the matter of compensation. We think it should be construed, not as defining the quantity of interest to be transferred, but as meaning the right of passage through the grounds of others, irrespective of the interest or title to be acquired. We see therefore in this nothing to limit the force of the adjudications elsewhere; and whatever might be our views, if the question were a new one, we feel constrained to follow what seems to be the almost unbroken line of decisions.

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We hold therefore that title in fee simple passed by the condemnation proceedings, if those proceedings were in conformity to the statute. It may be remarked that the legislature of 1868 changed the law as to the quantity of estate passing by such proceedings to a railroad company, (Gen. Stat. 213, §84,) where it is provided that "the perpetual use of such lands shall vest in such company, its successors and assigns for the use of the railroad."

Were the proceedings in this case in conformity to the statute? It appears that the application of the railroad company was made on the 24th of August, 1864; that the 26th of September following was the day fixed by the commissioners for the commencement of the work of laying off the route; that publication of notice of such time was duly made in the "Champion," the first publication being on the 25th of August, and more than thirty days before the appointed day; that the commissioners met at the appointed time and commenced their work; that after completing it they filed in the county clerk's office a written report thereof; that a copy thereof was duly filed in the county treasurer's office, the damages paid, and the report thereafter filed and recorded in the office of the register of deeds. It also appears that the then owners of the tracts through which the right of way was condemned accepted the appraisalment and received the money, that the road was constructed and in operation through these tracts in 1866; and that in 1868 and 1869 the plaintiff in error purchased the tracts of the then owners, receiving warranty deeds therefor. At the time of this purchase the hundred-feet strip was not all actually occupied by the railroad company, but only a strip of about twenty feet in width. The balance was and had been cultivated by the prior owners. The affidavit of publication of notice recited that the "notice was published in said newspaper for five consecutive weeks, the first publication being on the 25th day of August 1864, and the last on the 29th day of September 1864." In recording this affidavit by the register of deeds a clerical mistake was made,

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the figure 8 being substituted for 5, so that it stated that the first publication was on the 28th, and less than thirty days before the appointed time for the meeting of the commissioners. Now it is contended by counsel for plaintiff in error, that the occupation by the railroad company, at the time of the purchase by plaintiff in error being only of a twenty-foot strip was no notice of any claim to the balance of the one hundred-foot strip, and that the purchaser was chargeable with notice of the condemnation proceedings only as they appeared upon the records of the register of deeds' office; and that as they there appeared, they showed proceedings invalid, in that no legal notice appeared to have been given of the time of the commissioners' meeting. In this we think counsel is mistaken. The full legal notice was actually given; the proceedings actually had were regular. By those proceedings the title of the then owners was then wholly divested. This was divested, not by a voluntary conveyance, but by proceedings *in invitum*, to compel a transfer, exactly as by a sheriff's sale. Now as to such proceedings a party may not trust entirely to the records of the office of register of deeds, but must take notice of whatever appears upon the records of every officer or tribunal having jurisdiction of such proceedings. Again, there was sufficient in the record in the register of deeds' office to put the plaintiff in error upon inquiry. The report of the commissioners recited that notice had been published for thirty days. The day of the last publication was given as September 29th. Running back five weeks would bring it to August 25th, and not August 28th. This record was but a copy of a copy. Proof of publication was not by the law, in terms at least, required. (Sec. 6 of the act, Laws of 1864, p. 237.) The only object of publication is notice to the land-owners. If with a defective publication, or without any publication, they had appeared to the proceedings, and accepted the award, neither they nor their grantees would be heard to say that the notice was defective, or omitted. We think therefore, as against this plaintiff the court properly ruled that the proceedings were

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regular and valid. Some other questions are raised by counsel, but in the view we have taken of these two principal matters, it seems unnecessary to consider them.

The judgment will be affirmed.

All the Justices concurring.

E. W. BEDELL v. BURLINGTON NATIONAL BANK.

1. **NEW TRIAL; Rule, When Granted.** When a new trial has been granted by the district court, the supreme court will require a stronger case for interference than when one has been refused. [*Field v. Kinnear*, 5-233; *Ryan v. Topeka Bridge Co.*, 7-207; *City of Ottawa v. Washabaugh*, 11-124; *Atyeo v. Kelsey*, 13-212; *Crum v. Corby*, 15-112; *Barrett v. Barnes*, 17-266; *Condell v. Burlingame Savings Bank*, 23-596; *Hunt v. Haines*, 25-212; *City of Sedan v. Church*, 29-190; *Lindh v. Crowley*, 29-756.]
2. ——— Where the district court grants a new trial on the ground that the jury may have been misled by one of the instructions given, and it appears reasonably probable that they were so misled, this court will not reverse the order granting a new trial.
3. **COMMERCIAL PAPER; Bankers and Others; Purchasers before Maturity.** While a party engaged in dealing in commercial paper may be more familiar with the habits of business men in the making and discounting of such paper, and therefore more capable with notice of anything unusual in the form of the paper, or the conduct of the holder, yet beyond that he is under no greater obligation than any other purchaser of such paper to inquire into and ascertain the true nature of the transaction between the maker and the payee. [See *Stettauer v. Carney*, 20-474.]

Error from Labette District Court.

ACTION by the *Burlington National Bank*, as plaintiff, against *Bedell* as defendant, upon the following promissory note:

\$170.00. CHETOPA, KANSAS, Sept. 18th, 1872.

Three months after date, I promise to pay to the order of O. D. Bond, General Agent Great Western Telegraph Company, at the First National Bank of Chetopa, Kansas, one hundred seventy dollars, with — per cent. interest per annum from — until paid, value received; and in case suit is instituted on this note a reasonable attorney-fee for collection.

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The drawer and indorsers of this note severally waive demand of payment, notice of protest, and of non-payment.

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Defense, fraud and failure of consideration. Trial at the May Term 1874. Verdict for defendant. On plaintiff's motion the verdict was set aside, and a new trial granted. The defendant appeals. The facts and proceedings are stated in the opinion.

Ayres & Fox, for plaintiff in error.

Nelson Case, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This is a proceeding in error to review the action of the district court in granting a new trial. In such a case it is settled, that the "supreme court will require a stronger case for interference than when one has been refused." *Field v. Kinnear*, 5 Kas. 233. The reasons for this are fully given in the opinion in that case, and need not be repeated. It seems to us that they are controlling in this case, and compel an affirmance. The facts are these: The bank was a purchaser before due of a negotiable promissory note executed by Bedell. The claim was, that the note was obtained from Bedell by fraud and without consideration, and that the bank had knowledge of this, or notice sufficient to put it upon inquiry. The verdict of the jury was in favor of Bedell. The new trial was granted for the reason, as stated by the court, that it appeared to it that the jury might have been misled by one of the instructions. That instruction was as follows:

"And the plaintiff being a banking institution, and accustomed to buy and sell and deal in commercial paper, was bound to greater diligence as to what defenses there might be against the note between the original parties, than ordinary persons."

The note was given by Bedell in part payment of a subscription to the capital stock of the Great Western Telegraph Co., was obtained from him upon representations that the company was at work on the line between Humboldt and Chetopa, and

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would have the line completed to Chetopa, where Bedell resided, and in working order before the maturity of the note. The note was an ordinary negotiable note, payable to the order of O. D. Bond, General Agent Gt. W. Tel. Co., by him indorsed to McDonald, Whitcomb & Balt, the contractors for building the line of telegraph, and discounted for them by the bank. It appears that other parties at Chetopa besides Bedell were induced to take stock and give their notes therefor, as were also parties at Burlington, including the plaintiff, the Burlington National Bank. The notes of the latter were still outstanding, and not yet due, when it discounted the note in controversy. Before discounting it, the bank took the precaution to ascertain the responsibility of Bedell. While it must be conceded that the testimony points to a gross imposition practiced upon Bedell, yet it seems that others, including the bank, were equally victimized. Upon the other and equally essential matter, knowledge of or notice to the bank, we are constrained to say that the testimony is very deficient. We can well imagine that the district court, impressed with this deficiency, scrutinized carefully the instructions it had given to see if some one had not unduly influenced the jury to its apparently unwarranted conclusion. Unwilling perhaps to say that there was absolutely no testimony inculcating the bank, it nevertheless felt that the verdict was wrong, and charitably assumed the responsibility for the error which was properly imputable to the jury. Regarding the instruction itself, it may be true that a party engaged in dealing in commercial paper may be more familiar with the habits of business men in the making and discounting of such paper, and therefore more chargeable with notice of anything unusual in the form of the paper, or the conduct of the holder; but beyond that we do not understand that he is under any greater obligations than any other purchaser of such paper to inquire into and ascertain the true nature of the transaction between the maker and the payee. He is at equal liberty with all other persons, if the paper be in proper form, and the conduct of the holder without suspicion, to purchase in full reliance upon the protection

which the law casts around such paper. This instruction particularly, as applicable to the facts in this case, seems to cast an unwarranted restriction upon the free circulation of commercial paper, and doubtless improperly influenced the jury in its verdict. We see no error in the order granting a new trial.

Counsel for defendant in error has attached to the transcript a cross-petition, alleging error in taxing the costs of the term to the bank as a condition of the new trial. Whether there were error in this ruling or not, we do not think the question can be raised before us in this manner. A party alleging error in the proceedings in the district court must bring his separate action to have those errors examined, and cannot bring those errors up for review by simply attaching a cross-petition in error to the plaintiff's record.

The judgment will be affirmed.

All the Justices concurring.

OSCAR SEITZ, *et al.*, v. UNION PACIFIC RAILWAY CO.

1. **LIENS OF VENDOR, AND OF MECHANIC; Priority, Where Vendor Reserves Legal Title as Security.** The railway company owned three lots in the city of Salina. Mrs. B. desired to build a hotel on them. The parties thereupon agreed that Mrs. B. should build and furnish said hotel, that the railway company should advance some money by way of a loan to assist her in building and furnishing the same, and that when she should build and furnish it, and pay back to the railway company the amount of money advanced by the company to her, the company would then execute a deed, conveying to her the full legal title to the property. Under this contract the railway company furnished to Mrs. B. the sum of \$7,512.85, and she built and furnished said hotel. But she has never yet refunded said sum of money, or any part thereof; and the company has never yet executed to her a deed for said property. Said contract between the railway company and Mrs. B. was originally entirely in parol. But subsequently, and on November 4th 1867, Mrs. B. gave to the railway company her two promissory notes for said amount of money, and

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also gave a mortgage on the hotel property and on the furniture therein to secure the payment of said notes. The original parol contract was not in any other manner disturbed or altered by those transactions. While Mrs. B. was building said hotel she obtained labor and material therefor from the defendants below (plaintiffs in error.) The defendants below afterward duly filed statements for mechanic's liens on said property, under the provisions of ch.137 of Compiled Laws of 1862. These claims of the defendants have never been paid or satisfied. The court below held that these claims were valid liens upon the property, but also held that they were subsequent to the lien of the railway company thereon. When the contracts for furnishing said labor and materials were made is not shown. Whether any of them were made before the railway company furnished said money is not shown. Therefore, in support of the decision of the court below, it should be presumed that said contracts for labor and materials were made after the money was furnished. Some of the defendants furnished labor and material before said mortgage was executed, and some of them afterward. The judgment of the court below was, that the property should be sold, and that the claim of the railway company should be first paid from the proceeds thereof. *Held*, that the judgment of the court below was correct.

2. *MECHANIC'S-LIEN LAW OF 1862, Construed.* The mechanic's-lien law of 1862, taken all together, undoubtedly means, that a mechanic's lien shall operate upon the whole of the estate which the person procuring the labor and materials may have in and to the property for which he procures the same, whatever may be the character of that estate, but that such lien cannot operate upon anything more than such estate, and that so far as it does operate it is the paramount lien upon the enhanced value given to such estate by the labor and materials. That is, it is the paramount lien upon the surplus value of the estate, over and above what would have been the value of such estate without such labor and materials.
3. ——— *Extent and Effect of Liens.* Where a person holding an equitable estate in and to certain real estate, and not holding the legal estate, made improvements on such estate, and afterward mechanics' liens were filed thereon under the mechanic's-lien law of 1862 to secure payment for labor and materials furnished in making said improvements, said liens operate upon the said equitable estate only, and do not reach the legal estate, or affect the rights of the party holding the legal title. [*Harsh v. Morgan*, 1-293.]

Error from Saline District Court.

THE *Railway Company* brought its action in June 1868, to foreclose a mortgage. It made Mary A. Bickerdyke, H. D. Rush, Alonzo B. Chapman, Lorenzo D. Bower, Benj. Howard,

Statement of the Case.

Oscar Seitz, Miller & Stevens, Jacob De Witt, Hamlin & Woolley, and Palmer, Fuller & Co., defendants. Mrs. Bickerdyke was the mortgagor. The other defendants were joined as having some claim or lien on the mortgaged premises subsequently to the claim of the plaintiff. Trial at the October Term 1870 of the district court, J. H., judge *pro tem.*, presiding. An agreed statement of facts was filed, among which are the following:

"In 1867 the defendant Mary A. Bickerdyke commenced erecting a building for a hotel, and other buildings appurtenant thereto, for herself, on the lots of the plaintiff company, described in the petition in this case, their title thereto then being of record. Said hotel building was finished in March 1868. The money furnished by the plaintiff for materials for said building, and for the furniture purchased and owned by said Mary A. Bickerdyke, was furnished and paid at various times during the summer of 1867, and previous to November 4th 1867. Said building was erected with the knowledge of the plaintiff, and on the understanding that on the erection of said building, and on the payment of all her indebtedness to the plaintiff, said Mary A. Bickerdyke should have a title to said lots, but without any definite contract, until the giving of the mortgage specified in the petition. Said mortgage was given by said Mary A. Bickerdyke on the 4th of November 1867, to said plaintiff, on said lots and hotel-building and furniture, for the sum of \$7,512.85, the amount of money previously advanced as aforesaid by the plaintiff, and payable as stated in said petition and mortgage.

"The defendants hereinafter named have each recovered a judgment in this court against said Mary A. Bickerdyke for the several amounts hereinafter named, and each on a contract with said Mary A. Bickerdyke, and for labor done and materials furnished on and for said buildings on said lots. Each of said defendants did within six months after the completion of said buildings, file a mechanic's lien on said buildings for said labor and materials, and each commenced his action within twelve months after the completion of said buildings.

"The following is a statement of the judgments obtained by said defendants: H. D. Rush, March term 1868, for \$1289.98; Palmer, Fuller & Co., September term 1868, for \$2510.15; A. B. Chapman, March term 1869, for \$626.69; L. D. Bower, March term 1869, for \$354.80; Benj. Howard, September

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term 1868, for \$213.87; Oscar Seitz, September term 1868, for \$165.89; Miller & Stevens, September term 1868, for \$400; and Jacob De Witt, September term 1868, for \$227.57. Said judgments of H. D. Rush, and Palmer, Fuller & Co., have been sold and assigned to the plaintiff.

"It is agreed that the following claims and parts of claims, included in the foregoing judgments, namely, B. Howard, \$213.87; Palmer, Fuller & Co., \$359.43; A. B. Chapman, \$68; L. D. Bower, \$198; Oscar Seitz, \$28.50; Miller & Stevens, \$400, and Jacob De Witt, \$169.87, originated since the date of the plaintiff's mortgage; and that all the claims of said defendants, as first above stated, exclusive of the several claims and amounts last above stated, originated before the date of the said mortgage."

The district court held that the lien of the *Railway Company* was the first and paramount lien on the mortgaged premises, and a decree was entered that said premises be sold, "and the proceeds of said sale be first applied to the payment of the costs of suit; second, to the payment of the plaintiff's judgment and claim in full; and that the residue be applied to the payment of the claims and judgments of other lien-holders and judgment creditors *pro rata*," specifying such other liens in order and amount as first stated in the agreed facts. From this decree defendants *Seitz, Chapman, Howard, Miller & Stevens, and De Witt*, appeal, and bring the case here on error. The *Railway Company* only is made defendant in error.

C. A. Hiller, for plaintiffs in error:

The mechanics' liens were prior to the defendant's mortgage. Defendant in error is estopped from denying the plaintiffs' claims. The liens of plaintiffs in error, prior and subsequent to defendant's mortgage, should be distinguished. The personalty should be deducted from the mortgage of defendant in error.

The mechanics' liens are prior to the mortgage-deed. The mechanics' liens were based on the law approved March 4th 1862, Comp. Laws, 680, ch. 137. Section 17 of this lien law

Brief of Plaintiffs in Error.

says that the lien shall be a preferred claim on the building, and *previous incumbrancers* and *creditors* must look to the land. Defendant in error never took any steps under the lien law; hence it is a *previous* encumbrancer or creditor.

The general practice is, to give a liberal construction to the lien laws in favor of the mechanic or material-man. 10 Wend. 375; 2 Miss. 874; Houck on Liens, 85; 46 Mo. 595. The court below erred in applying the 14th section of the law to the case, and ignoring the 17th section. The case of *Smith v. Moore*, 26 Ill. 392, is precisely in point. And the building and lots should be divided, and sold only when it can be done without injury; otherwise the value of each should be found, and proceeds of the sale divided proportionably. Defendant Bickerdyke was the owner of the premises when the liens attached. 4 Scam. 531; 17 Ill. 301.

Defendant in error, by accepting a mortgage from Mrs. Bickerdyke is estopped from denying her title as against her and the lien-men claiming through her; and is further estopped by permitting the erection of this building, having knowledge thereof. A mortgage or other incumbrance may give rise to an estoppel; 14 Cal. 612. Now, defendant in error by accepting and placing on record its mortgage from defendant Bickerdyke, acknowledged her title to all the world, and cannot now contest it. But the case is still stronger against the railway company, if it is the owner, and permitted work to go on from which it alone obtains the benefits, and afterward sets up its title to defeat the mechanics' liens. The maxim, *Qui tacet consentire videtur*, applies here. Passive knowledge is sufficient in such cases. 14 Ill. 269; 1 Johns. Ch. 344; 23 Ill. 88; 14 Wis. 281; 3 Ohio St. 344; 14 Cal. 247.

If our rule of distribution be true, the claims admitted prior to the mortgage by the agreed statement, must be first satisfied: 2 Ohio St. 114. The other lien-men look to the building, and the mortgagee must look to the land for its claims. Yet no distinction between the lien-holders was made by the court below.

J. P. Usher, and C. E. Bretherton, for defendant in error:

1. The petition in error is brought by part only of the defendants below, and hence is defective. Bickerdyke, Rush, and others of the defendants, are not parties to the petition in error, either as plaintiff or defendant. It is well settled, that all parties interested in the judgment which it is sought to reverse, must be brought before the court, and if they are not, a motion to dismiss the petition will be sustained. Nash's Practice, 4th ed., 1258; 13 Ohio St. 568; 14 Ohio St. 287; 22 Ohio St. 131; 10 Kas. 204, 394.

2. It is evident that the plaintiffs in error can only sustain the substantial proposition of their case, which is thus stated in the fifth assignment in their petition, "That the court erred in its decision that the claims and interests of the defendants in error were prior and superior liens to the claims of the plaintiffs in error upon the buildings and additions upon said lands erected and constructed," by demonstrating that their liens gave them a better title against defendant in error than Bickerdyke herself possessed. Bickerdyke could only acquire title to the premises by performing her agreement or understanding with defendants, set forth in the findings of the court, to-wit, "On the understanding that on the erection of said building, and on payment of all her indebtedness to the plaintiff," (now defendant in error,) "said Mrs. M. A. Bickerdyke should have a title to said lots."

There is not in the case before us any question of priority between mortgagees and mechanic's-lien holders. The 17th section of the law of 1862 has no bearing on the questions involved in it. The debt of Bickerdyke to defendants in error was the very root of her title, and it is absurd that any one should claim under her and yet attempt to repudiate that debt. The lien-holders' position, as against an owner having other than a fee-simple title, is defined by §14 of that act; and all they can claim is, to have sold "whatever right or estate such owner had in the land at the time of making the contract," and no

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more. The exact question we now discuss came before this court in *Harsh v. Morgan*, 1 Kas. 298, under the act of 1859, the 17th section of which is identical with §14 of the act of 1862.

The opinion of the court was delivered by

VALENTINE, J.: The petition in error in this case ought probably to be dismissed because of a defect of parties in this court. But as we think the judgment of the court below is correct, we shall pass over the question of dismissal, without deciding it, and proceed to consider such questions as are involved in the merits of the case. The facts of the case are substantially as follows: The Union Pacific Railway Company, Eastern Division, owned three lots in the city of Salina. Mrs. M. A. Bickerdyke desired to build a hotel on them. The parties thereupon agreed that Mrs. Bickerdyke should build and furnish said hotel, that the railway company should advance some money by way of a loan to assist her in building and furnishing the same, and that when she should build and furnish it, and pay back to the railway company the amount of money advanced by the company to her, the company would then execute a deed conveying to her the full legal title to the property. Under this contract the railway company furnished to Mrs. Bickerdyke the sum of \$7,512.85, and she built and furnished said hotel. But she has never yet refunded said sum of money, or any part thereof, and the company has never yet executed to her a deed of said property. Said contract between the railway company and Mrs. Bickerdyke was originally entirely in parol. But subsequently, and on November 4th 1867, Mrs. Bickerdyke gave to the railway company her two promissory notes for said amount of money, and also gave a mortgage on the hotel property and on the furniture therein to secure the payment of said notes. The original parol contract was not however in any other manner disturbed or altered by these transactions. While Mrs. Bickerdyke was building said hotel she obtained labor and materials therefor from the defendants below, plaintiffs in error. The defendants below

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afterward duly filed statements for mechanics' liens on said property under the provisions of the statutes of 1862. (Comp. Laws, 680, et seq.) These claims of the defendants have never been paid or satisfied. The court below held that these claims were valid liens upon the property, but also held that they were subsequent to the lien of the plaintiff (the railway company) thereon. When the contracts for furnishing said labor and materials were made, is not shown. Whether any of them were made before the railway company furnished said money, is not shown. Therefore, in support of the decision of the court below we should presume that said contracts for labor and materials were made after the money was furnished, although probably it would make no difference in the decision of this case whether they were made before or afterward. Some of the defendants furnished labor and materials before said mortgage was executed, and some of them afterward. The judgment of the court below was, that the property should be sold and that the claim of the railway company should be first paid from the proceeds thereof. Of this the defendants (plaintiffs in error) complain. They claim that their claims should be first paid. We think however that the judgment of the court below was correct. We think that it is not only supported by reason and justice, but it comes fairly within the spirit of the mechanics'-lien law itself. The defendants make their claim exclusively under §17 of that law. (Comp. Laws, 683.) But §17 must be read in connection with §14; and indeed, in connection with the whole of the law upon the subject of mechanics' liens. Then, taking the whole of the law together, and it undoubtedly means that a mechanic's lien shall operate upon the whole of the estate which the person procuring the labor and materials may have in and to the property for which he procures the same, whatever may be the character of that estate, but that such lien cannot operate upon anything more than such estate, and that so far as it does operate, it is the paramount lien upon the enhanced value given to such estate by the labor and materials. That is, it is the paramount lien upon the surplus

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value of the estate over and above what would have been the value of such estate without such labor and materials. In the present case Mrs. Bickerdyke had a contingent equitable estate in the property in question. The plaintiff had all the rest of the estate. Upon this contingent equitable estate of Mrs. Bickerdyke the defendants' liens operated, and upon that they were the paramount lien to the extent above mentioned; but they operated upon nothing more. They could not operate upon anything more. They could not reach something that Mrs. Bickerdyke did not have. They could not reach to the plaintiff's legal estate. A lien upon an estate cannot be greater than the estate itself. A stream cannot rise higher than its fountain. And therefore, we think that said liens did not in any manner affect the legal estate of the plaintiff, or its rights thereunder. But the plaintiff (as well as the defendants) had liens upon Mrs. Bickerdyke's equitable estate. It had a vendor's lien, (*Stevens v. Chadwick*, 10 Kas. 406,) and a mortgage lien, upon the same. But for the purposes of this case we shall consider that the defendants' liens were paramount to either of these liens of the plaintiff. Indeed, for the purposes of this case we shall consider the mechanics' liens of the defendants upon Mrs. Bickerdyke's equitable estate as paramount and stronger than any other liens could possibly be. But the plaintiff had more than the said vendor's lien and mortgage lien upon Mrs. Bickerdyke's equitable estate. It also had a lien upon the legal estate, and held such legal estate in its own hands as security for its own claim. And these last-mentioned rights of the plaintiff are rights not derived from Mrs. Bickerdyke, or from the defendants, or from any common grantor; but they are rights originally held by the plaintiff, reserved to it by the transactions with Mrs. Bickerdyke, and with which it has never parted. And these rights are governed more by the law relating to vendor and vendee than by any law relating to liens or incumbrances. Originally the plaintiff held the whole of the estate, both legal and equitable. It parted with the estate upon certain conditions. But it reserved to itself the legal estate, with a lien upon it to secure the payment of said

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debt of \$7,512.85. Now, how can the plaintiff be divested of this legal estate except by the payment of said debt—except by the fulfillment of the terms and conditions upon which it agreed to divest itself of said legal estate? To take the legal title to said property from the railway company without paying said debt, against the consent of the company, and for no crime or fault of the company, would look very much like confiscation. If the judgment of the court below had merely ordered Mrs. Bickerdyke's equitable estate to be sold to satisfy the defendants' claims, then possibly there would have been no necessity for making any provision for the payment of the plaintiff's claim. But the purchaser of the property in such a case would have stood precisely in the place of Mrs. Bickerdyke. He would have obtained precisely her equitable estate; nothing more, and nothing less. And before he could have obtained the legal estate he would have had to fulfill all her obligations to the plaintiff. But the court below did not stop with ordering that the equitable estate of Mrs. Bickerdyke should be sold. The court ordered that the entire estate, legal as well as equitable, should be sold. And therefore, as the sale would divest the plaintiff of its legal estate, the court had to provide by its judgment for paying the plaintiff's claim. We see no error in this. On the contrary, it was eminently just and legal. We suppose that no one will claim that the giving of said promissory notes for the debt, and the giving of said mortgage upon Mrs. Bickerdyke's equitable estate and upon the furniture in the hotel to secure the payment of said notes, will in any manner change the plaintiff's rights with regard to the legal estate, when at the same time the legal estate was reserved as a further security for the payment of said debt.

The judgment of the court below will be affirmed.

All the Justices concurring.

THE CITY OF SALINA V. OSCAR SEITZ.

LICENSES; INTOXICATING LIQUORS; SALES BY DRUGGISTS; Cities of Third Class; Ordinances; Powers and Jurisdiction. In July 1871, the city of Salina, a city of the third class, passed an ordinance providing for the issuance of licenses upon certain terms and conditions to persons to sell intoxicating liquors, and providing for punishing by fines such persons as should sell intoxicating liquors without taking out or having such a license. Said ordinance with some amendments is still in force. During the year 1874 the defendant was a druggist, and kept drugs, medicines and intoxicating liquors for sale in said city. He did not take out or have any license to sell intoxicating liquors. He employed a clerk for the drug store, and authorized said clerk to sell said drugs, medicines, and intoxicating liquors. On May 16th 1874, said clerk sold, in said drug store, one gallon of said intoxicating liquor. The city of Salina immediately commenced a prosecution against the defendant for selling said liquor in violation of said ordinance. The action was commenced before the police judge of said city. It was afterward taken on appeal to the district court, and there tried again on its merits. The defendant was found guilty in the district court, and sentenced to pay a fine of \$50. *Held*, that said ordinance was and is valid [*State v. Young*, 17-414; *City of Marion v. Toomy*, 21-439; *State v. Simmons*, 21-685]; that each of said courts had jurisdiction to try the cause; that no error is perceived in the rulings of the court below; and that the defendant would have been liable even if said liquor had been sold for medical purposes only. [*State v. Fleming*, 32-588.]

Appeal from Saline District Court.

THE facts of this case are sufficiently stated in the opinion, *infra*. The provisions of the city ordinance under which *Seitz* was convicted, are sufficiently stated in the appellant's brief. *Seitz* was convicted at the June Term 1874, and he brings the case here on appeal.

J. G. Mohler, for appellant:

This prosecution was for an alleged violation of city ordinance No. 48, regulating the sale of intoxicating liquors, passed by the city council of the city of Salina, and approved July 21st 1871. The section claimed to have been violated reads as follows:

"Sec. 4. Every person who shall without first taking out and

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having a license as aforesaid, [referring to preceding sections of said ordinance,] directly or indirectly sell or offer for sale any spiritous, vinous, fermented, or intoxicating liquors, within the limits of the city, shall upon conviction be fined in any sum not less than fifty nor more than one hundred dollars."

Upon trial before the police judge a conviction was had, and an appeal was taken to the district court. In the district court appellant filed plea in abatement, raising the question of the authority of the city council to enact said ordinance No. 48. Upon the trial of the truth of said plea, evidence was submitted and said plea was by the court overruled, and exceptions taken by appellant. If the city council had no authority to enact said ordinance, as is claimed by appellant, then all proceedings in the case were without jurisdiction, and void, and the district court should have sustained the plea in abatement. The police judge of the city of Salina could have no jurisdiction if said ordinance was invalid; and if the police judge had no jurisdiction, the district court could have none: 19 Wis. 193; 24 Wis. 594; 27 Wis. 462.

Had the city council authority to enact ordinance No. 48? "The powers of all corporations are limited by the grants in their charters, and cannot extend beyond them." 21 Ill. 205; 1 Dill. Munic. Corp. 173, *et seq.* Courts adopt a strict rather than liberal construction of powers. Is power granted in ch. 60, Laws of Kansas 1871, to cities of the third class to enact ordinances such as No. 48 enacted by the city of Salina? Said ordinance is almost a *verbatim* copy of the Dramshop Act, (Gen. Stat. 399.) Sec. 4 of ordinance No. 48 is almost an exact copy of § 3 of the dramshop act. In § 3 of dramshop act it is provided, that any person selling liquor without license shall be fined not more than one hundred dollars. Sec. 4 of ordinance No. 48 provides a fine of not less than fifty dollars, nor more than one hundred dollars. The dramshop act is operative in all portions of the state. Cities of the third class are not exempt from the operation of its provisions: *Alexander v. O'Donnell*, 12 Kas. 608. Nowhere in the charter of cities of the third class is power to enact ordinances to prohibit the sale of intoxi-

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cating liquors expressly granted. This was not a prosecution for a violation of a city ordinance restraining, prohibiting, or suppressing tippling-shops. "Tippling-shop" has a well-known meaning in the law. *City of Emporia v. Volmer*, 12 Kas. 622. Appellant was not charged with keeping a tippling-shop, but with a single sale of whisky. Ordinance No. 48 was manifestly not enacted to carry out any authority granted in § 50 of said city-charter act of 1871. In the court below authority for the enactment of ordinance No. 48 was claimed under § 66 of said act, the "general-welfare clause" of the charter. "A general grant of power, such as mere authority to make by-laws, or authority to make by-laws for the good government of the place, and the like, *should not* be held to confer authority upon the corporation to make an ordinance punishing an act—for example, an assault and battery—which is made punishable as a criminal offense *by the laws of the state*. The intention of the state, that the general laws shall not extend to the inhabitants of municipal corporations, or that these corporations shall have the power to supersede the state law, will not be inferred from grants of power general in their character; nor will such authority in the corporation be held to exist as an implied or incidental right." 1 Dill. Munic. Corp. 401; 1 Ark. 201; 88 N. H. 424.

The appellant insists that the city council had no authority to enact such ordinance, there being a general statute of the state—Dramshop Act—regulating the sale of intoxicating liquors, and punishing a sale in violation of law; that the prosecution in this case should have been under the dramshop act before a justice of the peace, or in the district court, and not in the municipal court. 1 Dill. Munic. Corp. 89.

The opinion of the court was delivered by

VALENTINE, J.: The facts of this case are substantially as follows: On July 21st 1871 the city of Salina was and has since hitherto been a city of the third class. On that day said city passed an ordinance providing for the issuance of licenses

upon certain terms and conditions to persons to sell intoxicating liquors, and providing for punishing by fine such persons as should sell intoxicating liquors without taking out or having such a license. Said ordinance with some amendments is still in force. During the year 1874 the defendant, Oscar Seitz, was a druggist, and kept drugs, medicines, and intoxicating liquors for sale in said city of Salina. He did not take out or have any license to sell intoxicating liquors. He employed one J. M. Champion as a clerk in the drug store, and authorized Champion to sell said drugs, medicines, and intoxicating liquors. On May 16th 1874 said clerk sold to one Claus Fair in said drug store one gallon of said intoxicating liquor. The city of Salina immediately commenced this prosecution against the defendant for selling said liquor in violation of said ordinance. The action was commenced before the police judge of said city. It was afterward taken on appeal to the district court, and there tried again on its merits. The defendant was found guilty in the district court, sentenced to pay a fine of \$50, and he now appeals to this court.

The defendant claims that all the proceedings connected with this case from the beginning to the end were void; that the ordinance was void; that the proceedings before the police judge were void; that the proceedings in the district court were void; that neither court had any jurisdiction to try the defendant for such supposed offense; and that the district court committed other errors during the trial of the cause. Every claim of the defendant however we think is untenable, and therefore every question raised by him must be decided against him. The said ordinance is valid. (*Dramshop Act*, Gen. Stat., pp. 399, 400, §§ 1, 2, 3; *Laws of 1869*, pp. 86, 87, §§ 28 and 29, and especially subdivisions 4 and 5 of § 29; *Laws of 1871*, ch. 60, §§ 23, 48, 50, 66, 94; *Laws of 1872*, p. 234, § 2; *The State v. Pittman*, 10 Kas. 593; 597; *City of Emporia v. Volmer*, 12 Kas. 622, 633; *Neitzel v. City of Concordia*, 14 Kas. 446; *Williams & Pattee v. Louis*, 14 Kas. 605.) And said courts had jurisdiction to try the cause. (*Laws of 1871*, ch. 60, art. 5, and

especially §§ 72, 73, and 84, and cases above cited.) And we perceive no error in any of the proceedings.

Even if said liquor had been sold for medical purposes only, the defendant would still have been liable.

The judgment of the court below must be affirmed.

All the Justices concurring.

W. W. PAYNE v. FIRST NATIONAL BANK.

1. JURISDICTION OF DISTRICT COURTS; *Residence of Parties*. Where a cause of action is founded upon a promissory note, a district court of this state may obtain jurisdiction of both the subject-matter of the action and the parties to the suit, although the parties may be nonresidents of this state, and residents of the state of Missouri, and although the cause of action may have arisen in the latter state.
2. ——— *Attachment*. And in such a case, an order of attachment may be issued against the property of the defendant, on the ground that he is a nonresident of the state of Kansas, and no undertaking will be required of the plaintiff.
3. MOTION TO DISCHARGE ATTACHMENT; *Uncertainty*. Where a defendant moves the court to discharge an order of attachment "for the reason that the affidavit and proceedings for attachment are informal, defective, and not according to law," and defendant states no other reason, and states such reason in no other manner, *held*, that the defects and informalities of the "affidavit and proceedings" are not sufficiently pointed out to the court, and therefore that the court does not err in overruling the motion, and especially so, where the affidavit and proceedings appear to be sufficient.
4. CONTINUANCE; MOTION; *Absent Witness; Diligence; Stating Facts*. Where a motion for a continuance is made on account of the absence of evidence, the affidavit should show that the party applying for the continuance has used due diligence to obtain the evidence; and where the evidence desired is the testimony of an absent witness, it is not due diligence merely to have a subpoena issued for the witness, when it is known that the witness is a nonresident of the state, and that a subpoena cannot reach him.
5. ——— And in such case, where the evidence desired is the testimony of an absent witness, the party applying for the continuance should state

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the facts which he believes the witness would prove, in the same manner as he would state them if he were taking the deposition of the witness. [*Swenson v. Aultman, et al.*, 14-273; *Brown v. Johnson*, 14-377; *St. L. W. & W. Rld. Co. v. Ransom*, 29-298.]

6. ——— The granting or refusing a continuance is largely within the discretion of the trial court; and unless it is shown that the trial court has abused its discretion in such a case, the appellate court will not reverse its rulings. [*Ed. Ass'n Christian Churches v. Hitchcock*, 4-36; *Hottenstein v. Conrad*, 9-435; *Davis v. Wilson*, 11-74; *Swenson v. Aultman, et al.*, 14-273; *Brown v. Johnson*, 14-377; *Wilkins v. Moore*, 20-538; *Perley v. Taylor*, 21-712; *Moon v. Helfer*, 25-139; *State v. Rhea*, 25-576; *Cushenberry v. McMurray*, 27-328; *St. L. W. & W. Rld. Co. v. Ransom*, 29-298; *Parsons Water Co. v. Knapp*, 33-752.]
7. ACTION ON NOTE; *Practice, Where Execution of Note is not Denied Under Oath.* Where the plaintiff sets forth in his petition a cause of action founded on a promissory note against two defendants as makers of the note, and duly alleges the execution of the note, and the defendants do not deny the execution of the note by an answer verified by affidavit, but one of them sets forth in his answer, as a defense to the action, that he was only a surety for his codefendant, and that by subsequent transactions between the plaintiff and his codefendant he was released and discharged from the payment of said note, it must be held, that the execution of the note is admitted by the defendants; that there is no necessity for introducing the note in evidence on the trial [*Williams v. Norton*, 3-295; *Ferguson v. Tutt*, 8-370; *Mo. Riv. Ft. S. & Gulf Rld. Co. v. Wilson*, 10-105]; that if no evidence were introduced on the trial, judgment should be rendered for the plaintiff for the amount of the note; and that the burden of proving said defense rests upon the defendant.
8. PARTY NOT PREJUDICED, *Cannot Complain of Error.* Where a judgment has been rendered against two defendants, and rightfully as against one of them, the one against whom the judgment has been rightfully rendered cannot complain that the judgment has been wrongfully rendered against the other defendant. [*Burton, et al., v. Boyd*, 7-17; *Craft v. Bent*, 8-328; *DaLee v. Blackburn*, 11-190.]

Error from Wyandotte District Court.

ACTION on promissory note, against two parties, as defendants. An order of attachment was obtained, and levied on property of defendants. The summons was returned "Not found," as to both defendants. Defendant Bowen made no appearance. Defendant *Payne* appeared and moved to dissolve the attachment, and he also filed a separate answer to the petition. Other facts and proceedings are stated in the opinion.

Brief of Plaintiff in Error.

Trial at the September term 1874 of the district court. The plaintiff's petition set forth the note sued on, and alleged its due execution. No evidence was produced by plaintiff, the court holding that the note sued on need not be shown, and the affirmative of the issues was on defendants. Defendant *Payne* produced testimony tending to prove the truth of the matters alleged in his answer. The court found for plaintiff in the sum of \$555, and judgment was rendered in favor of plaintiff and against both defendants in the action for said sum. Defendant *Payne* brings the case here on error.

Frank Titus, for plaintiff in error:

1. The institution of this action is wholly unwarranted by law, and an abuse of the legal process of this state by a foreign corporation having its domicile in the state of Missouri. The statute governing attachments nowhere expressly gives this remedy to nonresident plaintiffs. By implication, in all the provisions of article 11 of the code, relating to attachments, the remedy is reserved to citizens of this state, or to matters arising within this state. There was no bond given in this action by plaintiff. Sec. 192 of the code expressly provides that a bond shall be given by plaintiff in all cases before an attachment shall issue, except when defendant is a nonresident, or a foreign corporation. Can that section be reasonably construed to mean, that a foreign corporation may institute attachments *ad libitum* against persons resident in different portions of the Union, and owning property in Kansas, without furnishing that indemnity, which all citizens of this state are required to furnish, save in excepted instances? The section obviously applies only to citizens of this state. Any other construction would seem unreasonable, as well as contrary to public policy.

2. The court below could only obtain jurisdiction, if at all, by consent of defendants in this action, which was not given. There is no rule of law which otherwise would warrant such assumption by the district court, the place of domicile of all parties being in Missouri, the subject-matter not being immova-

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ble property in Kansas, but the action being merely an ordinary personal one for the recovery of money, and the remedy sought being one which could not have been in contemplation of the parties to the contract, and which could not have been sustained in the place of their domicile. 2 Kent's Com. 463; Story Conf. of Laws, §§ 549 to 552; 9 Yerg. 244.

3. The motion to dismiss the attachment, and discharge the securities on the forthcoming bond, should have been sustained. The affidavit upon which the attachment issued was clearly informal and illegal in this, that it purports to have been subscribed and sworn to in Wyandotte county, Kansas, before a notary public of the state of Missouri, while the certificate of the officer shows that it was sworn to in Missouri. If verified out of the state it must be before some officer authorized to take depositions. It does not appear that the person before whom said affidavit was made was such officer, (code, § 330,) or that such person was an officer at all. 10 Kas. 88. Again, said affidavit should have been made by an officer of plaintiff, or its agent. It fails to show that Bancroft, the person who made the affidavit, was such agent, or in fact that the bank had appointed any agent for such purpose. It fails to set forth the reason why it is not made by some officer of plaintiff as required by law. Code, § 114.

4. The court erred in refusing defendant a continuance. The affidavit in support of the same fully complied with the statute, and this was the first application. The chief witness whose testimony was desired was defendant Bowen, whose interest it was to remain away, and to force Payne to pay the debt. Payne had used due diligence to ascertain the witness' whereabouts and take his deposition, and the affidavit fully discloses said fact; and if the witness could not be reached by process from the court below, it certainly did not become plaintiff to urge that as an objection, who by his own act had sought a jurisdiction foreign to all persons connected with the action. There were no counter affidavits filed. That the court should continue, when good cause shown, and that it is error to refuse, see 6 Mo. 444; 11 Cal. 21; Hill on New Trials, §§ 9,

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10. There is a difference between arbitrary and judicial discretion, which the appellate court will notice.

5. It was error to put defendant at the trial on affirmation proof of the issues, without requiring the note sued on to be put in evidence. While the statute does not require the note sued on to be filed, yet it does not alter the general rule of law, that the instrument showing the liability claimed should be put in evidence. If there is a variance between the pleading and the evidence, defendant should not be deprived of his rights so arising, by this mode of practice. If plaintiff possesses the note, if anything is due on it, and to whom, if it was protested, there should be some testimony produced to show such facts, before putting defendant on his defense, where there is a denial of liability, as in this case.

6. The judgment in this case is invalid, being entered up against both defendants in the action, when Bowen was never brought into court, nor served with either actual or constructive process. If it had been intended to take judgment against Payne only, the suit should have been dismissed as to his co-defendant.

Cook & Sharp, for defendant in error. (No brief on file.)

The opinion of the court was delivered by

VALENTINE, J.: This was an action on a promissory note. The note was executed in the state of Missouri by Emmer Bowen and W. W. Payne, as makers, to The First National Bank of Kansas City, Missouri, as payee, and the action was brought by the payee against the makers, in the district court of Wyandotte county, Kansas. All the parties reside in the state of Missouri. The plaintiff in error therefore claims that the district court did not have jurisdiction either of the parties or the subject-matter of the action, merely because the parties reside in Missouri, and because the cause of action arose there. We think however the court below had ample jurisdiction.

At the time of the commencement of the action an order of attachment was issued in the case against the property of the

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defendants below on the ground that they were nonresidents of the state of Kansas. (Code, §190.) No undertaking was given by the plaintiff below. (Code, §192.) The plaintiff in error also claims that these attachment proceedings are void, for the same reason that he claims that the court below had no jurisdiction of the cause of action. And in this we also think the plaintiff in error is mistaken. The plaintiff in error, one of the defendants below, moved the court below to discharge the attachment "for the reason," as he then claimed, "that the affidavit and proceedings for attachment are informal, defective, and not according to law." These are the only reasons he gives for his motion, and we give them in his exact words. The defects and informalities of "the affidavit and proceedings for attachment" were not sufficiently pointed out to the court below, and for that reason if for no other the court below did not err in overruling the defendant's motion. The affidavit and proceedings appear however to be sufficient, and of course then there could be no error. The supposed defects pointed out in the brief of plaintiff in error are not sustained by the record.

The defendant Payne also moved the court below for a continuance of his case, and supported his motion by an affidavit. The court below overruled the motion, and said defendant now claims that this ruling was erroneous. The statute provides that—

"A motion for a continuance, on account of the absence of evidence, can be made only upon affidavit, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it, and where the evidence may be; and if it is for an absent witness, the affidavit must show where the witness resides, if his residence is known to the party, and the probability of procuring his testimony within a reasonable time, and what facts he believes the witness will prove, and that he believes them to be true. If, thereupon, the adverse party will consent that on the trial the facts alleged in the affidavit shall be read and treated as the deposition of the absent witness, or that the facts in relation to other evidence shall be taken as proved to the extent alleged in the

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affidavit, no continuance shall be granted on the ground of the absence of such evidence." (Gen. Stat. 689, Code, §817.)

The affidavit in this case was attempted to be made under this statute, but it is defective in several particulars. It does not show that the defendant Payne used due diligence to obtain the evidence for which he asked the continuance; and it does not state the evidence itself in any proper manner. The only supposed diligence that the defendant used was in having a subpoena issued by the clerk of the court below for the three absent witnesses whose testimony he desired to procure. But this was not diligence, for the defendant knew that said witnesses were all nonresidents of the state of Kansas, and that a subpoena from that court could not reach them. One of said witnesses was his codefendant, whose exact evidence or whereabouts he says he did not know. But it does not seem that he even attempted to learn his exact residence or whereabouts. The other two witnesses were persons whose residence he knew was in Missouri, and yet he made no effort to obtain their depositions. And he did not state what would be the testimony of these three witnesses. He stated the nature of certain evidence as tending to prove certain facts; but whether he intended to state that this evidence had any connection with the testimony of said absent witnesses, we cannot tell. His words with reference to said evidence are as follows: "Said evidence is of the following nature, to-wit: proving and tending to prove that defendant Payne was, at the time of the taking of the note herein sued on by plaintiff, only a surety or indorser on the same, and was so known to be at said time by said plaintiff; that said plaintiff, so as aforesaid knowing said party, released by its actions said defendant Payne from all liability thereunder; that plaintiff has accepted other security, and taken other notes in lieu of the one sued on." This is all the evidence attempted to be stated in the affidavit; and there is nothing in the affidavit that specially connects it with said witnesses. But we suppose that the defendant intended that the court should infer that it was to come from said witnesses, as there is nothing in the affidavit that tends to show

that it was to come from any other source. Then, assuming that it was to come from said witnesses, it is still insufficient. First, the facts are not stated in sufficient detail. They should be stated with the same detail that they would be stated by the witness if he were on the stand testifying, or if his deposition was being taken. They are to be stated so that they may be read as the deposition of the absent witness if the court should consider the affidavit sufficient, and the opposite side should choose to admit them. Second, these facts are not stated to be the facts which the witnesses would prove by their direct testimony. They are not stated to be the facts which it is believed the witnesses would testify to if they were present. They are not in fact claimed to be the testimony or evidence of the witnesses; but they are stated to be the facts which it is believed the evidence of the witnesses would prove and tend to prove. They are not the primary or original facts coming within the knowledge of the witnesses, and to which the witnesses would testify, but they are secondary facts, inferences, or conclusions, drawn from the primary or original facts to which the witnesses would testify. They are not such facts as would fall from the lips of witnesses who might be on the stand testifying, but they are facts as they are usually alleged in pleadings, or are found by courts, juries, or referees. They are what are often known as conclusions of fact or conclusions of law. They are such as must be proved by other facts, or inferred from other facts, and are not themselves the primary, original, proving facts. The statute requires that the party asking a continuance shall state in his affidavit the "facts he believes the witness will prove." He is not authorized to state the facts which he believes will be proved by the facts which he believes the witness will prove. He must state the original primary facts as he would believe they would come from the witness, and not the conclusions or inferences which might be drawn from these facts. And he must state the facts in detail, so that they may be used as a deposition, and not in that general and comprehensive manner generally adopted for the statement of facts in pleadings, or in findings of courts or

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verdicts of juries. He should state the facts just as they would be stated by the witness in a deposition. This the defendant did not do. Now the granting or refusing of a continuance is largely within the discretion of a trial court; and unless it is shown that the trial court has abused its discretion in such a case, the appellate court will not reverse its rulings. (*Svenson v. Aultman*, 14 Kas. 273, and cases there cited.) We do not think that the court below has abused its discretion in this case. Probably however the court would not have abused its discretion if it had held the affidavit sufficient, notwithstanding the said defects.

Where a plaintiff sets forth in his petition a cause of action founded on a promissory note against two defendants as makers of the note, and duly alleges the execution of the note, and the defendants do not deny the execution of the note by an answer verified by affidavit, but one of them sets forth in his answer as a defense to the action that he was only a surety for his codefendant, and that by subsequent transactions between the plaintiff and his codefendant he was released and discharged from the payment of said note, it must be held that the execution of the note is admitted by the defendants; that there is no necessity for introducing the note in evidence on the trial; that if no evidence were introduced on the trial, judgment should be rendered for the plaintiff for the amount of the note; and that the burden of proving said defense rests upon the defendant. (*Reed v. Arnold*, 10 Kas. 102, 104, and cases there cited.)

The defendant Payne has no cause for complaint because judgment was also rendered against his codefendant Bowen. (*Craft v. Bent*, 8 Kas. 328; *DaLee v. Blackburn*, 11 Kas. 190; *Burton v. Boyd*, 7 Kas. 17.) Bowen is not complaining of the judgment rendered against him.

We should have affirmed this judgment without any consideration of the record, as counsel for plaintiff in error has failed to refer us to the particular pages of the record which he wished to have us examine.

The judgment of the court below is affirmed.

All the Justices concurring.

A. & N. RAILROAD Co. v. P. L. HUBBARD, *Judge, &c.*

PRACTICE, SUPREME COURT; *Mandamus Refused*. Where a majority of this court agree in the judgment that ought to be rendered, but disagree as to the reason for such judgment, such judgment must be entered, but it is useless to give the opinion of the several judges, for thereby no point of law is settled or decided. [*Foltz v. Merrill*, 11-479.]

Original Motion for a Mandamus.

THE *Atchison & Nebraska Rld. Co.*, as relator, applied to this court, by original motion and verified petition, for a writ of mandamus against *Hon. P. L. Hubbard*, Judge of the Second Judicial District, to compel said judge to sign a bill of exceptions in an action tried and determined in the district court of Atchison county at the November term 1875, wherein Peter Wagner was plaintiff, and the "*Atchison & Nebraska Rld. Co.*" was defendant. Judge *Hubbard* appeared and demurred to the petition.

W. W. Guthrie, for relator.

Horton & Waggener, for defendant.

The opinion of the court was delivered by

BREWER, J.: This is an application for a mandamus to compel the signing of a bill of exceptions. A majority of the court are of the opinion that the application should be refused, but they do not agree in the reasons therefor. It is useless therefore to give the separate reasons of the judges, for there is no point of law settled or decided by the judgment in this case. *Foltz v. Merrill*, 11 Kas. 479.

KINGMAN, C. J., concurring.

VALENTINE, J., not sitting in the case.

COMM'RS OF REPUBLIC COUNTY V. JOSIAH KINDT.

SHERIFF'S COMPENSATION FOR BOARDING PRISONERS; *Liability of County.* A sheriff is not entitled, as a matter of right, to extra compensation over and above the amount fixed by law for boarding prisoners, although he may have to carry the provisions fifty rods, and the water one hundred and sixty rods, and, although the cells of the jail may be small and inconvenient, and, although the weather may be cold and disagreeable. [*Comm'rs Atchison Co. v. Tomlinson*, 9-167; *Roberts v. Comm'rs Pottawatomie Co.*, 10-29; *Comm'rs Pottawatomie Co. v. Morrall*, 19-141; *Smith v. Comm'rs Shawnee Co.*, 21-669; *Comm'rs Clay Co. v. Renner*, 27-225; *Comm'rs Smith Co. v. Comm'rs Osborne Co.*, 29-72.]

Error from Republic District Court.

THE board of commissioners disallowed a claim presented by *Kindt*, the sheriff, and thereupon *Kindt* brought suit to recover the amount claimed. The nature of the plaintiff's claim, and the facts in the case, are stated in the opinion. Trial at the April Term 1874, and judgment in favor of plaintiff for \$57 and costs. The *Board of County Commissioners* appeal, and bring the case here on error.

A. F. Heeley, for plaintiffs in error.

W. H. Pilkinton, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by Josiah Kindt, sheriff of Republic county, against the board of county commissioners of said county, "For extra work in carrying meals to prisoners confined in jail, and otherwise attending to their wants," during the winter and spring of 1874. The claim of the plaintiff is in fact for extra work in boarding prisoners. The plaintiff had to carry the provisions for the prisoners about fifty rods, and the water about one hundred and sixty rods. The cells of the jail were small, and inconvenient, and required extra work to keep them in good condition; and the weather was cold and disagreeable. Under the circumstances

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we think the county board might in their discretion have allowed the plaintiff extra compensation for his extra trouble, but still we do not think that they were bound to do so. The plaintiff cannot claim extra compensation as a matter of right. The commissioners allowed the plaintiff compensation for boarding the prisoners at the rate of sixty cents per day for each prisoner. This is the amount fixed by law, (Gen. Stat. 477, § 3,) and the county board cannot be compelled to pay any more. (*Atchison Co. v. Tomlinson*, 9 Kas. 167.)

The judgment of the court below must be reversed, and cause remanded with the order that judgment be rendered in favor of the defendant below, and against the plaintiff for costs.

All the Justices concurring.

MISSOURI VALLEY LIFE INS. CO. v. ISABEL W. DUNKLEE.

LIFE INSURANCE; Action on Policy; Contract for, and Payment of, Premiums; "Cash Premiums." On July 25th, 1870, the Missouri Valley Life Insurance Company insured the life of John Orson Dunklee for the benefit of his wife Isabel W., in the sum of \$5,000. At the time of said insurance, and up to the time of the death of said John Orson Dunklee, he was a special agent in the employ of said insurance company. He collected large sums of money for them, paid the same over to them, and received commission thereon for his services. The company kept an account with him, and on two or more occasions charged him with the amounts of the premiums coming due on his insurance policy, and deducted the same from the amount of his compensation, although at the time the company so charged him he was owing the company about the sum of \$1,318.28. After this, and while he was in such employment, said insurance company, by its president and agent did, in the first part of January 1872, promise said John Orson Dunklee and said Isabel, that said defendant would charge said John Orson Dunklee with the amount of the premiums in said policy mentioned, as the same should thereafter become due, and in consequence of which promise said John Orson Dunklee continued in the employment of and to serve said defendant as such special agent until his death; and in consequence of such promise, and upon the faith thereof, said Dunklee deceased did not pay the quarterly premiums which came due

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on the 25th of January 1872, and on the 25th of April 1872, in money; but said company did not charge said premiums against said Dunklee upon its books. On May 5th 1872, said Dunklee died, and afterward this suit was brought by his widow, said Isabel W. Dunklee, to recover the amount of said policy: *Held*, That said contract with the president of the company is not void, although there is a clause in the by-laws of the company providing that "all premiums shall be payable in cash;" and further held, that the present action of the plaintiff may be maintained. [*N. Y. Life Ins. Co. v. McGowan*, 18-300.]

Appeal from Leavenworth District Court.

ACTION by Isabel W. Dunklee on a policy of insurance issued by plaintiff in error on the life of her deceased husband. Defense, that the quarterly premiums due in January and April 1872 were not paid when due, and never had been paid. The assured died in May 1872. Trial at the March Term 1874. A special verdict was returned, and is copied in full in the opinion, *infra*. Judgment for the plaintiff for \$5,239, and costs, and the Insurance Company brings the case here on error.

T. A. Hurd, for plaintiff in error:

1. Section 3 of the charter, set out in full in the special verdict, expressly provides that all premiums are payable in cash. Sections 4, 5 and 6 prescribe the duties of the president, vice president and secretary. It nowhere appears in said sections, or by the charter and by-laws, that Mackay was authorized to make the contract found by the second finding of the verdict; but on the contrary, they all show that he had no such authority. Section 6 provides that the secretary shall collect and receive all moneys of the company. No renewal-receipt was issued; and without it the policy could not by its terms be continued in force. The sections found, and the whole of the charter and by-laws, show, that Mackay had no authority to make the contract that the jury have found he did make. The sixth finding is that Dunklee had copies of the charter and by-laws and knew the terms and provisions thereof; the jury also found that he was an agent of the company. Dunklee then knew, when Mackay made the promise or agreement found

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by the jury, that he had no authority to make it, and that the company was not bound by it. He also knew that by the terms of his policy it would lapse on January 25th 1872, unless he paid the premium due, *in money*, before that day. Mackay never reported his action to the company, and the policy was canceled on defendant's policy-register on January 25th 1872, for nonpayment of quarterly-premium due on that day. Mackay's act did not bind the defendant: 2 Penn. St. 318; 1 Met. (Ky.) 550; 4 Bibb. 17; 5 Denio, 567; 14 Mass. 62; 17 Mass. 1.

2. It was alleged and proved that Dunklee was and for a long time had been an agent of the defendant. He is presumed to know Mackay's authority, and knew that Mackay was not authorized to change the agreement between him and the company, or waive the payment of his premiums in money. He was not in a position to rely upon any implied authority on the part of Mackay. 14 Barb. 358; 19 N. Y. 207; 8 Metcalf, 306; 3 Duer, 241; 13 Gray, 73; 20 Vt. 425.

3. We contend that the action of the court and jury, as shown by the record, is unwarranted in law, and on the part of the court is such an abuse of discretion as the statute intends to guard against; and that the interview between the court and jury plainly shows, that, by reason of prejudice on the part of the jury the defendant did not have a fair trial. A new trial should be awarded for that reason, and because of the actions and rulings of the court.

The court discharged the jury without requiring a finding upon all the material questions of fact in the case. We insist that the defendant was entitled to a finding upon all the questions of fact stated in its proposed verdict, including the question of deceased's intemperance.

Clough & Wheat, for defendant in error:

There is nothing in the verdict or the company's charter which limits the general power of the president; and we claim that the insurance company, and its president, could lawfully waive the payment of the premiums in *cash*, and accept pay-

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ment thereof in *labor and services*, performed or to be performed, and that therefore said agreement was binding and obligatory on the company. 11 Kas. 533, 549; 25 Conn. 542; 27 Wis. 372; 1 Denio, 516; 5 Lansing, 71; 18 Ill. 299; 44 N. Y. 276; 97 Mass. 144; 9 Blatch. 234; 19 La. An. 214; 26 Iowa, 10; 38 Penn. St. 221. See generally Bliss on Life Insurance, §§ 273, 274, 275, 298, 303, 307. And such new agreement could be in parol: 5 Lansing, 71; 2 Kas. 347; 18 How. (U. S.) 318; 19 N. Y. 305.

John Orson Dunklee was not agent of his wife, and could not cancel the policy, or release the insurance company therefrom by his consent, or by contract between him and the insurance company. Laws of 1871, p. 248, §77; 34 Conn. 313; 26 N. Y. 9.

The court did not, as we understand the case, rule out any evidence tending to show that John Orson Dunklee was intemperate before or when the policy was issued. And as there is no pretense that the company paid or tendered in payment to Mrs. Dunklee the amount of the surrender value, (the existence of which surrender value was affirmatively shown by the evidence,) which, by the terms of the policy it had to do before it could take advantage of Dunklee's becoming intemperate *subsequent* to the time when the policy was issued—and as there was no evidence that Dunklee was intemperate when the policy was issued, therefore there was nothing to submit to the jury involving the "temperance" or "inebriate" question.

The opinion of the court was delivered by

VALENTINE, J.: Injustice may have been done to the plaintiff in error in this case by the judgment of the court below, and yet we do not think that the injustice could have originated from any ruling of that court. If injustice was done, it was caused by the false testimony of the plaintiff below (defendant in error,) and the disposition of the jury to find everything in favor of the plaintiff below, and everything against the defend-

ant below, whether there was sufficient evidence, or indeed any evidence, to support such finding or not. If the court below had allowed the jury to find as the jury desired to find, the verdict would have been much worse for the plaintiff in error than it in fact is. The court however would not allow the jury to find against the defendant below where the evidence was all in its favor, unimpeached and uncontradicted. It was only where the evidence was contradictory and conflicting that the court allowed the jury to find (as they desired to find) in favor of the plaintiff below, and against the defendant below. Now taking the findings of the jury to be true, and we do not think the court below committed any error that would authorize a reversal of the judgment. The findings of the jury in connection with the admitted facts we think sustain the judgment. The findings are as follows:

(*Title.*) We, the jury, find the following facts, and this is our special verdict in this action:

1st. The plaintiff, Isabel W. Dunklee, mentioned in the policy sued on in this action, was the wife of said John Orson Dunklee at the time of his death, and at the time the said policy was executed; is the person mentioned in said policy as the beneficiary thereof. The said John Orson Dunklee died on the 5th of May 1872, and the defendant in this action, and its officers and agents knew and had due notice of said death on the 6th of May 1872; and on the 31st of January 1873 the said plaintiff again gave notice, and furnished proof to said defendant of the death of said Dunklee.

2d. The first six quarterly-premiums of \$30.90 each in said policy were paid to said defendant, and credited on its policy-register as having been paid. Said John Orson Dunklee was a special agent of said defendant from the time said policy was made and executed to the time of his death, during which time he was in the employ of defendant for compensation by it to be paid to him for his services, and while he was in such employment, the said defendant, by H. D. Mackay, its president and agent in that behalf, did in the first part of January 1872, promise said John Orson Dunklee and said plaintiff, that said defendant would charge said John Orson Dunklee with the amount of the premiums in said policy mentioned, as the same should thereafter become due, and in consequence of which promise of said defendant said John Orson Dunklee continued

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in the employment of and to serve said defendant as special agent, until his death; and in consequence of such promise, and upon the faith thereof, said Dunklee deceased did not pay the quarterly-premiums which came due on the 25th of January 1872, and the 25th of April 1872, in money; but said company did not charge said premiums against said Dunklee upon its books. We find that said Mackay had the right and authority to make the aforesaid agreement with the assured and the plaintiff, unless the court shall be of opinion that his action was unauthorized and void, in consequence of the terms and provisions of the constitution and by-laws of the company relating thereto, which are as follows, viz.:

"Sec. 3. All policies issued by this company are non-forfeiting, and all premiums shall be payable in cash. In case any policy-holder shall omit to pay any premium due from him to the company, or violate any other condition of the policy of insurance, the board of directors may forfeit his policy, except that when said violation is neglect to pay premiums and that only. In such case the company shall issue such paid-up policy as is provided for by the original policy. The company may issue paid-up policies to its policy-holders for such proportion of the same as premiums paid will warrant, upon such basis as the company may from time to time adopt; or the company may, in lieu of issuing paid-up policies of insurance, or declaring the same forfeited as above provided, continue the same in force beyond a certain period to be determined as follows, to-wit: The net value of the policy, when the premium becomes due and is not paid, shall be ascertained according to the combined experience, or actuaries' rate of mortality, with interest at four-and-one-half per cent. per annum. After deducting from such net value any indebtedness to the company, held by the company against the assured, four-fifths of what remains shall be considered as a net single premium of temporary insurance; and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of premium, and the assumptions of mortality and interest aforesaid.

"Sec. 4. It shall be the duty of the president to preside at all meetings of the stockholders and directors; to exercise a supervision and superintendence over all the business and affairs of the company, and to report in writing, in a book to be kept for that purpose, at each meeting of the board of directors, the true condition, standing and affairs of the company; he shall have the safe-keeping of the seal and the attested charter of the company, and with the written consent of the finance committee may transfer stocks and other property held as investments or owned by the company; acknowledge deeds and other papers, satisfy mortgages, make and call in investments. He shall sign all policies, statements, contracts, and other papers necessary and proper for the interests of the company; and, with the secretary, issue all policies; and with the general agent and executive committee, establish agencies for insurance, and appoint agents therefor, at such places as the president, general agent and executive committee shall deem for the best interests of the company, and shall be *ex officio* chairman of the executive committee, finance committee, and committee on death-losses, and shall devote his entire time and energies to the interests and business of the company.

"Sec. 5. The vice president shall perform the duties of president during the absence of that officer, and in case the president ceases from any cause

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to act as such, the vice president shall act as president until a new president is elected and qualified. At other times he shall perform such duties, not otherwise provided for, as may be required of him by the board of directors, or executive committee.

"Sec. 6. The secretary shall be the clerk of the corporation; shall attend all the meetings of the board, and its standing committees; shall keep a full and true record of all the proceedings of the board of directors, stockholders, and standing committees; shall keep a record of every policy issued, and all endorsements thereon, and shall sign all policies and premium receipts, and, with the president, issue the same; and shall sign or countersign all papers when required by the board, or required to be signed by him by these by-laws, or by the statutes of the state; shall collect and receive all moneys due the company, or collected on its account, and forthwith pay the same over to the treasurer, and take and preserve his receipt therefor; and keep, subject to the order of the finance committee, all the securities and money-documents of the company. He shall have the charge and supervision of the books of accounts; see that just, true and correct cash and other suitable books are kept; particularly of all moneys received, drawn, or disbursed; for what, and of whom received; for what, and to whom paid; and of all money, demands, securities, assets, accounts, and property necessary to a clear and distinct exhibition of the affairs, standing, and business of the company, which shall at all times during business hours be open to the examination of the board, or any director thereof; to give notice of all meetings of the board, and to perform such other duties, not inconsistent with the duties of his office, as may be required by the board of directors, the president, or any of the standing committees of the company; and he shall also, with the assistance of the president and actuary, prepare and cause to be filed at the proper places all such statements, accounts and reports as are or may be required by the laws of the United States, or of any state in which the company may do business; and shall perform generally all the acts ordinarily pertaining to the office of secretary of like companies. In the absence of the secretary, the assistant secretary shall act as secretary. When the secretary is not absent the assistant secretary will perform such clerical duties as may be required of him by the secretary. The secretary and assistant secretary shall each give such bond as may be satisfactory to the finance committee, for the faithful discharge of their official duties."

3d. In the month of May 1873 said plaintiff, by Clough & Wheat her agents, demanded payment at the office of said defendant in the city of Leavenworth for the amount of the policy mentioned, which payment was refused, and has not since been paid.

4th. The aforesaid policy had, at the death of John Orson Dunklee, a surrender value.

5th. Said policy was not canceled on the 25th of January 1872, nor on the 25th of April, 1872, nor at any other time; nor did said John Orson Dunklee ever consent, contract or agree that said policy had been or should be canceled or lapsed.

6th. The said John Orson Dunklee had copies of the charter and by-laws of the said defendant, and was acquainted with the terms and provisions thereof.

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7th. The defendant paid the plaintiff Mrs. Isabel W. Dunklee money at various times from the 1st of January 1872 to the 1st of April 1872, on account of the said John Orson Dunklee's salary.

8th. If on the foregoing facts the plaintiff is entitled to recover, then we find for her, and assess the damages against said defendant at the sum of \$5,239.

JAS. S. CROW, *Foreman*.

We do not think that the contract between Mackay and the Dunklees was void, although the by-laws of the company required that all premiums should "be payable in cash." The payment provided for by the contract was substantially a payment in cash. Dunklee was at the time collecting large sums of money for the company. He paid such sums over to the company, and received his commissions and fees for his services therefrom. The company kept an account with him. And it would not be strange, that the company should charge him with the amount of his premiums as they became due, and should deduct such amounts from his said compensation. This is just what the company in fact did with reference to certain of the premiums which the company admit were in fact paid. The last two premiums, which the company admit were paid, were paid in that way, although Dunklee was then owing the company about the sum of \$1,318.28. Said policy was for the sum of \$5,000, was issued July 25th 1870, on the life of said John Orson Dunklee for the benefit of his wife, said Isabel W. Dunklee. The premiums were payable quarterly, and each premium was for the sum of \$30.90.

There are some other questions in this case, but there are none that merit discussion.

The judgment of the court below will be affirmed.

All the Justices concurring.

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WILLIAM H. CLARK v. BENJAMIN F. AKERS, *et al.*

1. OTTAWA INDIAN TREATY OF 1862; *Conveyances in Violation of Treaty*. A deed made by an Ottawa Indian for land allotted and patented to him under the treaty of 1862, conveying such land to another Ottawa Indian, at any time prior to July 4th 1867, without the consent of the Secretary of the Interior, was absolutely void, and could not create even an equitable estate in the lands in favor of the grantee, even though he had paid the purchase-money. [*Clark v. Libbey*, 17-634. Other cases under Ottawa treaty: *McCullagh v. Allen*, 10-150; *Clark v. Libbey*, 14-435; *Campbell v. Paramore*, 17-639; *Baldwin v. Squires*, 20-280.]
2. DEED—DELIVERY; *Evidence of Delivery*. A deed of conveyance for lands takes effect only upon delivery; and ordinarily the date of a deed (admitted to have been delivered) is *prima facie* evidence of the time of its delivery. [*Babbitt v. Johnson*, 15-252.] But where a deed bears one date, and the acknowledgment thereof another and subsequent date, and the date of the recording of the deed is still subsequent to either, it will be held, in the absence of evidence to the contrary, that the deed was delivered at least as early as the day of acknowledgment; and especially so where the words "Sealed and delivered in presence of A. S. L.," are found on the face of the deed immediately succeeding the body of the deed, and preceding the acknowledgment.
3. CONVEYANCE; TITLE; *Deeds Before and After Removal of Disability*. Where an owner of land is legally disabled from selling, conveying, or incumbering the same, except with the consent of the Secretary of the Interior, and where the law provides that "any conveyance or incumbrance of said lands done or suffered," except as provided, "shall be null and void," and such owner executes a deed without the consent of the Secretary of the Interior, and subsequently, after all disabilities and restrictions are removed, said owner executes another deed to another grantee for said land, *held*, that the execution of the second deed, and "willingly putting the same in use as having been made in good faith," is not such a legal fraud upon the first grantee as to prevent the second deed from having full force and effect. [*Stevens v. Smith*, 2-243; *Blue Jacket v. Comm'r's Johnson Co.*, 3-354; *Scoffins v. Grandstaff*, 12-467, *Clark v. Libbey*, 14-435; *Campbell v. Paramore*, 17-639; *Baldwin v. Squires*, 20-280; *Smith v. Stees*, 10 Wall., U. S. Sup. Ct., 321.]

Error from Franklin District Court.

EJECTMENT, brought by *Clark*, as plaintiff, against *Benj. F. Akers*, *Benj. Esterly*, *Jennie Nugent*, and *E. J. Nugent*, to recover the possession of 120 acres of land. Trial, and judgment for defendants, at the March Term 1874. The facts and proceed-

ings are fully stated in the opinion. The plaintiff brings the case here on error.

W. H. Clark, plaintiff in error, for himself.

John W. Deford, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action in the nature of an action of ejectment, brought by William H. Clark against Benjamin F. Akers, Benjamin Esterly, Jennie Nugent, and E. J. Nugent, for the recovery of certain real estate. Said real estate consists of 120 acres of land lying in a body, and described as follows: The W. $\frac{1}{4}$ of the N.W. $\frac{1}{4}$ of section 27, township 17, range 20, in Franklin county, and the N.E. $\frac{1}{4}$ of the N.E. $\frac{1}{4}$ of section 28, same township and range. John W. Early was the original patentee of said land. Early executed three separate deeds for this land or portions thereof, which we shall designate as deeds "B," "E," and "F," as they are so designated in the record and in counsel's briefs. The first deed was from Early to John T. Jones for the land in section 27, dated May 28d 1865. This deed we shall designate as deed "E." The next deed was from Early to John T. Jones and Joseph King for the land in section 28, dated May 8th 1866. This deed we shall designate as deed "F." The third deed was from Early to Charles Kinney for the whole of the land, dated December 11th 1871. This deed we shall designate as deed "B." The plaintiff claims title to said real estate under said deed "B." The defendants claim title under deeds "E" and "F." And this entire case depends upon the validity of these three deeds. The court below found in favor of the defendants, and against the plaintiff, and the plaintiff now brings the case to this court. The court below made two sets of findings in this case—the first with reference more especially to the rights of the parties under deed "F;" and the second more especially to the rights of the parties under deed "E;" and in each set of findings the court makes, first, findings of fact, second, findings of law, and

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then, third, conclusions of law from these findings of fact and law. The first set of findings reads as follows:

And now comes the plaintiff by A. W. Benson his attorney, and the defendant B. F. Akers by H. P. Welsh his attorney, and Jennie Nugent and E. H. Nugent by John W. Deford their attorney: and this cause came on to be heard upon the pleadings and evidence, and to be decided by the court; and thereupon the court doth find the following conclusions of fact and law in this case. From the evidence presented the court finds the following facts:

1st. Under the provisions of the Ottawa Indian treaty of June 24th, 1862, the N.E. $\frac{1}{4}$ of the N.E. $\frac{1}{4}$ of section 28, township 17, range 20 in this county, was allotted and patented to John W. Early, an Indian of the Ottawa Tribe.

2d. On the 8th of May 1866, John W. Early, for a consideration of \$100, (without the consent of the Secretary of the Interior at any time,) executed and delivered to John T. Jones and Joseph King, Indians of the Ottawa Tribe, a warranty deed for the land herein described, which was recorded on the same day.

3d. On the 10th of November 1867, John T. Jones and Joseph King, for a consideration of \$500, executed and delivered to Isaac S. Kalloch a warranty deed for the land herein described; and on the 1st of April 1870 Isaac S. Kalloch, for a consideration of \$400, executed and delivered to Benjamin F. Akers a warranty deed for the same premises.

4th. On the 18th of August 1870, John T. Jones, for a consideration of \$333.33, executed and delivered to Jennie Nugent a warranty deed for the land herein described; but at and before the execution of the deed, and payment of the consideration therefor, Jennie Nugent had actual notice of the conveyance mentioned in the preceding paragraph.

5th. In the year 1871, William H. Clark and M. E. Cheney, partners in the law business, arranged with Charles Kinney to take deeds for Indian lands in his name in cases where the Indians had attempted to convey their lands and such conveyances were of doubtful validity; and to enable Clark & Cheney to control the titles so taken, Kinney executed to Cheney a general power to convey real estate.

6th. On the 11th of December 1871, John W. Early with intent to defraud John T. Jones and his grantees, for a consideration of \$2.50, paid by Clark & Cheney, executed and

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delivered to Clark & Cheney a quitclaim deed for the land herein described, with the name of Charles Kinney written therein as grantee, without Kinney's knowledge or solicitation, under the general arrangement hereinbefore mentioned.

7th. On the 28d of April 1873, Charles Kinney, at the request of Clark, without any consideration paid, executed and delivered a quitclaim deed for the premises herein described to William H. Clark, who received the same with actual knowledge of all the conveyances herein described, and with intent to defraud John T. Jones and his grantees, and has willingly put the same in use as having been made in good faith.

The court finds the law applicable to the foregoing facts to be—

1st, That the Ottawa Indian Treaty vested in the patentees an estate in fee in the lands allotted, with certain restrictions against alienation.

2d, That prior to July 16th 1867 the allottees and patentees under the treaty had no right whatever to alienate any portion of their lands except to each other, and then only with the consent of the Secretary of the Interior.

3d, That after the 16th of July 1867 all restrictions against alienation were removed, and the patentees became invested with a title in fee simple to their lands; but the removal of such restrictions gave no force to the prior void deeds or conveyances.

4th, A deed made by an Ottawa Indian at any time prior to July 16th 1867, without the consent of the Secretary of the Interior, was absolutely void, and could not create even an equitable interest in the land in favor of the grantee, even though he had paid the purchase-money, and taken actual possession.

5th, The statute provides "Every person who being a party to any conveyance of any estate or interest in real estate, with intent to defraud prior or subsequent purchasers, and any person being privy or knowing of any such conveyance who shall willingly put the same in use as having been made in good faith, shall be adjudged guilty of a misdemeanor."

6th, Where two persons claim title to the same land, and both claim from the same grantor, and where the oldest deed is the first recorded, the grantor named therein has the better or paramount title; and in an action of ejectment the plaintiff must recover on the strength of his own title; and unless he

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shows a clear right to recover, he cannot evict the possessor, even where such possessor is a mere trespasser.

From the foregoing the court concludes—

1st, That William H. Clark, having actual notice of the prior conveyances from Early to Jones and King, and from Jones and King to Kalloch, and from Kalloch to Akers, could not obtain from Early an estate in the lands, and therefore cannot recover possession.

2d, That as between Akers and Nugent, both claiming to derive title from the same grantor, and the latter having notice of the prior deed to the former, Akers has shown the better title, and is entitled to the possession as against any claim set up by Nugent.

The second set of findings are substantially the same as the first, *mutatis mutandis*, except as follows: There is nothing in the second set of findings like the sixth finding of law, and the second final conclusion of law, found in the first set of findings. Deed "E" was not acknowledged and recorded on the day of its date, as deed "F" was, but it was dated May 23d 1865, acknowledged January 10th 1866, and recorded April 15th 1868. And because of this difference, the court below made (in the second set of findings) the fourth finding of law hereafter given, which last-mentioned finding and conclusion are not contained in the first set of findings. They, with the first final conclusion of law contained in the second set of findings, are as follows:

[*Fourth finding of law:*] "A deed of conveyance for lands takes effect only on delivery. The date in the deed is ordinarily *prima facie* evidence of the time of its delivery, but where the deed bears one date, and the acknowledgment one several months later, if recorded, the date of the record would *prima facie* be the date of the delivery."

[*The final conclusion:*] "From the foregoing the court concludes, First, That William H. Clark, having actual knowledge of the prior conveyances from Early to Jones, and from Jones to Nugent, could not obtain from Early any estate in the lands; for title cannot pass when the deed is *malum prohibitum*; and therefore in the case at bar Clark has no vested estate.

"2d, That the deed from Early to Jones, dated May 23d 1865, acknowledged January 10th 1866, and recorded April 15th 1868, was delivered at the last-mentioned date, and by such

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delivery took effect from that date, and vested in John T. Jones an estate in fee simple in and to the W. $\frac{1}{4}$ of the N.W. $\frac{1}{4}$ of section 27, township 17, range 20."

The sixth finding of fact in the first set of findings shows that the consideration for deed "B" was \$2.50. The fifth finding of fact in the second set of findings, (which corresponds to the said sixth finding in the first set of findings,) shows that the consideration for said deed "B" was \$5. The deed itself, upon its face, shows it to have been \$100. And from the evidence we would infer that it was in fact \$10. We think the foregoing is a sufficient statement of the facts of the case for the present. We shall however mention some other facts as we progress with the opinion.

We agree with the court below, that "A deed made by an Ottawa Indian at any time prior to July 16th 1867, without the consent of the Secretary of the Interior, was absolutely void, and could not create even an equitable interest in the land in favor of the grantee, even though he had paid the purchase-money and taken actual possession." Or, as stated in the second set of findings, "A deed made by an Ottawa Indian, of land allotted and patented to him under the treaty of 1862, conveying such land to another Ottawa Indian, at any time prior to July 16th 1867, without the consent of the Secretary of the Interior, was absolutely void, and could not create even an equitable estate in the lands in favor of the grantee, even though he had paid the purchase-money." And therefore we think the said deeds "E" and "F" were wholly void. They were void, not because of any accident, or mistake, or oversight, or irregularity in their execution, but they were void because of a want of power in Early to alienate or incumber the land in any manner or form except with the consent of the United States, and King were Ottawa Indians. The question is now in controversy by virtue of the treaty made with the Ottawa Indians of June 24th 1867, (see, page, 1237.) By that treaty the Ottawa Indians became citizens of the United States on July 16th 1867. By the act of February 23d 1867, however, the

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time for them to become citizens was extended two years, or until July 16th 1869. (15 U. S. Stat. at Large, 517, article 17.) By the terms of the treaty of 1862 it was provided that—

“Plats and records of all the sections and locations shall be made [by and for said Indians,] and upon their completion and approval proper patents by the United States shall be issued to each individual member of the tribe and person entitled for the lands selected and allotted to them, *in which it shall be stipulated that no Indian, except as herein provided, to whom the same may be issued, shall alienate or incumber the land allotted to him or her in any manner, until they shall, by the terms of this treaty, become a citizen of the United States; and any conveyance or incumbrance of said lands, done or suffered, except as aforesaid, by any Ottawa Indian, of the lands allotted to him or her, made before they shall become a citizen, shall be null and void.* And forty acres, including the houses and improvements of the allottee, shall be inalienable during the natural lifetime of the party receiving the title: *Provided, that such of said Indians as are not under legal disabilities by the local laws may sell to each other such portions of their lands as are subject to sale, with the consent of the Secretary of the Interior at any time.*” (12 U. S. Stat. at Large, 1240; article 7.)

The patent issued to Early stipulates that the grant of the lands to him is “upon the express condition, and with the limitation, as required by the treaty aforesaid, that the said John W. Early shall not alienate or incumber the aforesaid tracts of land until he shall become by the terms of said treaty a citizen of the United States; and any conveyance or incumbrance of said land, done or suffered by said John W. Early, made before he shall become a citizen, shall be null and void.” The consent of the Secretary of the Interior was never given in this case, that Early should sell, convey, alienate, or in any manner incumber any part or portion of his said land. Therefore we think the said deeds “E” and “F” were void. (*Farrington v. Wilson*, 29 Wis. 388; *Stevens v. Smith*, 2 Kas. 248; *Smith v. Stevens*, 10 Wall. 821; *Blue Jacket v. Johnson Co.*, 3 Kas. 854; *Scoffins v. Grandstaff*, 12 Kas. 468; *Clark v. Libbey*, 14 Kas. 485.) This is wholly unlike the case where a party *has the power* to alienate or incumber his land, and in attempting to

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do so makes some mistake. In such a case the courts may rectify the mistake, or in many cases would hold that the title passed under the rule of equitable estoppel. But in this case, Early had no power to convey his land except with the consent of the Secretary of the Interior; and as that consent was never obtained, said attempted conveyance must of course be void. But notwithstanding the want of power in Early to alienate or incumber his said land, it would seem that the court below considered said deeds "E" and "F" valid, and therefore that the deed "B" was void. One of the reasons for considering the deed "E" valid, is shown by the following conclusions of law made by the court below, to-wit: "A deed of conveyance for lands takes effect only on delivery. The date in the deed is ordinarily *prima facie* evidence of the time of its delivery, but where the deed bears one date, and the acknowledgment one several months later, if recorded, the date of the record would *prima facie* be the date of the delivery." And therefore, "That the deed from Early to Jones, dated May 23d 1865, acknowledged January 10th 1866, and recorded April 15th 1868, was delivered at the last-mentioned date, and by such delivery took effect from that date, and vested in John T. Jones an estate in fee simple in and to the west-half of the northwest quarter of section 27, township 17, range 20." Now it is true, that "A deed of conveyance for lands takes effect only upon delivery." And it is also true, that "The date in the deed is ordinarily *prima facie* evidence of the time of its delivery." But it has never been held, so far as we are informed, that the date of the record of a deed was *prima facie* evidence or any evidence of the date of its delivery. It has been held in some cases that the date of the acknowledgment of the deed was *prima facie* evidence of the date of its delivery. (*Henry Co. v. Bradshaw*, 20 Iowa, 355, 362; *Loomis v. Pingree*, 48 Maine, 299, 308.) But generally it is held that the date of the deed itself is *prima facie* evidence of the date of the delivery; and this is generally so, although the date of the acknowledgment may be subsequent to the date of the deed. (*Jayne*

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v. Gregg, 42 Ill. 413, 416; *Blake v. Fash*, 44 Ill. 302; *Breckenridge v. Todd*, 3 Monroe, 52, 55; *Ford v. Gregory*, 10 B. Mon. 175, 180; *Smith v. Porter*, 10 Gray, 66, 68, 69.) In the case reported in 10 B. Monroe, 180, the court says: "The delivery of a deed is always presumed to have been made on the day of its date, and its subsequent acknowledgment does not change this presumption; but the delivery may be proved to have occurred at a different time." In the case reported in 10 Gray, 68, 69, the court, after holding that the date of a deed is *prima facie* evidence of the time of its execution, says: "It is of little importance that the deed was not acknowledged on the same day on which it purports to have been executed." On the face of the deed which we are now considering, at the usual place for such a thing to be found, the following is found, to-wit: "Sealed and *delivered* in presence of Asa S. Lathrop." Many courts have held that from such words as these, on the face of the deed, a delivery may be inferred. And as these words come immediately after the body of the deed, and immediately before the acknowledgment, why not infer that the delivery was made at some time after the deed was executed, and at some time before the acknowledgment was taken? It is not necessary that a deed be acknowledged in order to be valid. (*Simpson v. Mundee*, 3 Kas. 172; *Gray v. Ulrich*, 8 Kas. 112; *Ogden v. Walters*, 12 Kas. 291.) The acknowledgment of a deed constitutes no part of the execution thereof. It merely furnishes additional evidence of the execution thereof. And the recording of the deed is still further removed from any connection with the execution thereof. In the present case, if the deeds "E" and "F" were delivered on the day that they were acknowledged, or at any time previous thereto, they would be equally as void as though they were delivered on the day that they purported to have been executed. We shall hold that they were delivered at least as early as the day on which the acknowledgments were taken, and therefore that they are void.

But the main reason why the court below considered the deeds "E" and "F" valid, and the deed "B" void, would

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seem to be, that the court considered Clark and his grantors attempted to perpetrate a fraud upon John T. Jones and his grantees, and that Clark in so doing committed a misdemeanor. The following findings and conclusions of the court below will show this, to wit: The sixth and seventh findings of fact; the fifth finding of law, and the first final conclusion of law in both sets of findings. The statute supposed to have been violated is §98 of the crimes act, (Gen. Stat. 336.) The substance of this statute, so far as it is supposed to have any application to this case, is given by the court below in the fifth finding of law. It is a statute enacted for the purpose, among other things, of preventing fraudulent conveyances. Now whatever may be the character of the transactions between Early, Kinney, Cheney, and Clark, in their moral aspect, we are unable to discover that any legal fraud was perpetrated by such transactions. *How* was John T. Jones, or any of his grantees, defrauded? They never had any legal or equitable right to the property in controversy. They had nothing in law. And is it possible to take something from nothing? How could Clark, or any of his grantors, take something from Jones or any of his grantees which neither Jones nor any of his grantees ever possessed? The deeds "E" and "F" were wholly void. They were nothing in law. The rights of all the parties were precisely the same as though they had never existed. Early lost nothing by them, and Jones and King gained nothing by them. Therefore, suppose that Clark has obtained the full title to the land in controversy, then what has he obtained that Jones or King, or any grantee of either, ever possessed? What has he procured from either of them by any transaction, fraudulent or otherwise? They have lost no legal right, and are not in any danger of losing any such right from any act of Clark's, and are therefore not in any situation to call Clark's acts fraudulent. Such acts are certainly not legally fraudulent as to Jones and King and their grantees, whatever they may be in their moral aspect. The court below says that Clark has no title to said land, "for title cannot pass when the deed is *malum prohibitum*."

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Now in the language of the court below, why are not the deeds "E" and "F" *malum prohibitum*? They were executed and put in operation in contravention of the provisions of the treaty of 1862. And can it be possible that the ineffectual attempt of Jones and King to obtain Early's land in contravention of the provisions of said treaty shall forever take away from Early all power to ever afterward dispose of his land? This is undoubtedly just what this particular proviso of the treaty was intended to guard against.

We agree with the court below that "In an action of ejectment the plaintiff must recover on the strength of his own title;" but if the said deeds "E" and "F" are void, then under the other facts of this case Clark's title must necessarily be good; and that said deeds "E" and "F" are void, we have already held.

The judgment of the court below must be reversed, and cause remanded with the order that judgment be rendered on the findings of the court below for the plaintiff for the recovery of the property in controversy.

All the Justices concurring.

GEORGE W. SIBERT v. JOHN H. WILDER, *et al.*

1. LIMITATION OF ACTIONS; *Statute of Repose*. Statutes of limitations are now regarded, not as statutes of presumption, but as statutes of repose.
2. ACKNOWLEDGMENT, TO REVIVE DEBT—*To Whom to be Made*. An acknowledgment of a debt, to take the case out of the statute of limitations, must be made, not to a mere stranger, but to the creditor, or some one acting for or representing him. [*Schmucker v. Sibert*, 18-104.]

Error from Douglas District Court.

In December 1873 *Sibert* brought his action against *Wilder & Palm*, on a promissory note given by defendants to one

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W. H. R. Lykins, in August 1867. Defendants paid Lykins \$250 on said note, and afterward and in October 1867, after said note was due and payable, Lykins assigned the note to *Sibert*. In March 1868, one Chancellor Livingston commenced an action against said Lykins, and caused said *Wilder & Palm* to be summoned therein as garnishees of said Lykins. Said action was continued from term to term, and in October 1873, John H. Wilder, one of the firm of "Wilder & Palm," as garnishee, made his answer, under oath. A copy of such answer is annexed to and made a part of *Sibert's* petition in this case, and is relied upon by *Sibert* to take his action out of the statute of limitations. The defendants demurred to the petition. The district court, at the January Term 1874, sustained the demurrer, and gave judgment in favor of the defendants. *Sibert* appeals, and brings the case here on error.

Thacher & Stephens, for plaintiff:

The affidavit of Wilder is an acknowledgment of a then subsisting claim. His language is, "There was due and owing on said note on the 25th of March 1868, the amount of said note, less \$250. Said note *it still outstanding and unpaid at this date*, except that I claim an offset for \$300." Before and independent of the code of procedure, *any* promise or acknowledgment of a subsisting indebtedness, whether by parol or in writing, was a revivor of the demand. If it is an acknowledgment, it is that the debt is still due. (5 Wend. 258.) At the time of the adoption of our statute, some of the states through their courts had established the rule that no demand should be revived except by an express promise, or such an acknowledgment as should be held equivalent thereto. In other states the doctrine has been held different, as in Massachusetts, in *Whitney v. Bigelow*, 4 Pick. 110. There the court made the distinction that where a *promise* is relied on, it must be made to the party, but where an *acknowledgment* of indebtedness was relied on, it might be made to any one. And so in *Davis v. Stiner*, 14 Penn. St. 278.

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By § 24 of the code it is provided, "In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same, shall have been made, an action may be brought," etc., "but such acknowledgment or promise must be in writing, signed by the party." The proof shows clearly an acknowledgment of an existing liability, and the witness does not claim that the demand is barred. But it is claimed by defendants that when Wilder answered he was *compelled* to answer. He was not however compelled to acknowledge the existence of a debt which was barred by the statute. He was at liberty to state that, originally there was a cause of action, and that the same was barred by the statute. Instead of so doing he said, "Said note is still outstanding and unpaid at this date," etc. If this is not the *admission of an existing liability* of the amount of the note, less the reduction by payment and offset, we are unable to understand the force of language. The provision of the statute is, that either an acknowledgment, a promise, or a payment of a part, shall renew the obligation. A *promise* must of necessity be made to the party, or his representatives. An *acknowledgment* may be made to any one. Hence the provision of the statute. A payment is only an acknowledgment, and much less forcible than a written acknowledgment. It is in reality only an acknowledgment to the extent of the amount paid, unless it be paid as interest, in which case it would be an acknowledgment of the amount for which interest was paid; yet both the statute and the courts have held payment of part of the principal sufficient to take the case out of the statute for the residue. The court will not, by construction, do away with the statute, but will give effect to all parts of it when the intent of the lawmaker can be discovered. (*Waller v. Harris*, 20 Wend. 561.) Here it appears that the note was made by defendants to Lykins; that Lykins transferred the note to the plaintiff; that Livingston had brought suit against Lykins, and garnisheed defendants, and that in such proceed-

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ing the answer was made and signed by Wilder *admitting* the liability. And besides, the writing is made and signed when the very purpose of the inquiry is to ascertain whether anything and how much is *owing*.

S. A. Riggs, and Nevison, Simpson & Alford, for defendants in error.

1. The answers made in court by Wilder, when garnisheed by Livingston, do not constitute a cause of action in favor of Sibert against Wilder & Palm. The answers were not voluntary. Wilder was *compelled* to make answer to the questions propounded; and the answers were therefore given under duress. "By the general consent of the courts of this country and of England, a mere acknowledgment which does not contain, by any reasonable implication or construction, a new promise, is not sufficient." (Parsons' Mercantile Law, 285.) A *promise* cannot be inferred from an *involuntary* acknowledgment. Duress avoids all contracts. "As the acknowledgment should be voluntary, we doubt whether those made under process of law, as by a bankrupt, or by answers to interrogatories which could not be avoided, should ever have the effect of a new promise." Parsons' Merc. Law, 287; Metcalf on Contr. 142; 5 Selden, 91; 4 Selden, 367.

2. Even if Wilder's answers had been voluntary, they would not have constituted a cause of action. "A new promise is not now implied by the law itself, from a mere acknowledgment." Parsons' Merc. Law, 236. And see, 2 Greenl. Ev., § 440. "The mere acknowledgement of a debt is not a promise to pay it. A man may acknowledge a debt which he knows he is incapable of paying, and it is contrary to all sound reasoning to presume from such acknowledgment that he promises to pay it." 1 Pet. 351; 4 Penn. St. 321; 14 N. H. 422; 9 Penn. St. 410; 15 N. H. 140; 22 Vt. 179.

The acknowledgment was not made to Sibert, but to Livingston. It is now settled, we believe, that the acknowledgment must be made to the creditor and not to a stranger. 2

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Story's Eq., §1521a; 1 Phillips' Ev., note 140. A creditor cannot avail himself of a promise made to a stranger. There is no privity between them. Besides this, there would be no consideration to such a promise. 4 Seld. 367; 5 Seld. 91.

The opinion of the court was delivered by

BREWER, J.: This action was brought to recover the amount of a promissory note given by the defendants August 29th 1867, and payable one day after date. The petition was filed December 17th 1873, and consequently the demand is barred by the statute unless the cause of action is saved by subsequent acknowledgment. The acknowledgment relied upon to take the case out of the statute is the affidavit of J. H. Wilder, one of the copartners, taken before the clerk of the court, October 30th 1873, one month and-a-half before suit brought. The language of said affidavit is, "There was due and owing on said note on the 25th day of March 1868, when notice of garnishment in this and other cases was served, the amount of said note as above stated, less the \$250. Said note is still outstanding and unpaid at this date, except that I claim an offset on a certificate of deposit issued to said W. H. R. Lykins by one A. E. Baird, dated September 17th 1867, for \$300, and on a counter-check by said Lykins to one B. W. Fitts, and transferred to me, accompanied by a written order upon Lykins for that amount dated October 9th 1867. The firm of Wilder & Palm, was and is composed of myself and Andrew Palm." This affidavit was signed by John H. Wilder. The defendant demurred to the petition, and the court below sustained the demurrer.

Three objections are made to this acknowledgment—that it was not voluntary, but enforced; that it is not the admission of a present and subsisting debt, which the party is liable for and willing to pay, and that it was not made to the creditor, or any one acting for him, but to an entire stranger. As the record appears before us we think the last point well taken; and without considering the others, upon that decide the case.

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All that can be gathered from the record is, that this acknowledgment was made in an answer returned by Wilder as garnishee in an action brought against the assignor of the plaintiff. It was not therefore made to this plaintiff, or his assignor, or to any one acting for him, but to a party claiming adversely to such assignor. Is such an acknowledgment within the statute? We think not. It may be conceded that at one time the decisions of the courts were in favor of such a construction: *Peters v. Brown*, 4 Esp. N. P. R. 46; *Clark v. Hougham*, 2 Barn. & Cress. 153; *Monstephen v. Brooky*, 3 Barn. & Ald. 141; *Halliday v. Ward*, 3 Camp. 32; *St. John v. Barrow*, 4 Porter, (Ala.) 223; *Whitney v. Bigelow*, 4 Pick. 110. But these rulings grew out of the fact that the statute of limitations was regarded as a statute of presumptions rather than as one of repose. It is well said in 3 Para. on Contr., 5th ed., p. 63, "A very little observation will show that these two views lead to results which are not only distinctly different, but antagonistic. This difference may be stated theoretically thus: If the statute of limitations be a statute of presumptions, then it is taken away by whatever will rebut the presumption, and this is anything which implies or amounts to an acknowledgment that the debt still exists; but if it be a statute of repose, then it remains in force unless the debtor renounces its benefit or protection, and voluntarily makes a new promise to pay the old debt." It is perhaps needless to add that the latter is to-day the accepted view. Under that view it is held that an acknowledgment to a mere stranger will not avoid the running of the statute. The acknowledgment of a debt, to take a case out of the statute of limitations, must be made, not to a mere stranger, but to the creditor, or some one acting for him, and upon which the creditor is to act or confide. 2 Story's Eq., § 1521a. See also, as further authorities, *Bloodgood v. Brewer*, 4 Selden, 362; *Wakeman v. Sherman*, 5 Selden, 85; 5 Nev. 206; *Taylor v. Hendrie*, 8 Nev. 243; 3 Parsons' Contr., 5th ed., p. 85; *Collins v. Bane*, 34 Iowa, 389; *F. & M. Bank v. Wilson*, 10 Watts, 261; *Christy v. Flemmington*, 10 Penn. St. 129; *Kyle v. Wells*, 17 Penn. St. 236; *Johns v. Sands*, 63 Penn. St. 324; *Rings v.*

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Brooks, 26 Ark. 540; *Roscoe v. Hale*, 7 Gray, 275; *Keener v. Crull*, 19 Ill. 190; *Farrell v. Palmer*, 86 Cal. 187; *Georgia Ins. Co. v. Elliott*, Taney, 130.

The judgment will be affirmed.

All the Justices concurring.

SHEPARD & PLAYFORD V. JOHN G. ALLEN & SON.

1. EVIDENCE; *Immaterial Testimony*. The admission of immaterial evidence is generally not sufficient to require a reversal of the judgment. It is never so except where it tends to prejudice the substantial rights of the party against whom it is introduced. [*Greer v. Adams*, 6-203; *Palmer v. Meinert*, 17-478; *Moon v. Helfer*, 25-139; *L. T. & S. Rly. Co. v. Paul*, 28-816.]
2. PROMISSORY NOTE—*When Given for Preëxisting Debt; Payment, or Security*. Where a promissory note is executed for a preëxisting debt, it is wholly within the control and direction of the parties themselves at the time the note is executed, whether it shall serve as the absolute payment and extinguishment of the original debt or not; and in such a case, where there was evidence introduced on the trial, on both sides of the question, and the finding thereon was general, and to the effect that the note was not executed in absolute payment of the debt, and the evidence was sufficient to sustain such finding, *held*, that such finding cannot be disturbed by the supreme court. [*McCoy v. Haslett*, 14-430.]

Error from Osage District Court.

ALLEN & SON, as plaintiffs, recovered judgment against *Shepard & Playford*, at the April Term 1874, for \$952.25, and costs. The defendants bring the case here on error. The facts and proceedings are sufficiently stated in the opinion.

James Rogers, for plaintiffs in error.

William Thomson, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by John G. Allen & Son against Shepard & Playford, on an account for

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goods sold and delivered. The judgment below was for the plaintiffs, and the defendants below, who are now plaintiffs in error, brought the case to this court. The only assignments of error are as follows:

"*First*, That the said court erred in admitting the evidence on the part of the said Allen & Son, to which the said Shepard & Playford at the time objected.

"*Second*, That the said judgment was given for the said Allen & Son when it ought to have been given for the said Shepard & Playford according to the evidence, and the law of the land."

I. The only evidence of the plaintiffs below, objected to, was certain testimony of the witnesses F. G. Nelson and W. Thompson. This evidence was offered by the plaintiffs below in rebuttal, and was proper rebutting evidence. It had reference merely to an interview between said witnesses and the defendant Shepard concerning certain notes, and what Shepard said about them. The evidence was objected to on the ground that it was irrelevant and incompetent. Now if it was irrelevant or incompetent, it was so merely because it was immaterial in the case. And the admission of immaterial evidence is generally not sufficient to require a reversal of a judgment. It is never so except where it tends to prejudice the substantial rights of the party against whom it is introduced. It is certainly not so in this case.

II. The trial of the case was before the court without a jury; and the court made a general finding in favor of the plaintiffs and against the defendants; and upon this general finding the judgment of the court below was unquestionably correct. This substantially disposes of the second assignment of error.

III. But the main argument of the plaintiffs in error, as we find it in their brief, is founded upon the claim that the finding of the court below is erroneous, and not sustained by sufficient evidence. Certain notes were given for the amount of the account sued upon; and the principal question of fact contested in the court below was, whether said notes were given as absolute payment of said account, or whether they were given

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merely as conditional payment, as additional security, or as collateral evidence of the preëxisting debt for which they were given. That the whole matter was completely within the direction and control of the parties at the time the notes were executed, we suppose no one will question. The parties could have made the giving of said notes serve as the absolute payment and extinguishment of said debt if they had so chosen. (*McCoy v. Hazlett*, 14 Kas. 430.) Or they could have made the notes serve merely as additional evidence of the debt, and allowed the original debt still to subsist and continue in force, if they had so chosen. *Kermeyer v. Newby*, 14 Kas. 164; *Cooper v. Condon*, 15 Kas. 572, 578. Hence, the only thing for the court below to do was, to hear the evidence offered on each side, and then to decide the question in accordance with the preponderance of the evidence. This the court below did. There was evidence introduced on both sides, and the court below upon this evidence decided in favor of the plaintiffs below. We cannot disturb that decision. There was sufficient evidence to uphold the same. What the decision should have been, if there had been no evidence introduced on either side upon the subject, is a question which is not now before us. Or upon whom would rest the burden of proof in such a case, we need not now decide. The weight of authority however would seem to be that the original debt in such a case would, *prima facie*, continue to exist; that the burden of proof to show that it had been paid or extinguished by the execution of promissory notes therefor, would rest upon the debtor; and that if no evidence were introduced except that of the mere execution of the notes, it would be presumed that the original debt still continued in force, unpaid and unextinguished. (*Kermeyer v. Newby*, *supra*; 10 U. S. Dig., First Series, 61 to 74, and cases there cited.)

The judgment of the court below will be affirmed.

All the Justices concurring.

N. B. LORD V. A. L. ANDERSON.

JOINT DEBTORS; Compromise; Release by Creditor of one of Several Joint Debtors.

Where a partner sues his two copartners for a final accounting and settlement of the copartnership affairs, and it appears that the two partners sued had previously received jointly \$1,281 more than they were entitled to, and the plaintiff \$1,281 less than he was entitled to, and while the action was pending, the plaintiff settled with and discharged from all further liability one of the defendants, *held*, that the judgment in favor of the plaintiff and against the other defendant should be for one-half of \$1,281, to-wit, \$640.50.

Error from Franklin District Court.

ACTION by *Anderson* against *Lord* and another, to recover an alleged balance of \$1,500. Plaintiff brought his action against two defendants, and prosecuted it to judgment against *Lord* alone. Trial at the September term 1874. Findings and judgment in favor of *Anderson* for \$826.50, and interest, and costs. *Lord* appeals, and brings the case here on error. The principal facts are stated in the opinion.

Thacher & Stephens, for plaintiff in error.

W. H. Maxwell, and *C. R. Meigs*, for defendants in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action by one partner (A. L. Anderson) against two others (N. B. Lord and C. C. Smith) for a final accounting and settlement of the copartnership affairs. After the commencement of the action Anderson released Smith from all liability to him growing out of the partnership matters, and then prosecuted the action against Lord alone. There had been a settlement by the parties up to a certain time, and this action was to enforce that settlement, and for a further and final settlement of the copartnership affairs. The only assignment of error in this court is, that "the district court overruled the motion for a new trial made by the plaintiff in error," defendant below. The motion for a new trial reads as follows:

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"And now comes the defendant, and moves the court for a new trial for the reasons, 1st, The judgment is not sustained by the evidence; 2d, The decision of the court is against the evidence; 3d, The judgment of the court was rendered and entered for a larger amount than was due the plaintiff."

This motion was overruled, and the defendant below excepted; and this was the only exception taken to any ruling of the court below. The judgment of the court below was in favor of the plaintiff and against the defendant Lord for \$826.50 principal sum, and \$175 as interest; total \$1,001.50. The findings of the court below were as follows:

The assets of the company was the Ottawa lot, taken by Lord at,...	\$4,500 00
Cash turned over to Smith by Anderson,.....	200 00
	<hr/>
	\$4,700 00
Anderson advanced for company purposes,.....	2,571 50
	<hr/>
Leaving net profits,.....	\$2,128 50
One-third of the profits,.....	\$709 50
Add to this, Anderson's advancement,.....	2,571 50
	<hr/>
Anderson should receive,.....	\$3,281 00
Deduct what Anderson received from Lord,.....	2,000 00
	<hr/>
	\$1,281 00
Deduct what Anderson received from Smith per Richmond,.....	100 00
	<hr/>
	\$1,181 00
From this deduct one-half of balance due on advancement, be- cause of release of Smith,.....	254 50
	<hr/>
Balance due Anderson,.....	\$826 50
For which sum, with interest on \$557.50 from October 3d 1870, and on \$275 from May 24th 1873, making a total of \$1,001.50, judgment should be entered in favor of Anderson and against Lord.	

The evidence upon which these findings were made was conflicting and contradictory. But there was sufficient evidence to sustain every material finding of fact made by the court. We cannot, as we have many times decided, weigh the conflicting and contradictory evidence in a case, and determine on which side the preponderance lies. All that we can do is, to see whether the findings of the court are sustained by sufficient evidence without taking into consideration any of the contradictory or adverse evidence. Some of the foregoing findings however are not findings of fact from the evidence, but are

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merely conclusions from the other findings, or conclusions of law. These findings, or rather conclusions, if we should find them erroneous, we can correct from the other findings, and from the admitted facts. The partnership-firm consisted of Anderson, Lord and Smith. Anderson furnished all the capital, and all were to share equally in the profits. The court below finds that Anderson furnished \$2,571.50. The evidence would have sustained a finding for a greater amount. The court also finds that the profits of the partnership were \$2,128.50, making the total assets of the company \$4,700. Of this amount Anderson should have received back his original capital, to-wit, \$2,571.50, and one-third of the profits, to-wit, \$709.50; total, \$3,281; and each of the other partners should have received one-third of the profits, that is, \$709.50 each, or \$1,419 in the aggregate. Now Anderson in fact received only \$2,000 in available funds, and therefore should have received \$1,281 more. While his two partners received in available assets \$2,700, or \$1,281 more than they were entitled to receive. They in fact received all the available assets of the company, which were \$4,700, and then paid back to Anderson \$2,000. They received this jointly. They acted together in the partial settlement by which this was done, as one person. Now, as Lord and Smith received \$1,281 more than they were entitled to, and Anderson \$1,281 less, it would seem that in a suit by Anderson against them he should recover that amount from them. But after this suit was commenced Anderson received from Smith \$100, and discharged Smith from all further liability. This certainly ought to discharge one-half of the joint, or joint and several, or several liability of Lord and Smith. (Gen. Stat. 183, §5; id., pp. 605, 606.) As Lord and Smith were liable in the aggregate to Anderson for \$1,281, this compromise and settlement with Smith should have left Lord liable for only one-half of \$1,281, or \$640.50. On account of said compromise the court below did deduct \$454.50 from said \$1,281, leaving as the amount found due from Lord to Anderson, and for which, with interest, the court below rendered judgment for \$826.50. One hundred dollars of said amount deducted,

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the court below says, is "what Anderson received from Smith per Richmond." And \$254.50 of said amount, the court says, is "half of the balance due on advancement, because of release of Smith." Said \$254.50 does not however seem to be one-half of any sum mentioned in the case. It, with the \$100, paid by Smith, would however come within 25 cents of being one-half the share of the profits of each partner. The other hundred dollars deducted was probably deducted through a mistake in deducting \$254.50 from \$1,181, and calling the remainder \$826.50. We think the court below decided correctly in determining that something more than the \$100 paid by Smith to Anderson should be deducted on account of the discharge of Smith; but we think the court was mistaken in the rule it adopted to determine just how much should be deducted. We think that when Smith was discharged, just one-half of the amount due from Lord and Smith should have been deducted.* The uncontradicted evidence in the case shows, that Smith got his full share of the amount in value that went to Lord and Smith. That matter was arranged satisfactorily between Lord and Smith. We cannot say that the court below erred in determining that the amount due Anderson drew interest, and in fixing the time when the same commenced to draw interest. We have not scrutinized the question however very closely, as no possible error of the court in this respect could make much difference in the amount of the judgment that should be rendered. Anderson testifies that on October 3d 1870, he had

[*THE amount due (\$1,281) was not admitted by defendants, but was ascertained at the trial, and from the testimony. The amount paid to plaintiff before trial (by the released defendant, Smith,) was \$100 only. Of course, the plaintiff was entitled to recover from Lord only the one-half of said \$1,281 joint debt found due. He compromised with Smith for less than half at his peril. But take another case, (suggested by a referee's report recently made in an action in the Shawnee district court;) Suppose a plaintiff should claim that a specific sum, say \$1,200, was due him from two defendants; that one defendant, without knowing what sum was in fact due, should pay one-half the amount claimed, (\$600,) and should be thereupon released; that the other defendant should resist the plaintiff's claim, and on trial it should be ascertained that the amount actually due from both defendants at the commencement of the suit was \$400, and no more, and it should be shown that the released defendant had paid plaintiff \$600 since suit brought: how then? The plaintiff by his settlement with one defendant has received the whole debt due him from both, and \$200 in excess! Would he be also entitled to a judgment against the remaining defendant for \$200, the one-half of the ascertained actual joint debt of \$400? If so, then he obtains \$800 where only \$400 were due. "A creditor is entitled to payment but once."—BARRETT.]

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already advanced \$2,379.34 for the company. Lord at that time paid him \$2,000 of the amount, and, as Anderson testifies, "said he would send balance of \$379 to me [Anderson] next day." This \$379 was evidently then due. There may have been other "unreasonable and vexatious delays of payment or settlement of accounts." (Gen. Stat. 525, ch. 51, §2.) We cannot even tell from the record brought to this court when this present action was commenced. And of course, it devolves upon the plaintiff in error to show error. It is now difficult for us to determine from the findings of the court below what amount should draw interest from October 3d 1870, and what amount from May 24th 1873, as we have come to the conclusion that the amount for which judgment should be rendered should be only \$640.50 instead of \$826.50 as found by the court below. The court below finds the "Balance due Anderson \$826.50," "with interest on \$557.50 from October 3d 1870, and on \$275 from May 24th 1873." Now, the aggregate of these two last-mentioned sums is more than \$640.50, and even more than \$826.50; and hence we hardly know how to divide the sum of \$640.50 so as to make the right amount draw interest from October 3d 1870, and the right amount from May 24th 1873. But as it is the duty of the plaintiff in error to show error, and as we think he has not done so in this respect, we shall allow the court below to render judgment for interest on any sum not exceeding \$557.50 from October 3d 1870, and interest on the balance of \$640.50 from May 24th 1873.

The judgment of the court below will not be reversed, but the cause will be remanded with the order that the judgment be modified so as to correspond with this opinion.

All the Justices concurring.

ABEL D. BENT v. F. B. PHILBRICK, *et al.*

1. VERDICT; *Finding Upon Particular Questions of Fact.* Under chapter 91 of the laws of 1874, either party may request of the court to submit to the jury a question as to a particular fact, and if the fact be involved in the issues, and material to the controversy, the court has no discretion, but must submit the question and require the jury to answer. [*L. L. & G. R. R. Co. v. Rice*, 10-426; *Bent v. Philbrick*, 18-190; *City of Wyandotte v. Gibson*, 25-236; *Baehler v. Consol. Ranch Co.*, 31-502.]
2. PLEADING; ISSUE; *Reply; Waiver.* Where the record fails to contain any reply to an answer alleging new matter, but the case was tried by both parties without any objections on the account of the want of a reply, and as though a reply had been filed, this court will treat the case in the same way. [*Walker v. Armstrong*, 2-198; *Wilson v. Fuller*, 9-176; *Russell v. Smith*, 14-366; *Hopkins v. Cothran*, 17-173; *K. P. Rly. Co. v. Taylor*, 17-566; *Netcott v. Porter*, 19-131; *Bashor, et al., v. Nordyke & Marmon Co.*, 25-222.]

Error from Butler District Court.

ACTION by *Bent* as plaintiff, against *Philbrick* and wife, to foreclose a mortgage. Trial at the August Term 1874. Verdict and judgment in favor of the plaintiff for \$596. The amount claimed by plaintiff was \$650, with interest, protest damages, and protest fees. And because the verdict and judgment were too small, plaintiff brings the case here on error. The facts and proceedings are stated in the opinion.

Pryor & Kager, for plaintiff.

H. T. Sumner, and *A. J. Miller*, for defendants.

The opinion of the court was delivered by

BREWER, J.: This was an action to foreclose a note and mortgage. The note was payable to Brown Bros., was indorsed by them to one R. B. Waite, and by him to the plaintiff. All this, as admitted by the pleadings, took place before maturity. The answer, admitting that \$500 was due, (that being the amount actually borrowed and received by defendants,) and offering a judgment, alleged that the balance of the note, \$150, was for illegal and usurious interest, and that the plaintiff "took and

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received said note with full and complete knowledge of the nature and terms of said usurious and illegal contract." As no reply appears in the record, it would seem as though there were nothing to try, and that the court, upon the pleadings, should have entered judgment for the \$500 and twelve-per-cent. interest. (Laws of 1872, p. 284, §§ 1 and 2.) But the case was tried by both parties as though the allegations of new matter in the answer was denied; and we shall take the case upon that basis, as in our judgment, upon that basis, there was such error as requires a reversal. If there really be no reply on file, the trial court can in its discretion permit the filing of a reply upon such terms as may be just and proper.

Counsel for plaintiff in error call our attention to a dozen or more matters in which they claim the court erred. It is unnecessary for us to notice all these in detail. It is obvious that, upon the supposition that the reply was a simple denial, the defendants were called upon to establish two propositions—first, that the amount of the note in excess of \$500 was for illegal and usurious interest, and second, that the plaintiff bought with knowledge. And testimony which tended to prove either fact was competent, irrespective of the question whether the other fact were proven or not. Counsel on the trial objected to the admission of a good deal of testimony tending to prove the first fact, as incompetent, because the second fact was not proved; and now present these matters to this court as points of error. It seems unnecessary to more than state the facts to show the correctness of the ruling.

Again, counsel insist that the court improperly permitted the jury to separate during the progress of the trial. As it does not appear that they were permitted to separate except during the intervals of the session of the court, and before retiring to consider of their verdict, it is difficult to see wherein there was any improper separation.

It appears that in addition to the general verdict the plaintiff requested the court to submit to the jury certain questions of fact, and require answers thereto. This the court refused. It seems to us that these questions were pertinent and appro-

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prate, and should have been submitted. The first ran directly to the point of plaintiff's knowledge of the usurious contract at the time of receiving the note. This was one of the essential matters in dispute; and a specific question in reference thereto the court had no discretion to refuse. The law in force at the time is to be found in ch. 91 of the Laws of 1874. That provides that, "in all cases the jury shall render a general verdict; and the court shall, in any case, at the request of the parties thereto, or either of them, in addition to the general verdict, direct the jury to find upon particular questions of fact, to be stated in writing by the party or parties requesting the same." This does not give a discretion to the court, but a right to the parties. We do not of course understand the law as compelling the court to submit every question presented, even though irrelevant, immaterial, or frivolous; but where a question is submitted as to a particular fact which is pertinent to the issues, and necessarily to be determined by the jury, the court has no discretion to refuse. *L. L. & G. Rld. Co. v. Rice*, 10 Kas. 426. For this error the judgment must be reversed, and the case remanded with instructions to grant a new trial.

All the Justices concurring.

JNO. SARAHASS, *et al.*, Trustees, *fc.*, v. LUCY B. ARMSTRONG.

1. JUDICIAL NOTICE; *Church Organizations*. The courts do not take judicial notice of the general organization of the Methodist Episcopal Church, its administration and control over local churches of that denomination, and their property.
2. ACT OF CONGRESS; *Relief of Mission Church of Wyandotte Indians*. The act of July 28, 1866, entitled "An act for the relief of the trustees and stewards of the Mission Church of the Wyandotte Indians," appears upon its face to be a grant to a church organization among and of Wyandotte Indians, and made by virtue of the governmental protection over these wards of the nation.
3. ——— A society of Wyandotte Indians was the beneficiary; and though the Wyandotte nation removed from the limits of the state of Kansas, yet while that society was continued in existence among them,

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the parties recognized by the nation as the trustees thereof are the legal custodians of the fund, and may maintain an action in the courts of this state to recover it from one to whom it had been loaned prior to the removal.

Error from Wyandotte District Court.

FORECLOSURE of mortgage, brought by "John Sarahass, William Johnson, and George Peacock, Trustees of the Methodist Episcopal Church, Wyandotte and Quindaro Mission, Kansas Conference, plaintiffs," against *Lucy B. Armstrong*, defendant. Defendant gave to John Sarahass, Jacob Whitecrow, William Johnson and John Brown, as trustees, etc., her note for \$1,100 and interest, on which she had paid \$62 as interest. The defense was, that "said plaintiffs are not the trustees of the M. E. Church, Wyandotte and Quindaro Mission, Kansas Conference, nor have they any power or authority to collect any money or transact any business for said church." Trial at the March Term 1874. The court found, as a conclusion of fact, "that the plaintiffs Sarahass, Johnson and Peacock are not the lawful trustees of the Methodist Episcopal church for the Wyandottes, to sue for and collect the note set out in their petition against defendant, for the reason that they had all emigrated beyond the bounds of the Kansas Conference, and away from the locality where they resided in Wyandotte county, Kansas, at the time said note and mortgage were executed by defendant"—and thereupon gave judgment in favor of the defendant for costs. The plaintiffs appeal, and bring the case here on error.

D. B. Hadley, for plaintiffs.

Cook & Sharp, for defendant.

The opinion of the court was delivered by

BREWER, J.: In July 1866, congress enacted as follows: "That for refunding to Jacob Whitecrow, John Sarahass, and others, trustees and stewards of the Wyandotte and Quindaro Mission of the Kansas Conference of Methodist Episcopal Church, for the destruction of their church-building and library,

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\$4,680, to be applied in rebuilding said buildings, and inclosing the graveyards of the Wyandotte Indians in the state of Kansas, and that the sum hereby appropriated be paid out of any moneys in the treasury not otherwise appropriated." (14 U. S. Stat. at Large, 309.) In 1868 the said trustees loaned a portion of the money to defendant, and took her note and mortgage as security therefor. Subsequently the Wyandotte nation removed to the Indian territory. The same religious organization was preserved there, and these plaintiffs are the successors in office as trustees of those who made the loan, at least they are so recognized by the Wyandotte Indians. Prior to the removal the organization had two places of worship, one in Quindaro, and the other in Wyandotte, and kept up services in both. It owned the building in the former place, but not in the latter place. It sold the building it owned, and from that time the preaching and meetings in Quindaro have ceased. It does not appear in whom the title to the building in Wyandotte was vested; but since the removal, the society in Wyandotte is wholly a white society, and known as the "Wyandotte Methodist Episcopal Church North." It preserves the book of records kept by the W. & Q. Mission of the Kansas Conference, and that record shows an election prior to the commencement of this action, of five trustees, all white men, and two of them residents in Wyandotte county. It does not appear that the money granted by congress was ever used in the erection of a church-building in lieu of the one destroyed; nor does it appear what disposition was made of the balance of the money granted.

This is about as full a statement of the facts as can be gathered from the case made. And upon these we remark, that the argument of the counsel for defendant in error, as to the general organization of the Methodist Episcopal church, its administration and control over local churches of that denomination, and their property, cannot be considered by us, for the facts concerning the same are not in the case made, and they are not matters of which the court can take judicial notice.

It seems to us that the grant from congress was to a church organization among and of Wyandotte Indians, and by virtue

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of the governmental protection over these wards of the nation; that it was in no sense a grant to the great Methodist church to assist it in its missionary work. The Wyandotte church, as an Indian church, and not as a member of the Methodist denomination, was the beneficiary. The grant was not local, to the Methodist church in Wyandotte county, but tribal to the Wyandotte Indian church, whether that society remained in Kansas, or moved elsewhere. It was something which attached to and vested in an organization of the Wyandotte tribe of Indians. Whoever therefore are recognized by the Wyandotte nation as the official representatives of that organization, are entitled to the possession of this fund, and may maintain an action to recover it.

For these reasons the judgment must be reversed, and the cause remanded with instructions to grant a new trial.

All the Justices concurring.

A. T. & S. F. RAILROAD CO. v. JOS. WILLIAMS, *Treasurer.*

SCHOOL-DISTRICT TAXES, *To Pay Bonds, and Interest; Tax of 55 Mills held Valid.*

On March 5th 1873, the county superintendent of public instruction of Butler county reduced School District No. 58 of said county, by a change of its boundaries, so that it contained only \$14,672 worth of taxable property. On June 14th 1873 a school-district bond of said district, and interest on it and other bonds, became due, amounting in the aggregate to \$300, for the payment of which bond and interest \$67.39 had been provided by the taxation of the previous year. On June 14th 1874, another bond of said district, and other interest, would become due, amounting to the sum of \$280. On the first Monday of September 1873, the county board of said county levied a tax of 55 mills on the dollar, on the taxable property of said school district, to raise funds with which to pay the said bonds and interest coming due in 1873 and 1874, and to provide for delinquencies: *Held, That such taxation is not void.*

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Error from Butler District Court.

INJUNCTION, brought by the *Railroad Company*, to restrain the collection of a tax. The district court, at the August Term 1874, overruled a demurrer to the answer of the defendant, and gave judgment against the plaintiff for costs. The plaintiff brings the case here for review. The material facts are stated in the opinion.

Ross Burns, and *J. G. Waters*, for plaintiff.

A. L. Redden, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by the Atchison, Topeka & Santa Fé Railroad Company against Joseph Williams, county treasurer of Butler county, to restrain the collection of certain taxes. It appears from the record that on June 14th 1872, School District No. 58 of said county issued five bonds for \$200 each, to become due in one, two, three, four, and five years, respectively, and to draw interest from date at the rate of ten per cent. per annum. On March 5th 1873, the county superintendent of public instruction detached a portion of the territory of said school district from the district and attached the same to another district. By so doing school district No. 58 was left with only \$14,672 worth of taxable property within its boundaries; and a two-per-cent. tax levied thereon would raise only \$293.44. In 1872 a tax of \$67.39 (and only that amount) was levied with which to pay the amount of the bond and interest coming due on June 14th 1873. In 1873 a tax of 55 mills on the dollar was levied on the property of said school district for the purpose of raising funds with which to pay the balance of said amount coming due June 14th 1873, and also to pay the amount coming due June 14th 1874. This 55-mill tax is the tax of which the railroad company now complains. They claim that said tax is void for the following reasons: They claim that the county superintendent of public instruction had no authority, under

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any circumstances whatever, to diminish the territorial area of said school district to such an extent that it would require a tax to be levied on the property of the district for any given year of more than two per cent. on the taxable property of such district to raise funds for the payment of all bonded indebtedness due and coming due against such district for that and previous years. They claim that the county superintendent did so diminish or attempt to diminish said school district, and that said 55-mill tax was levied on only the property of such diminished district. And therefore, as the tax was not levied on all the property of the district, as the district existed before the change, they claim that the tax is void. They also claim that said 55-mill tax was excessive; that it was more than enough to pay all the bonded indebtedness of the district for the years 1873 and 1874; and therefore, that it was void. We think they are mistaken in their legal conclusions. If the superintendent when he diminished the district had looked to the year 1873, and that year only, he would have found that during that year the amount of the bond and interest coming due would have been \$300, and that \$67.39 of that amount had been provided for by a tax of the previous year, leaving only \$232.61 to be provided for by a tax for the year 1873. But if the superintendent had looked to the year 1874, and to that year only, then he would have found that the amount of the bond and interest coming due during that year would have been only \$280. Now, a tax of two per cent. on the taxable property of the diminished district would have raised, as we have before stated, \$293.44, more than enough to pay the amount to be provided for for either of said years. We think however that the superintendent should have looked to the year 1874, and to that year only. It was the duty of the board of county commissioners of Butler county to have levied on the first Monday of September 1872 a tax on the taxable property of said school district sufficient to pay the amount coming due in 1873, to-wit, the said sum of \$300, which sum was to become due June 14th 1873. (Gen. Stat. 1044, § 72; Laws of 1872, p. 172, § 3.)

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They should not have waited until September 1873 to levy a tax to pay a bond and interest which were to become due on June 14th 1873. On the first Monday of September 1873 they should have levied a tax on the then taxable property of the district to pay the amount of the bond and interest coming due on June 14th 1874. And this is the tax and taxable property that the superintendent should have looked to when he changed the boundaries of the district in March 1873. The amount coming due on June 14th 1874, was, as we have before stated, \$280, and a two-per-cent. tax on the taxable property of the diminished district would have raised that amount. We therefore think that the action of the county superintendent in diminishing said district was not void, and therefore the said tax of 55 mills on the dollar is not void.

For the purposes of this case we shall assume that said 55-mill tax was levied by the board of county commissioners on the taxable property of said school district on the first Monday of September 1873, although the record does not show definitely when it was levied, nor by whom. Said tax may possibly be slightly excessive, but still it is certainly not so much so as to render the tax void. It would take about 20 mills on the dollar to raise an amount sufficient to pay the indebtedness becoming due in 1873, and about 20 mills more to raise an amount sufficient to pay the indebtedness becoming due in 1874; and it would probably take about 10 mills more to cover delinquencies. If an amount more than necessary to pay the amount of the bonds and interest coming due in 1873 and 1874 should be collected before such last-mentioned amounts became due, which is not probable, the excess could and would be applied in payments of the other bonds and the interest as the same should afterward become due. Sec. 5 of "An act to enable school districts in the state of Kansas to issue bonds," approved February 26th 1866, (Gen. Stat. 940,) is §1 of "An act to amend an act to enable school districts in the state of Kansas to issue bonds," approved February 27th 1871, (Laws of 1871, page 80,) and is §101 of the School Laws of 1871. (Supt. McCarty's Edition, p. 29;) and it was repealed

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February 29th—March 21st—1872; (Laws of 1872, p. 178, § 6.) Hence said § 5, or § 1, or § 101, whichever it may be called, ~~can have~~ but little force or influence in the decision of this case. We suppose that § 1, chapter 110, of the Laws of 1872, (page 248,) amending § 10 of article 2, ch. 92 of the Gen. Stat., (page 915,) was, on March 5th 1873, and still is, in force. Said section provides that the county superintendent shall not reduce the territory of any school district so that more than two per cent. "upon its property-valuation shall be required to meet accruing interest and matured bonds." This is a guide purely to the county superintendent. The § 101 mentioned in that section, which relates to the duties of certain other officers, was repealed March 21st 1872, as we have already stated, by the act of February 29th 1872. Since March 21st 1872, there has been no statute limiting the amount of the tax which the county commissioners might or could levy on the property of a school district to pay the maturing bonds and interest of the district. (Laws of 1872, ch. 94, pp. 172, 173.)

There are several questions involved in this case which we have not discussed or decided, some of which might perhaps be equally fatal to the plaintiff's cause of action.

The judgment of the court below is affirmed.

All the Justices concurring.

A. T. & S. F. RAILROAD CO. v. NEIL CAMPBELL.

1. **NEGLIGENCE; Fires Set by Locomotive Engine; Condition and Management of Engine.** In an action to recover damages for property destroyed by fire communicated from an engine, in which it appears that the engine in passing over a distance of a few miles, with an ordinary load, set the adjacent grass and stubble on fire several times; that though this engine had been backward and forward over the same road during all of that fall, and though other engines were passing and repassing, some upon the same day, yet no fires had been communicated other than these upon this day from this engine; that engines in good order, and properly supplied with precautions to prevent the escape of fire, and properly and carefully managed, seldom communicate fire to the adjacent grass and stubble; and where it appears that something seemingly heavier than the smoke, and separating from it, was seen to be thrown out of the smoke-stack, and fall into the neighboring stubble, and almost immediately the stubble was in a blaze, and thereafter in this burnt stubble a piece of coal is found surrounded by ashes, and apparently the remnant of a piece of coal six inches in diameter which had been there burning; and where the conductor of the train, at the first station after passing these fires, telegraphed to the assistant superintendent of the road "that the engine was setting the country on fire;" and where it appears from the testimony of experts that where an engine starts a succession of fires, and others operated along the same road under similar circumstances of wind and weather do not start any, the difference can be reasonably accounted for only upon the supposition of defect in the construction, condition, or management of the engine doing the damage: *Held*, That a verdict finding negligence would be sustained, although it appeared that a very strong wind was blowing at the time of the fire, that several competent witnesses who examined the engine at and shortly after the fire testified that it was in perfect order and supplied with the best appliances for preventing the escape of fire, that as many testified that the engineer was a competent and careful engineer, and that he testified that he used all possible care and precautions to prevent the escape of sparks and fire upon that day, and although there was no direct testimony contradicting these witnesses, and that it was impossible for any one from the testimony to point out in what respect, if at all, the engine was defective, or out of order, or the engineer guilty of negligence. [See *A. T. & S. F. Rld. Co. v. Bales*, post, 252, and cases cited.]
2. **VERDICTS; Answers to Particular Questions; Compelling Answers; Exceptional Cases; Duty of Court.** While the rule is general, that wherever in addition to a general verdict a question of fact is submitted to the court which is proper and pertinent, and an answer can be deduced from the

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testimony, it is the duty of the court to compel an answer, and refuse to receive a verdict until one is made, yet, where the question is not as to one of the issuable, essential, and principal facts, but runs to one of the minor and subdivided facts into which every principal fact may be resolved and reresolved almost indefinitely, and the entire testimony leaves in uncertainty the existence of several of such minor facts (including the one inquired about) either of which would be sufficient to sustain the general conclusion reached, the court may sometimes properly receive and sustain a verdict where the only answer to the question is, that the jury do not know. [*Morrow v. Comm'rs Saline Co.*, 21-484; *Map Co. v. Jones*, 27-184.] But it should never do so when it is evident that a determination of the fact is essential to the conclusion reached in the general verdict, nor where it is apparent that the jury by improperly professing ignorance have sought to leave the facts in such uncertainty as unduly to hinder any subsequent inquiry into the correctness of their verdict.

Error from Lyon District Court.

CAMPBELL sued the *Railroad Company*, claiming in his petition that, on the 12th of October 1871, the defendant while running a train of cars through the county of Lyon on its line of railroad, propelled by a steam locomotive, by reason of the negligent and careless management of said locomotive, and by reason of said locomotive being out of repair, and in an unsafe condition, fire was set to the grass on plaintiff's land in said county adjoining the track, and burned up and destroyed 250 rods of fence, 75 tons of hay, 80 tons of straw, 37 apple trees, and a grove of cottonwood trees, to his damage \$1,100. The answer of the company is a general denial, with a special averment that, on the day of the injury complained of, the locomotive alleged to have set out the fire was in good condition and operated in a careful manner by competent and careful servants of defendant. Trial at the June Term 1874. The case was tried by a jury. The following is the charge to the jury, referred to in the opinion:

"*Gentlemen of the Jury*: This is an action for damages caused by fire originating from sparks emitted from one of the locomotive engines of the defendant, on the 12th of October 1871, by reason, as plaintiff alleges, of the said engine being out of repair, and being in an unsafe and dangerous condition, and

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by the unskillful, negligent and careless manner in which said engine was managed by defendant's servants. The defendant company answers by a general denial.

"You are the exclusive judges of the evidence, and of the facts proved; also, of the credibility of the witnesses, and of the weight to be given to their testimony.

"In order to recover in this action; the plaintiff must prove by a preponderance of testimony, first, that his property was, on the 12th of October 1871, damaged by fire originating from one of the locomotive engines of the defendant; second, that said fire was caused, either by the engine causing said fire being out of repair, or from being in dangerous or an unsafe condition, or that said fire was caused either by the careless, unskillful, incompetent, or negligent manner in which said engine was managed by the servants of said defendant at the time of the occurrence of said fire. The gist of the action is, negligence on the part of defendant; and unless the plaintiff satisfies you by competent evidence, that the fire complained of was caused by the negligent conduct of the defendant's servants, or some one of them, or by a defective engine, he cannot recover.

"Negligence may be shown by circumstances; and in this case it would be unreasonable to require the plaintiff to show by direct evidence a defect in the engine, or mismanagement of the same, these facts being peculiarly within the knowledge of the defendant. Therefore, if you are satisfied from the evidence that the defendant's engine causing the fire complained of caused two or more other fires on the same day, and under similar circumstances as to wind and weather, and that the ordinary working of an engine under like circumstances does not ordinarily produce such results, or that engines properly constructed and properly managed do not ordinarily under like circumstances produce such results, or that other engines of the defendant passed over the same road where the fires were set, on the same day, and under similar circumstances as to wind and weather, and caused no fires, these facts and circumstances would be sufficient to establish, *prima facie*, negligence; and unless the defendant satisfies you from the evidence that its engine causing the fires was properly constructed, in good order, and properly managed, the plaintiff would be entitled to recover his damages caused by said fire, as shown by the evidence.

"If you believe from the evidence that the fire complained of was caused by reason of the defendant's engine being out of

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repair, or in an unsafe condition, or by the careless or unskillful manner in which it was managed by the servants of defendant, you will find for the plaintiff.

"If you believe from the evidence that at the time the fire complained of was set by the defendant's engine, that said engine was properly constructed, in good repair, and skillfully and carefully managed by competent servants, you will be justified in attributing the cause of said fire to some unavoidable accident, and will find for the defendant."

Verdict and judgment in favor of *Campbell* for full amount claimed. New trial refused, and the *Railroad Company* brings the case here on error.

Ross Burns, and *J. G. Waters*, for plaintiff in error.

Ruggles & Sterry, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This was an action by defendant in error to recover damages for property consumed by fire, claimed to have been started from one of the engines of the railroad company. The fire was the same as that which destroyed the property of Wm. M. Stanford, a judgment in whose favor therefor was in 1874 sustained by this court. (*A. T. & S. F. Rld. Co. v. Stanford*, 12 Kas. 354.) There are also three other actions now pending in this court to recover damages done by the same fire, or fires from the same engine upon the same day. Of course, as to all questions then decided, nothing need now be said. Many of the questions in that case do not arise in this; and some additional matters are here presented.

And the first question we shall examine is, as to whether the verdict is contrary to the evidence. And here the only matter of difficulty is as to negligence on the part of the company. The evidence thereon may be briefly stated as follows: There is the testimony of some fifteen witnesses who saw the train drawn by the engine No. 9 passing from Emporia westward, and immediately after it passed along saw fires starting in the prairie grass beside the track. The exact number of fires started, as seen by the witnesses, does not clearly appear; but

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there were quite a number—one at Emporia, several near the county line between Lyon and Chase counties, and one at least near Cottonwood station. Though trains were passing and repassing over this road during that fall, some upon the same day, it appears that they started no fires. Several competent witnesses testified that an engine in good condition, and well managed, seldom throws out sparks so as to start fires along the road, and that if two engines passed over a road upon the same day, under the same conditions of wind and weather, and one started no fires while the other started a succession of them, this difference could be reasonably accounted for only on the supposition that the latter was badly constructed or managed. One witness testified to seeing something coming from the smoke-stack of this engine, a little heavier than smoke, separating from the smoke and falling into a field, and almost immediately thereafter a fire starting up in the surrounding stubble. He thought this object looked like a string of dust, as he expressed it. He was at the time standing some little distance from the engine, but in plain view. Another witness who went into this field, after the fire, found there a burnt piece of coal about the size of half a dollar, surrounded by ashes and apparently the remnant of a larger piece of coal, one (say six inches in diameter) which had there been burning. The conductor of the train, who had noticed the fires, when it reached Cottonwood Falls telegraphed the assistant superintendent of the road that the engine was setting the country on fire, and asked what he should do, and was told to go ahead. On the other hand, it appeared that a strong wind was blowing that day, the engineer thinking it the strongest he had ever run a train against. Some five witnesses, apparently experts, and competent, who examined the engine at or shortly after these fires, testified that she was in good order, and supplied with all the best appliances for preventing the escape of fire. As many testified that the engineer was a competent and careful engineer; and he testified that he took all possible precautions on that day to prevent injury from escaping sparks. No defect in the engine was suggested by any witness; nothing

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pointed out as wanting to complete the most perfect arrangement for guarding against accidents or injury. There was not a syllable of testimony denying the competency and prudence of the engineer, and nothing tending to show wherein he failed of the utmost possible care upon that occasion. Upon this testimony can a finding of negligence be supported? That the evidence of the plaintiff established a *prima facie* case of negligence, will not, under the prior rulings of this court, be doubted; but it is insisted strenuously that this raises a mere presumption which may be sufficient in the absence of other testimony, but which falls to the ground when opposed by clear and positive testimony as to the actual condition and management. Presumptions may be good in the absence of testimony, but cannot overthrow it. Here all the testimony is to the effect that the engine was in good condition, and supplied with all known appliances for preventing injury. Upon what may a jury find that it was not in such condition, and so supplied? Who can name a thing that was wanting? Who can tell what was out of order? Is a jury at liberty to find against the only direct and positive testimony? And if so, of what avail is it to introduce testimony? And so as to the conduct of the engineer: who can name anything which he ought to have done and did not do? in what respect did he omit care? in what was he negligent? In other words, what more could the company, if possessed of all the facts it now possesses, have done to prevent the injury? What do the jury say ought or could have been done? Must not the conclusion be inevitable, that this injury was the result of accident, and not of negligence? Something which could not have been foreseen nor guarded against, and is not now known? On the other hand, it is said that all or nearly all of the witnesses for the defendant are or were in its employ, and may be presumed to be influenced to some extent thereby; that the sole witness as to the care and prudence of the engineer, is the engineer himself; the one upon whom all blame must rest, if blame there be; and whose strong interest therefore would be to show no

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negligence; one too, who would be least likely to see negligence in any act of his — for it is not in human nature for one readily to perceive faults or omissions in one's own conduct; that his own testimony shows that he is not perfectly clear and accurate in all his recollections, and that a jury might properly hesitate to give the fullest credence to his statements as to his own care and conduct. More than that, the marked difference between the results that followed the passage of this engine upon this day, and those that followed its passage upon other days, and that of other engines upon the same and other days, is too great to be fairly and reasonably attributable to accident, and that too in the very judgment of the experts called by defendant. While the testimony may not show in what particular the company was guilty of negligence, yet the results of the running of the engine are clear and satisfactory evidence of negligence somewhere; and a jury was clearly justified in so finding. We have given the testimony, which is quite voluminous, a careful examination, and notwithstanding the undoubted fact that ordinarily direct and positive testimony as to actual condition and conduct is entitled to more weight than mere presumptions from results, we are compelled to hold that there is abundant testimony to uphold this verdict. We cannot be otherwise than strongly impressed with the belief that there was negligence in the running of engine No. 9 upon that day, although unable to point out the particular matter of negligence.

The suggestions already made are decisive of the second question we shall consider. In addition to the general verdict certain questions were presented to the jury, and they were instructed to answer them. Six questions were thus presented by the plaintiff, and thirty by the defendant. The six were fully and specifically answered, while some six or seven of the thirty received only the answer, "Don't know." The following are the questions thus answered:

"5th. Was said engine No. 9 in good repair on October 12th 1871, and provided with all the most approved appliances then

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in use for preventing injuries, by the escape of fire and sparks therefrom, to property or combustible material upon or adjacent to the line of the railroad?" *Answer*—"Don't know."

"6th. If engine No. 9 was not in good repair on October 12th 1871, and was not provided with such appliances mentioned in question No. 5, wherein was said engine out of repair, or defective, or wanting as to such appliances?" *Answer*—"Don't know."

"24th. If the fire was started from engine No. 9, how was it so started? by sparks from the stack, or in some other way?" *Answer*—"Don't know."

"25th. If by other means than sparks, what? *Answer*—"Don't know."

"26th. If the engineer of No. 9 reduced the speed of his train to about 10 miles per hour, ran with a slow or dead fire, and with one of the dampers shut and closed all day on October 12th 1871, were these precautions all that careful management required him to take?" *Answer*—"No."

"27th. If no, what other precaution should he have taken?" *Answer*—"Don't know."

"29th. Was engine No. 9 properly and carefully managed at the time of passing the place of fire, on October 12th 1871?" *Answer*—"No."

"30th. If no, in what particular?" *Answer*—"Don't know."

Now, if a jury may properly find negligence on the part of the company, without being able to specify in what particular the negligence consisted, it follows that the only answer which sometimes they can give to a question as to negligence in a particular matter is, that they do not know. And the fact that testimony has been received as to that particular matter may not affect the propriety of the answer. In this very case, we think the jury might properly say that they were satisfied that this injury resulted from negligence, and still, after hearing defendant's witnesses in reference to the condition of the engine, and conduct of the engineer, be unable to decide whether the fault was with the engine, or the engineer. True, all the direct testimony points to an engine in good order, and suitably supplied; but the jury are not limited to this direct testimony, and upon it bound to find the fact accordingly. Suppose, for instance, the question were as to the sanity of a party at the time of a particu-

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lar act, and half a dozen experts, more or less interested, testify as to his sanity: *must* a jury find a party sane, upon this, the only direct testimony upon the question, when the act itself carries upon its face the most satisfactory evidence of the actor's derangement? Or suppose one's field or grass is burned with fire from a neighbor's premises, and it appears that that neighbor was, prior to the fire, smoking a cigar, and also having a bonfire; and it is evident to the jury that by reason of distance and other facts the fire could not have been communicated without gross negligence on the neighbor's part, and yet it does not appear whether the fire was communicated by the cigar, or the bonfire: may not the jury find the neighbor guilty of negligence, and yet in response to a question as to whether the fire was communicated from the cigar, answer that they do not know? While the rule is general, that wherever a question of fact is pertinent, and an answer can be deduced from the testimony, it is the duty of the court to compel an answer, and refuse to receive a verdict until one is made, yet, where the question is not as to one of the issuable, essential, and principal facts, but runs to one of the minor and subdivided facts into which every principal fact may be resolved and reresolved almost indefinitely, and the entire testimony leaves in uncertainty the existence of several facts, including the one inquired about, either of which would be sufficient to sustain the general conclusion reached, there may be cases in which a court may properly receive and sustain a verdict where the only answer to a question is, that the jury do not know. These cases are not common, and a court should always scrutinize with great care a verdict accompanied by such answers to questions, and should never receive or sustain one when it is evident that a determination of the fact is essential to the conclusion reached in the general verdict, nor where it is apparent that the jury by improperly professing ignorance have sought to leave the facts in such uncertainty as unduly to hinder any subsequent inquiry into the correctness of their verdict.

In reference to the instructions we deem it unnecessary to

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notice them in detail. The court presented its views of the law in a charge of its own preparation, and refused to give any of the instructions asked by either side. In this charge we think the law is correctly stated, and with sufficient fullness and detail. Upon the whole case we see no error justifying a reversal, and the judgment must be affirmed.

An examination of the records in the cases of the same plaintiff in error against Joseph Rickabaugh, and against Stephen Shaw, shows that they are so nearly like the case at bar that no separate opinion is required for them, and they also will be affirmed.

All the Justices concurring.

H. D. SHEPARD v. O. H. PRATT, *et al.*

1. **TESTIMONY; Facts; Opinions of Witness.** A witness should state the facts, and not his conclusions from the facts. So, where in a deposition a witness, after testifying that he heard a conversation between certain parties, proceeds as follows: "From such conversation I learned," and then gives, not his recollection of what the parties stated, but what he understood was the result of the conversation, *held*, that there was no error in ruling out that portion of the deposition. [*City of Atchison v. King*, 9-550; *DeLee v. Blackburn*, 11-190; *Eagle Manf. Co. v. Jennings*, 29-657.]
2. **LOST PAPERS; Diligence; Secondary Evidence.** Where secondary evidence is sought to be introduced of the contents of an instrument claimed to be lost, it is not sufficient for a witness to give his opinion as to the character and extent of the search made for it; he should disclose the facts concerning the search, that the court may determine whether a sufficient one has been made. [*Lee v. Birmingham*, 30-312; and see *Guthrie v. Merrill*, 4-187; *Johnson v. Mathews*, 5-118; *Shaw v. Mason*, 10-184; *Grant v. Pendery*, 15-236; *City of Waterville v. Hugan, et al.*, 18-478; *Brock v. Cottingham, et al.*, 23-383; *C. B. U. P. Rld. Co. v. Waters*, 24-604; *Stainbrook v. Drauyser*, 25-383.]
3. **PARTNERSHIP; Sharing Profits.** A sharing of the profits is not always conclusive evidence of a partnership.
4. ——— **Profits, as Compensation for Services.** Where a party without any interest in the property is, by agreement, to receive as compensation for his services, and only as compensation therefor, a certain proportion of the profits, and is neither held out to the world as a partner, nor through

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the negligence of the owner permitted to hold himself out as partner, he is not a partner, either as to the owner or third parties.

5. **INTEREST; PLEADING; Liquidated Demands.** Wherever a demand is liquidated, and a sum certain is claimed, no interest is recoverable unless claimed, and unless the time from which it is to be computed is stated in the petition. [*Green v. Dunn*, 5-254; *Wyandotte & K. C. Gas Co. v. Schliefer*, 22-468; *Hiatt v. Parker*, 29-771.]
6. ——— **Unliquidated Demands.** It is unnecessary in most actions where the demand is unliquidated, and sounds wholly in damages, and where there is but a single cause of action, to state specifically and in amounts the different elements or items which go to make up the sum total of the damages. It is enough to claim so much in gross, as damages for the wrongs done.
7. ——— **Verdict; Measure of Damages.** In such a case, the only limitations upon the size of the verdict are, that it shall not exceed the gross amount claimed, and that the jury in arriving at it shall have had regard to the true measure of damages.
8. **TROVER; Measure of Damages.** In actions in the nature of trover for the conversion of personal property, the measure of damages is ordinarily the value of the property at the time of the conversion, with interest thereon to the date of the verdict.
9. ——— **When Interest is Not Recoverable.** Where a petition alleges the conversion of a definite number of cattle, and that said cattle were of a given average value, and that by such conversion the plaintiffs were damaged in a specified amount which is the product of the average value multiplied by the number of cattle for which amount judgment is asked, and makes no claim for interest, and where upon the trial it appears that only a portion of the cattle charged in the petition were taken and converted by the defendant, and that the cattle taken were of the average value charged, and there is no testimony tending to shew that they were of a higher value, *held*, that the jury were not warranted in a verdict for an amount larger than the product of the average value multiplied by the number taken, even though said amount was reached by computing interest, and that a verdict for such larger amount was excessive.

Error from Morris District Court.

TROVER, brought by *C. H. Pratt and D. A. Painter*, to recover for the taking and conversion of cattle. All the necessary facts are stated in the opinion. The plaintiffs had judgment, at the October Term 1874, for \$3,998.81, and costs, and *Shepard* brings the case here on error.

James Rogers, and McClure & Humphrey, for plaintiff in error.

Ruggles & Sterry, for defendants in error.

The opinion of the court was delivered by

BREWER, J.: The defendants in error brought their action against plaintiff in error to recover the value of certain cattle claimed to belong to them, and to have been converted by him to his own use. That the cattle at one time belonged to them, and that Shepard did get possession of and convert them, are undisputed facts. It appears that they made an arrangement with one Joseph Wheat to take the cattle and winter them. While so in possession, Wheat transferred them to Shepard. Shepard claims that Wheat was a partner of theirs, with perfect legal right therefore to dispose of the cattle; or at the least, that they so acted and held him out to the world that he and others were justified in regarding him as a partner, and treating with him as such. Pratt and Painter claim that Wheat was simply employed to take care of and feed the cattle through the winter, was not a partner, and had no right of disposal. Three classes of questions are presented by counsel for plaintiff in error.

I. It is insisted that the court erred in ruling out portions of two depositions. In the deposition of R. A. Wheat the witness testified that he was present at a conversation between the plaintiffs and Joseph Wheat, and then the deposition reads: "From the conversation I learned that the said Pratt and Painter and Joseph Wheat had entered into a partnership," etc. This was stricken out, and properly so. It does not purport to be his recollection of the conversation, but his conclusions from it. The use of the word, "learned," might not of itself be decisive; but the further language shows that the witness is not trying to give the language of the various parties to that conversation, or the substance of it, but is simply giving the results, as he understood them. This is manifestly wrong. *City of Atchison v. King*, 9 Kas. 550; *DeLes v. Black-*

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burn, 11 Kas. 190. Again, as to the deposition of John F. Gregory these are the facts: The witness had testified substantially that in April 1872, Joseph Wheat brought him an order signed Pratt & Painter, to the best of his recollection, which was written by and in the handwriting of D. A. Painter, one of defendants in error; and then follows the part objected to and ruled out, as follows:

"I have made strict and diligent search for said order, but cannot find the same; and as far as I can ascertain, it is lost. Said order was directed to me as agent for the firm of Gregory, Strader & Co., who were at that time engaged in the live-stock commission business, and said order was in substance as follows:" [Here follows witness' description of the contents of the order, also stricken out.]

Here too we see no error. The witness has substituted his own opinion of the character of the search for those facts upon which alone the court can determine whether a sufficient search has been made. No one can tell from this statement *where* the witness searched; *when*, or *how long* he searched; *where* and *when* he last saw the order; or any other facts concerning its loss. No sufficient foundation was laid for secondary evidence of its contents. *Johnson v. Matthews*, 5 Kas. 118.

II. A second class of objections runs to the instructions. It is said that the court erred in refusing instructions Nos. 5, 6 and 7 asked by defendant, and in giving instruction No. 1 asked by plaintiffs. With reference to the instructions refused, it may be said, that inasmuch as the record does not purport to contain all the instructions this court cannot affirm error, because they may have been refused because already once given. *DaLee v. Blackburn*, 11 Kas. 190; *Ferguson v. Graves*, 12 Kas. 39. Again, as a matter of fact, said fifth and seventh instructions had already been given in substance, though not in the same language, and the court was under no duty to repeat them, or to clothe the same ideas in different language and then present them. By so doing, it is sometimes true, that the principles of law or their application to the case in hearing are made clearer to the jury; but as often, if not

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oftener, such practice tends to confuse rather than instruct. At any rate, it is well settled that the court commits no error in refusing to present a principle of law to the jury a second time, or in different language. *Gillett v. Corum*, 7 Kas. 156; *Kansas Ins. Co. v. Berry*, 8 Kas. 159; *Abeles v. Cohen*, 8 Kas. 180. As to said 8th instruction, it is not true that an equal division of the profits always and under all circumstances constitute a partnership. While such may be one of the tests of a partnership, yet it is only one of several tests, and is sometimes overborne by other and controlling facts. In the case at bar, such an instruction given, without any qualifications or limitations, would have been apt to mislead. We think therefore that if this refusal was fully and properly before us we could not hold that there was error therein.

In reference to the instruction given at the instance of the plaintiffs: It assumes nothing as to the facts proved or disproved, but simply charges the jury in substance, that if from all the evidence they believe that the defendants in error were, in the fall of 1871, the owners of and in the possession of certain Texas cattle, and then made an arrangement with Joseph Wheat whereby he was to winter them, and that they should pay him for the fodder consumed and necessary help employed, and that upon the sale of the same they were to pay Wheat one-third of the increase in value over and above the price at which they were valued at the time of delivery to him, less the expenses of wintering, *as and for the purpose only of compensating Wheat* for taking charge and care of and wintering said cattle, and that said defendants in error did not hold out said Wheat to the world as a partner, nor by their negligence had permitted or allowed him to be so held out, and thereby plaintiff in error was misled to his prejudice, then and in said case Wheat would not be a partner in such cattle. That this states the law as it is now generally recognized, seems hardly to admit of doubt. See among others the following authorities: *Loomis v. Marshall*, 12 Conn. 69; *Denny v. Cabot*, 6 Met. (Mass.) 82; *Burchle v. Eckart*, 1 Denio, 337; *same case*, 8 N. Y. 132; *Lewis*

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v. Grider, 51 N. Y. 281; *Parker v. Fergus*, 48 Ill. 439; *Eastman v. Clark*, 58 N. H. 276.

III. The remaining objection is to the verdict. It is insisted that it is contrary to the evidence, and that if it can be sustained for the plaintiffs at all, that the damages are excessive. In reference to the first proposition, it is unnecessary to say more than that there is abundant testimony to support the verdict, and that though the preponderance may seem to be on the defendant's side, yet, after the jury and the district court have both passed upon the question of fact, it is, by well-settled rules, beyond the province of this court to interfere.

The other claim, that the damages are excessive, presents a question of some difficulty. The verdict was for \$3,998.81. No witness values the cattle at over \$85 per head, and no testimony shows over 99 cattle in the defendant's possession, except perhaps a general statement of Joseph Wheat that Shepard "got something over 100 head." It would seem extremely probable that there were only 98 head taken by Shepard, and that \$85 per head was in excess of their actual value. But still the jury were the triers of these questions, and they were at liberty to take the highest valuation and the largest number if such was their judgment upon the testimony. But the highest value and the largest number would only make a verdict of \$8,500. The difference, say counsel for defendants in error, is the interest. To this counsel for plaintiff in error replies, that no interest is recoverable because none is claimed, and cites as authority, Gen. Stat. 647, (code, § 87;) *Graves v. Dunn*, 5 Kas. 254, 261. Unquestionably the excess over \$3,500 was intended for interest, probably more than that. Was it recoverable? The section cited is one describing what the petition must contain; and the third essential is, "a demand of the relief to which the party supposes himself entitled." Then follows this provision: "If the recovery of money be demanded, the amount thereof shall be stated; and if interest thereon be claimed, the time for which interest is to be computed shall be also stated." And in the case cited, this court, where

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no interest was claimed in the petition, and the judgment included interest, modified the judgment by striking out the interest. That was an action upon a note, and establishes the proposition that where the demand is liquidated no interest is recoverable unless claimed in the petition. "But here," say counsel for defendants in error, "the demand is unliquidated; the amount is to be ascertained by the verdict. It is claimed as damages, while in the other class of cases it is claimed as debt. It is sufficient in a case like this, and where there is but a single cause of action, to allege generally a sum as damages without specifying the separate items or elements which enter in to make up the sum total of the damages, and then the only limitation is that the verdict shall not exceed the amount claimed, and that the jury in arriving at such verdict shall follow the established rules for determining the amount of damages. In actions of trover the measure of damages is the value of the property at the time of conversion, with interest to the date of the verdict. And the jury, in adding interest to the value only pursued the true measure of damages." There is doubtless truth in these claims, and we think these propositions upon the general subject may be laid down as correct:

1st. Wherever a demand is liquidated, no interest is recoverable unless claimed, and unless the time from which it is to be computed is stated in the petition.

2d. It is unnecessary in most cases where the demand is unliquidated, and sounds wholly in damages, and where there is but a single cause of action, to state specifically and in amounts the different elements or items which go to make up the sum total of the damages. It is enough to claim so much in gross, as damages for the wrongs done.

3d. In such a case the only limitations upon the size of the verdict are, that it shall not exceed the gross amount claimed, and that the jury in arriving at it shall have had regard to the true measure of damages.

4th. In actions in the nature of trover for the conversion of

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personal property, the measure of damages is ordinarily the value of the property at the time of the conversion, with interest to the date of the verdict.

But these propositions, though decisive in most cases, do not meet the entire difficulty in this. The petition does not allege generally that the plaintiffs have been damaged so much by the wrongs of the defendant, but enters into some specifications. It alleges that the plaintiffs were the owners of 225 head of cattle; that they were and are of the value of \$7,875; that they cannot state the precise value of each animal, but that they were and are of the average value of \$35 per head; that the defendant took possession of said cattle and converted them to his own use, to their damage \$7,875, for which sum they claim judgment. This is all that bears upon the question. Here the plaintiffs have specified the items of damage. Are they not limited to their specification? Suppose for instance the testimony had shown a conversion by defendant of the 225 head and average value equal to the amount stated, \$35, could the jury, under the petition, have added interest? None is claimed. The damages stated, \$7,875, are the product of the value per head, \$35, multiplied by the number converted, 225. By what right could the jury add more? So, when the testimony shows that only 100 head have been converted, and that they were of the value of \$35 per head, are not the jury limited to the value stated per head, multiplied by the number proved to have been converted? If the plaintiffs had made the allegations less definite, or had added a claim for interest, no question could be raised upon the verdict. If the allegation had been, for instance, that defendant had converted a large number of cattle, without specifying any number, to the plaintiffs' damage, etc.; or, if it had alleged the conversion of 225 head, to the damage, etc., without specifying any value per head; or, if it had alleged both number and average value, and the testimony had shown the value of the 100 above the alleged average value; or, if it had alleged both number and value, and claimed interest, then we think the verdict must have been

upheld. But where the number and average value are both stated, and no testimony shows the value of those proved to have been taken above this average value, and no claim for interest is made, then we think a verdict in excess of the value multiplied by the number taken, cannot be sustained. In many cases it might be proper to permit an amendment by inserting a claim for interest; but an examination of the testimony does not lead us to consider this a case where the interests of justice require an amendment. If the plaintiffs below elect to remit such portion of the judgment as is plainly for interest, it may stand; otherwise a new trial must be ordered.

The case will therefore be remanded, with instructions that if within sixty days after filing of the mandate in the court below the plaintiffs remit \$498, thus reducing the judgment to \$3,500, the judgment will be affirmed, otherwise it will be reversed and a new trial ordered. The costs of this court will be divided.

All the Justices concurring.

THE JUNCTION CITY & FORT KEARNEY RLY. CO. v. JAMES L. WINGFIELD.

CASE MADE; PRACTICE; When Case is not Served and Settled in Proper Time it is Void. Where the court below, after a case is disposed of in that court, gives sixty days within which to "make, serve and file" a case for the supreme court, and the case is not served on the opposite party, or his attorney, until sixty-three days have elapsed, and the case is then presented to the judge for settlement, and is on that same day and on the very day on which it was served, settled, certified, signed, attested, sealed, and filed with the papers in the case, without notice to, or suggestion of, amendments, or appearance by the opposite party, held, that the failure to serve the "case made" within the proper time was fatal to its validity; and, that, as nothing was afterwards done which could give it any vitality, the petition in error founded thereon must be dismissed. [*Hunt v. Spencer*, 20-128; *Shumaker v. O'Brien*, 19-476; *Ingersoll v. Yates*, 21-81; *Anna Life Ins. Co. v. Koons*, 26-215; *Dodd v. Abram*, 27-69.]

Error from Davis District Court.

WINGFIELD brought his suit against the *Railway Company* to recover the value of a lot of ties which he alleged he furnished at the request of said company. The amount claimed was \$207.99. Answer, payment. Trial at the March Term 1874. Verdict and judgment for plaintiff. The *Railway Company* undertook to obtain a "case made," and afterward brought the case here by petition in error. The proceedings are fully stated in the opinion.

J. P. Usher, for plaintiff in error.

McClure & Humphrey, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This case is presented to the supreme court on petition in error, and what is termed a "case made for the supreme court." The defendant in error now raises the question that said "case made" was not properly served and settled as provided by law. Section 548 of the civil code provides, that—

"The case so made, or a copy thereof, shall, within three days after the judgment or order is entered, be served upon the opposite party or his attorney, who may within three days thereafter suggest amendments thereto in writing, and present the same to the party making the case, or his attorney. The case and amendments shall be submitted to the judge, who shall settle and sign the same, and cause it to be attested by the clerk, and the seal of the court to be thereto attached. It shall then be filed with the papers in the case. A certified copy thereof shall be filed with the petition in error," etc. (Laws of 1871, page 274.)

Section 549 of the code provides, that—

"The court or judge may, upon good cause shown, extend the time for making a case, and the time within which the case may be served; and may also direct notice to be given of the time when a case may be presented for settlement after the same has been made and served, and amendments suggested, which, when so presented, shall be settled, certified, and signed

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by the judge who tried the cause; and the case so settled and made shall thereupon be filed with the papers in the case; * * * and if no amendments are suggested by the opposing party, as above provided, said case shall be taken as true and containing a full record of the cause, and certified accordingly." ('Laws of 1870, page 168.)

After this case was disposed of in the court below, the court then made an order that the defendant (plaintiff in error) have "leave to make, serve, and file a 'case made' in sixty days from the 17th of March 1874." When the case was made is not shown. But it was not served or filed until May 19th—sixty-three days from March 17th, instead of sixty. This case should have been served, under the order of the court, at furthest as early as May 16th. Then the plaintiff below (defendant in error) should have had at least three days after such service within which to suggest amendments; and if the plaintiff had suggested any amendments within that time, then the case should not have been settled until due notice of the time thereof had first been given to the plaintiff below. But in the present case the "case made" was not served on the plaintiff until three days after the time within which it could legally be served, and then, instead of giving the plaintiff three days within which to suggest amendments, and giving him due notice of the time when the case would be presented for settlement, the case was immediately presented for settlement, without any suggestion of amendments on the part of the plaintiff, without notice to him of the time for settlement, and without any appearance on his part; and on that same day the case was "settled, certified, and signed by the judge who tried the cause," was "attested by the clerk, and the seal of the court attached," and was "filed with the papers in the case." We think the failure to serve the "case made" within the proper time was fatal to its validity, and that nothing was afterward done that could give it any vitality.

We have examined the "case made," and find that even if we should consider it as having been properly served, settled, certified, attested, sealed, and filed, still we would have to affirm

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the judgment below; but as the "case made" was not properly served and settled, we shall have to dismiss the petition in error.

All the Justices concurring.

W. S. SHORT v. E. J. NOONER.

1. JUDGMENT, AND DECREE, in *Foreclosure Actions*. In this state, in the foreclosure of a mortgage on real estate made to secure a debt, no judgment barring any person's right, title, interest or equity in or to the mortgaged property should be rendered until a judgment for the sale of such property is first rendered; and the judgment barring such rights and interests should be made to operate only in connection with such sale and after such sale had been made; and no judgment for a sale of the mortgaged property can regularly be rendered until a judgment for the amount of the debt due and secured has first been rendered in favor of the holder of the debt and mortgage. [*Delahay v. Goldie*, 17-263; *Nooner v. Short*, 20-624.]
2. FINAL ORDER. The question of what is a final order, discussed, and the decision in case of *McCulloch v. Dodge*, 8 Kas. 476, approved. [*Savage v. Challiss*, 4-319; *Hottenstein v. Conrad*, 5-249.]
3. PLEADING; PETITION; *Foreclosure of Mortgage*; *Statement of Interest of Defendants*. The plaintiff, Short, commenced an action against Fletcher and wife and E. J. Nooner, on a promissory note and a real-estate mortgage made to secure said note, alleging in his petition that Fletcher executed the note, that Fletcher and wife executed the mortgage, and "That the said defendant Nooner has, or claims to have some interest in or lien upon said premises as described in said mortgage-deed, but plaintiff is ignorant of the nature and extent thereof, and does not know whether the said defendant Nooner has at this time any subsisting lien upon said premises, and he demands proof of the same;" and plaintiff then prayed for a judgment against Fletcher for the amount of the note, and "for a decree" against all the defendants "for the foreclosure of said mortgage-deed, and that the premises be sold," etc. There were no other allegations in the petition against Nooner. *Held*, that said petition does not state facts sufficient to sustain or uphold any judgment against Nooner, and especially not a judgment barring *all right, title and interest* of Nooner in and to said premises. It lacks an allegation showing that Nooner's claim is *junior, or inferior*, to the mortgage-lien of the plaintiff.

Error from Neosho District Court.

FORECLOSURE of mortgage executed by one Fletcher and wife, to secure a note executed by Fletcher alone. The petition was filed in April 1873. *E. J. Nooner* was joined with the Fletchers as a defendant. The only allegation in the petition relating to *Nooner* is copied in full in the opinion, *infra*. At the July Term 1873 of the district court the following decree was entered:

(*Title*.) "Now comes the plaintiff, by Allen & Allen, his attorneys, and the defendants Amanda M. Fletcher and E. J. Nooner having failed to answer or demur to the petition of the plaintiff filed herein, it is thereupon considered and adjudged that said defendants Amanda M. Fletcher and E. J. Nooner be forever debarred and foreclosed of any and all right, title and interest in and to the premises or any part thereof in plaintiff's petition described, to-wit: All that part of the N. $\frac{1}{4}$ of the N.E. $\frac{1}{4}$ of section 22, lying on the east side of Big creek, and the S.W. $\frac{1}{4}$ of N.E. $\frac{1}{4}$ of section 22, in township 27 south, range 19 east, in said Neosho county."

At the December Term 1873 "said action came on for trial, and was tried," (says the transcript,) and judgment was rendered against Jonas L. Fletcher for \$735.58 debt, and for costs, and a decree was made that the mortgaged premises be sold, etc. An order of sale was issued, the premises advertised and sold, (plaintiff *Short* being the purchaser,) report of sale made, and, at April Term 1874, said sale was confirmed, and a sheriff's deed was executed to the purchaser. In June 1874 *Nooner* filed his motion to vacate and set aside the decree entered in July 1873. This motion, and the proceedings thereon, are sufficiently stated in the opinion, *infra*. Said decree was set aside as to *Nooner*, at the July Term 1874, and *Short* brings the case here on error.

C. F. Hutchings, for plaintiff in error:

1. *Nooner's* motion to set aside the judgment against him was served, in the language of the officer, "By leaving a true and certified copy hereof at the usual place of residence of

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the within-named W. S. Short." *Constructive* notice is not sufficient. The court should have sustained Short's motion to set aside the service. The legislature has provided that *actual* notice shall be given. Sec. 569 of the code provides that motions of this kind shall be "upon reasonable notice to the adverse party or his attorney in the action." This is a wise provision, and the courts cannot disregard it. It was never intended that judgments upon which rights to property have been built should be set aside by *ex parte* proceedings.

2. The district court held that the petition stated no cause of action against Nooner, and for that reason the judgment rendered against him was absolutely void. The learned judge thought it was necessary for the plaintiff to set forth in his petition the *quantum* of interest, and the exact nature of the claim or lien of the defendant, and to aver that such claim or lien was *inferior* to plaintiff's lien. If such reasoning be correct, a party cannot bring an action to foreclose a mortgage and make persons having adverse *paramount* liens parties for the purpose of determining such adverse interest, unless the plaintiff will aver what he knows to be false, and where the plaintiff is not informed of the exact nature of an adverse claim he cannot have it determined. It has always been held sufficient in the courts of chancery in such cases, to aver that the plaintiff is not informed of the exact nature of a defendant's interest, and to demand a discovery and proof of the same. Swan's Prec., Form 142; 4 Paige, 85; Story's Eq. Pl. §§ 36, 37, 255; Metc. on Pl. 45; Nash's Pl., Form 18; 2 Estee's Pl. § 42, and Form 450; 16 How. Pr. Rep. 424; 32 Cal. 289; 9 N. Y. 502; 11 Ves. 296, 378.

Stillwell & Baylies, for defendant in error:

1. Short, by his conduct in the court below, has waived his right to complain of the rulings of that court. The record shows that after the making and entering of the order vacating the former judgment against Nooner, plaintiff entered a general appearance in the original case by taking leave to amend his petition. The case then stood as though no trial had ever

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been had, or judgment rendered. It shows an election on the part of plaintiff to reform his pleading, and try the case upon such pleading when amended; and we submit that after he has thus treated the original judgment as legally vacated, and been permitted on his own motion to amend a pleading which the court has decided defective, that he will be deemed to have waived all errors, if any, in the previous rulings of the court, and the case will be treated as if there had been no trial.

2. The errors complained of are not reviewable in this court, with the case in the condition disclosed by the record. Said supposed errors do not attach to or appear upon "the record of a judgment," within the meaning of that term as used in § 542 of code. A judgment is the final determination of the rights of the parties in an action. (Code, § 395.) Hence the journal-entry showing the action of the court in sustaining the motion to vacate, cannot be a "judgment," as it is not a final determination, in any sense, of the rights of the parties in the action. This entry simply follows the motion, which is an application for an order, (code, § 532;) and an order can only be reviewed when it falls within the limits of §§ 542 and 543 of the code. *McCulloch v. Dodge*, 8 Kas. 476.

3. The judgment rendered against Nooner at the July Term 1873, was void, and should have been vacated on motion at any time. (Code, § 575.) This pretended judgment was rendered upon default. Was it his duty to make an appearance in order to protect his rights? We think it was not, for the reason that no rights of his were assailed in the petition. The petition stated no facts constituting a cause of action against him, as is required in all cases in order to entitle a party to judgment; and a judgment rendered against a party without a cause of action being alleged against him in the petition is void. *Greer v. Adams*, 6 Kas. 203; *School District v. Carson*, 10 Kas. 288.

We insist further, that the judgment vacated was not only void for want of a sufficient petition to sustain it, but for the reason also that there was no ground under plaintiff's showing for such a judgment at the time it was rendered. The plain-

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tiff's right to any judgment against defendant in error depended entirely upon the result of the suit against J. L. Fletcher. The right to relief against Nooner depended upon the question whether Fletcher was indebted to plaintiff. Fletcher's answer on file pleaded payment in full on the note to Short. Here was an issue to be tried. If Fletcher was not indebted, Short could have no interest in the mortgaged premises, the mortgage being given to secure such debt; and with no interest in the premises he could not maintain an action against Nooner.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by W. S. Short against Jonas L. Fletcher and wife, and E. J. Nooner, on a promissory note and mortgage. The petition shows that Fletcher executed the note; and that he and his wife executed the mortgage. The only allegation in the petition with respect to Nooner is as follows: "That the said defendant E. J. Nooner has or claims to have some interest in or lien upon said premises as described in said mortgage-deed, but plaintiff is ignorant of the nature and extent thereof, and does not know whether the said defendant Nooner has at this time any subsisting lien upon said premises, and he demands proof of the same." The petition then prayed for a judgment against Fletcher for the amount of the note, and "for a decree" against all the defendants "for the foreclosure of said mortgage-deed, and that the said premises be sold," etc. Fletcher answered to said petition, pleading payment; but neither of the other defendants made any appearance in the case. Afterward, the following judgment was rendered, to-wit: "That said defendants Amanda M. Fletcher and E. J. Nooner be forever debarred and foreclosed of any and all right, title and interest in and to the premises, or any part thereof, in plaintiff's petition described." This was the only judgment rendered in the case at that term of the court, and such judgment had no connection whatever with any personal judgment for money, or

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for any judgment for a sale of the mortgaged premises. It was absolute in its terms. The case was then continued as to Jonas L. Fletcher, and afterward, and at the next term of the court, a personal judgment was rendered in favor of Short and against Fletcher for the amount of said note, and that the mortgaged property be sold to satisfy said judgment. Afterward, Nooner filed a motion to set aside the judgment rendered against him. When the motion came on to be heard plaintiff Short appeared specially and objected to the service of the notice of the motion on him, and moved the court to set such motion aside. The court however overruled his objection and motion, and the plaintiff excepted. And Nooner's motion again coming on to be heard, both of the parties *made a general appearance*, "*the plaintiff Short in person and by his attorney C. F. Hutchings*"; and said motion was duly heard, and argued by counsel; in consideration of the premises, and the evidence submitted, the court does [did] sustain the motion of said defendant Nooner;" and the plaintiff again excepted. The plaintiff then asked leave of the court to amend his petition, which was granted. Here was another general appearance by the plaintiff. Time was given to the plaintiff in which to make such amendment, and time was also given to the defendant Nooner in which to answer to the amended petition. This case for the supreme court was immediately made, and settled and signed while the action was still pending in the court below in the exact condition above specified.

It was evidently irregular and erroneous to render a judgment against Nooner at the time said judgment was so rendered against him; and this would be so even if the allegations of the plaintiff's petition were considered sufficient in every respect. In this state, in the foreclosure of a mortgage on real estate made to secure a debt, no judgment barring any person's right, title, interest or equity in or to the mortgaged property should be rendered until a judgment for the sale of such property has first been rendered; and the judgment barring such rights and interests should be made to operate only in connection with such sale and after such sale has been made; and no

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judgment for the sale of the mortgaged property can regularly be rendered until a judgment for the amount of the debt due and secured has first been rendered in favor of the holder of the note and mortgage. The judgment rendered against Nooner was not a contingent judgment, depending for finality upon some other action or event to take place in the future. It was absolute in its terms, and barred Nooner of all right to the property, whatever that right might be, and whatever might take place in the future. The court below may have set aside said judgment merely because it was rendered before it properly could be rendered. If so, then the order setting the judgment aside was not a final order, and cannot at this time be reviewed by this court. (*McCulloch v. Dodge*, 8 Kas. 476.) But it is claimed by plaintiff in error that the court below set said judgment aside principally upon the ground that the plaintiff's petition did not state facts sufficient to constitute a cause of action against Nooner; that the petition was so defective that it could not sustain or uphold any judgment as against Nooner; and plaintiff in error therefore claims, that the order setting aside said judgment is final; that it in effect determines the action as between himself and Nooner, and prevents any judgment from being rendered between them; and he therefore claims that the action of the court is reviewable at this time. (Code, §§ 542, 543.) He claims that his right to have the same reviewed was complete as soon as the judgment was set aside, and before he asked leave to amend his petition, and that he did not waive or suspend such right by asking and obtaining such leave. But passing over all these preliminary questions, we think the decision of the court below upon the main question, and upon the merits of the case, was correct. We have already quoted all the allegations of the petition that are supposed to state any cause of action as against Nooner, and we do not think they state any such cause of action. What did Nooner admit by his default, by not answering to said petition? He merely admitted the truth of the allegation therein contained—nothing more, and nothing less. He admitted that he “Nooner has or claims to

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have some interest in or lien upon said premises as described in said mortgage-deed;" that "plaintiff is ignorant of the nature and extent thereof, and does not know whether Nooner has at this time any subsisting lien upon said premises, and he [plaintiff] demands proof of the same." These allegations are certainly not sufficient to sustain or uphold any judgment. The usual allegations in cases of this kind are substantially as follows: "That the defendant G. H. has or claims some interest in or lien upon the said real property; but the same, whatever it may be, is *subject to the lien of the said mortgage.*" This form is taken from 2 Estee's Pleading and Forms, 265, No. 450. See also, Miller's Pl. & Pr. 610, No. 208; 5 Wait's Pr. 199; 1 Nash Pl. & Pr. (4 ed.) 787, No. 5; 2 Van Santvoord's Pl. (2 ed.) No. 55; 2 Monell's Pr. 390, No. 147; Curtis' Eq. Prac. 59 to 62, Nos. 18 and 19. This form of pleading, or of allegation, in this particular class of cases, (as above quoted from 2 Estee's Pl. & Forms,) has been held to be sufficient; (*Drury v. Clark*, 16 How. Pr. 424; *Frost v. Koon*, 30 N. Y. 428, 448;) and we think it is sufficient. But the form adopted by the plaintiff below we think has never been held to be sufficient by any court, and we do not think that it is sufficient. And we do not think that such a form ever was sufficient in any case, either in law or equity. Every word of the plaintiff's petition may have been true, and yet Nooner may have been the absolute owner of the property in controversy, holding the same free and clear from all incumbrances. There is no allegation in the petition that Fletcher, the mortgagor, ever owned or had any interest in the property. And Nooner claims that he himself is the owner thereof. There should have been some allegation in the petition showing that Nooner's claim to the property was *junior, or inferior*, to the mortgage-lien of the plaintiff. And it will be noticed that the said judgment against Nooner was not a judgment barring only such rights and interests of Nooner as were *subsequent to the mortgage-lien*, but it was a judgment that barred all of Nooner's rights and interests in and to the property.

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In connection with this subject, and as to who are proper parties in foreclosure suits, and as to what defendants confess by a default in such suits, see *Frost v. Koon*, supra; *Lewis v. Smith*, 9 N. Y. 502; same case, 11 Barb. 152. The form given by Judge Swan in his work on Pleading and Precedents (No. 142, page 416,) we think is hardly sufficient.

Counsel for plaintiff in error has made a point in this court, as well as in the court below, that the service of the notice of the motion to set aside said judgment was not sufficient. We suppose it is not necessary to say anything further upon this question.

The order of the court below setting aside said judgment will be affirmed.

All the Justices concurring.

W. P. McCONNELL v. R. P. HAMM, *Treasurer*.

MUNICIPAL BONDS, Issued for a Private Purpose, are Void; Disposal of Money Collected as Taxes to Pay Such Bonds and Coupons. The city of Neosho Falls issued certain bonds to a private individual to aid a purely private enterprise, and which were therefore wholly *ultra vires* and void. [*C. B. U. P. Rld. Co. v. Smith, et al.*, 23-745.] Afterward the city council passed an ordinance providing for a levy of taxes to pay certain coupons on these bonds. The amount of this levy was reduced by the city clerk without authority, and as reduced transmitted to the county clerk, and entered by him in a separate column on the county tax-roll, and then the roll turned over to the county treasurer. The county treasurer thereafter, at the usual tax-paying time, without the issue of any personal tax-warrants, or any attempt to sell the real estate, received from the taxpayers this tax and paid it over to the city treasurer. The city treasurer refused to pay it over on demand to the holder of the coupons: *Held*, That the holder could not maintain an action against the treasurer for the money thus received.

Error from Woodson District Court.

ACTION by *McConnell* against *Hamm*, to recover \$140 alleged to be in his hands as treasurer of the city of Neosho Falls, legally and properly payable to plaintiff as owner and holder of certain bonds and coupons. All the necessary facts appear in the opinion. The district court, at the June Term 1874, gave judgment in favor of defendant, and plaintiff brings the case here on error.

C. B. Graves, for plaintiff:

The answer of *Hamm* presents no defense to the petition. It simply alleges the illegality of the bonds and coupons. But *McConnell* did not sue upon the bonds or coupons, and does not rely upon their validity. The publication of the ordinance under and by virtue of which the bonds and coupons were issued; the publication of the ordinance levying the tax; the fact that the tax was a specific one, charged separately, not blended or mixed with any other; the fact that the payment of the tax was not preceded by any legal act or process tending to jeopardize either person or property, together with the presumption that every man knows the law, show that the tax was paid voluntarily, and cannot be recovered by the taxpayers. (5 Kas. 412; 8 Kas. 431; 1 Ohio St. 265, 535.

To whom then does the money belong? *McConnell* held a claim against the taxpayers, one which was charged up against each of them proportionately—a claim which they were under no legal obligation to pay, perhaps, but nevertheless one which they did pay with a full knowledge of all the facts, and therefore with the intention and desire that *McConnell*, or whoever should be the owner and holder of such claim when the same became due, should receive the money. This seems conclusive, since the payment was unaccompanied by any instruction to the contrary. Certainly, the taxpayers had a right to make such a disposition of their money. Evidently they tried to make such disposition of it; and how

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any one can rightfully interfere with such disposal, does not seem clear. Can Hamm question their legal liability for the payment of such claim, by interposing in his own behalf a defense available only to the taxpayers, and one which they have expressly waived by refusing to take advantage of it? The money was not paid to the city in liquidation of any claim, or contributed to any fund: hence the city has no more right to or interest in it than a mere stranger. The same is true of Hamm, and every other person save McConnell. The money was received by Hamm in trust for the use and benefit of McConnell, and he cannot divert or appropriate it to any other purpose, or refuse to apply it to the use intended by the taxpayers. 8 Blk. Com. 432; 4 Kent Com. 307; Story's Eq., §§ 972, 1041, 1196; 2 Kas. 61; 8 Kas. 458; 5 Am. L. Reg. 98.

The opinion of the court was delivered by

BREWER, J.: This case was tried by the court, in the court below, on an agreed statement of facts, which may be briefly stated as follows: To aid in the construction of a mill for the manufacture of wool in the city of Neosho Falls, Woodson county, said city on the 20th of June 1872, issued and donated to R. P. & R. W. Pilling & Bro. its bonds in the sum of \$11,000, in denominations of \$100 each, numbered successively from 1 to 110, inclusive, payable in ten years, and bearing interest at 7 per cent. per annum, with coupons attached, numbered successively from No. 1 to 20, inclusive, payable on the first day of February and August of each year respectively. On the 30th of August 1872, said city, by ordinance duly published, levied a tax for the express purpose of providing for the payment of interest-coupons Nos. 2 and 8 of so many of said bonds as were numbered from No. 37 to No. 50, and from No. 85 to No. 110, inclusive. Between the passage and publication of said ordinance the amount of said levy was changed by the city clerk, and reduced in amount, without authority. Said levy was then transmitted by the city clerk to the county clerk, and by him

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charged on the tax-roll of said county, in a separate column. Between November 1st 1872, and January 15th 1873, the taxpayers of said city, without any legal process or compulsion, paid to the treasurer of said county the tax levied as aforesaid for the purpose of redeeming said coupons Nos. 2 and 3. On the 15th of January 1873, the treasurer of said county paid said tax to Hamm, who was and is the treasurer of the city of Neosho Falls, and who now has the same in his possession and under his control. McConnell, at and before the date of said tax levy, was, and he is now, the owner and holder of said coupon No. 3, which he duly presented to Hamm on the 31st of January 1874, and demanded the payment of said money, which Hamm refused and still refuses to make, either in whole or in part. Those of said bonds numbering from No. 37 to No. 50, inclusive, were registered in the state auditor's office August 24th 1872, and those numbering from No. 85 to No. 110, inclusive, were so registered on the 9th of October 1872.

Upon these facts the district court found for the defendant. Was there error in this? It is not disputed but that these bonds were illegal and void, as issued for a purely private purpose; but the claim is, that the taxpayers voluntarily paid this money over for the purpose of paying the coupons, and that the city treasurer has no right to detain the money and prevent the accomplishment of this purpose, and that he holds the money in trust for the owner of the coupons, and must pay it over on demand. All men are presumed to know the law, and it must be presumed that the taxpayers knew that these bonds were illegal—knew that the ordinance providing for a levy was without authority, and the tax void. And still, with all this knowledge, they each take so much money and place it in the hands of the treasurer to pay over to the holder of these coupons. It is said that this is merely the application of a familiar principle of law, that if A. hands to B. money, and requests him to pay it to C., and B. accepts the money on that request, there is an implied promise to pay it to C., and C. can maintain an action against him for it. We are of opinion that

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such a principle is inapplicable to the facts in this case. We are not justified in holding that the taxpayers voluntarily paid this money over to the treasurer with the request that he pay it to the coupon-holders, nor that there was any implied promise on the part of the treasurer to pay it to anybody. The money was paid, not because they wished to pay it, but *as a tax*. Granted, that the tax was without legal warrant, still it had all the forms of legality. Certain instruments, in form promises to pay, had been issued by the municipality. To pay those instruments the city council, the proper authority, passed an ordinance directing the levy of a tax. The city clerk, the proper officer, transmitted this as a legal and proper levy to the county clerk. True, he reduced the amount of the levy, but whether that was known to the taxpayers or not, is not stated; and whether, if known, it would have invalidated the tax if otherwise legal, may well be doubted. The county clerk accepted the levy as legal and proper, and entered it upon the county tax-roll, and passed the roll over to the county treasurer. At the accustomed tax-paying time the taxpayers come, and finding this tax on the tax-roll, pay it. They pay it because it appears in form at least a charge against their property, and for the purpose of removing that charge. The county treasurer received it as tax-money, and as such paid it over to the city treasurer. Now, because all these parties, officers, authorities, and taxpayers erred in their judgment of the legal rights, duties, and obligations of the city, and the taxpayers, and without proof of any express request or actual wish of the taxpayers, shall it be held that when they went through the form of paying taxes they were not paying taxes, but simply engaged in a voluntary private transaction of handing money to one private individual with the request that he pay it to another, and that the treasurer when receiving taxes as treasurer, and receiving only such moneys as appear upon his books due as taxes, is nevertheless entering into a private engagement with the taxpayer to carry out his personal wish in respect to the receipt and payment of money? The maxim, that every one is

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presumed to know the law, is, as every one really knows, a pure fiction. True, public policy requires its recognition, and general application; but when the question arises as to the actual state of a man's mind, this legal fiction does not compel the court to find the fact to be what the testimony clearly shows it not to be. Here, there was no express request from the taxpayers to the treasurer to receive the money and pay it over to the coupon-holders, and no express agreement of the treasurer that he would so do; and the circumstances clearly negative any such implied request or promise. To sum the matter up, a party to whom neither the taxpayers nor the city owes a dollar asks the court to compel the official custodian of the city's funds to pay him a portion of the money in his hands received in the form and through the processes of taxation, upon the claim that these taxpayers placed these moneys in the treasurer's hands, and the treasurer received them upon the request on the one hand and the promise on the other to receive the moneys and pay them over to the claimant, when there is no proof of any such express promise or request, or that the parties acted otherwise than in obedience to the supposed obligations of the taxing process and official station. We see no error in the ruling of the court. Whether this money, thus erroneously paid, is the property of the municipality, or of the parties paying it to the treasurer, is a question to be decided whenever properly presented. It is enough now to decide that it does not belong to the plaintiff.

The judgment will be affirmed.

KINGMAN, C. J., concurring.

VALENTINE, J., concurring as follows: I concur in the judgment rendered in this case. The bonds mentioned in the case are unquestionably void for reasons stronger than those mentioned in the foregoing opinion, and therefore the tax levied to raise a fund with which to pay interest on such bonds is also void. The tax however was levied by the city; it was collected for the city; it was paid to city treasurer Hamm for the city, and it is the city that apparently owes the plaintiff McConnell.

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Hamm is under no obligation nor apparent obligation to the plaintiff McConnell, nor to any other one of the bondholders, but only to the city. He does not hold the fund in trust for the bondholders, but for the city. And he should pay it out only as the city directs. The city has never directed that the treasurer shall pay any portion of the fund to McConnell, and hence the plaintiff has no cause of action for the same against the treasurer.

Judgment affirmed.

J. L. VANAUSDELN, *et al.*, v. D. L. CRENSHAW.

CONTRACT OF SALE; *Time for Performance; Failure; Rights of Vendor and Vendee.* Where A., on April 27th, contracts to sell and deliver to B., within three weeks, a combined reaper and mower, and in ten days delivers the mower without the reaping attachment, receiving a small payment thereon, and does not deliver the reaping attachment for more than seven weeks thereafter, and then offers it to B., who refuses to accept it, and thereupon A. offers to take back the mower and return all money received, with interest, which proposition B. declines to accept, and refuses to return the mower, and it does not appear what amount of damages, if any, B. has sustained by the failure to deliver the reaping attachment within the three weeks as agreed, *held*, that a judgment in favor of A. for the unpaid value of the mower will not be disturbed.

Error from Crawford District Court.

ACTION by Crenshaw as plaintiff against Vanausdeln and A. Camblen to recover balance due on sale of reaper. The facts are fully stated in the opinion. The district court, at the September Term 1874, gave judgment for plaintiff, and defendants bring the case here on error.

M. A. Wood, and J. T. Bridgens, for plaintiffs in error.

The opinion of the court was delivered by

BREWER, J.: This was an action brought by defendant in error to recover for a mowing machine sold and delivered to plaintiffs in error. The case was tried by the court without a jury. The testimony is not before us, but only the findings of fact, and conclusions of law; and the only question presented is, whether upon the findings the proper judgment was entered. The findings are, that Crenshaw on April 27th 1874 sold to the defendants a combined reaper and mower for \$150, to be delivered within three weeks; that in ten days thereafter the mower was delivered without the reaping attachment, and \$25 paid; that the reaping attachment was not delivered nor tendered until June 18th; that on June 16th the defendants thinking they could wait no longer purchased two machines of other parties, and refused to receive the reaping attachment when tendered; that on the 19th of June 1874 the plaintiff offered to take back the mowing machine, return the money received with 25 per cent. interest, and to pay the defendants for one trip to Girard, and to release them from all obligations on the contract; that this offer the defendants refused unless plaintiff would pay them for six trips to Girard which they had taken to secure the reaping attachment, and which they claimed to be worth \$2.50 per trip; that the defendants still keep the mowing machine, and that it is worth \$100.

Upon these findings was a judgment for \$75 in favor of Crenshaw erroneous? We think not. True, the contract was for a combined reaper and mower; but the mower had been delivered, and when the reaping attachment was tendered the defendants refused to receive it. It does not lie in their mouths therefore to say that the plaintiff has not completed his contract. They refuse to receive the reaping attachment, and refuse to return the mower. This mower is worth \$100. They have paid but \$25. What right have they to the plaintiff's property without paying for it? But, say the defendants, the plaintiff did not perform his contract in time; he was to deliver it in three weeks from April 27th, and did not offer to

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deliver until June 18th, more than seven weeks thereafter. Concede all that, and if they have suffered any damage by reason of the plaintiff's delay, and time was of the essence of the contract, they could recoup such damages. But no damages are found. True, they bought other machines; but it does not appear what they paid for them; or that they paid more than their actual value; or that they could not turn round and sell them immediately at a profit. It does not appear that they are damaged to the amount of a farthing by this. They took six trips to Girard, which they claim were worth \$2.50 per trip, but there is no finding that they were worth a cent, or had cost a cent, or that they had lost anything thereby. Surely, there is nothing from which we can say what damages, if any, they sustained by reason of the delay.

Upon the facts therefore as found, we do not see that there was any error in the judgment, and it must be affirmed.

All the Justices concurring.

CITY OF EMPORIA V. H. E. NORTON, *et al.*

1. CONSTRUCTION OF STATUTES; *General Rule as to Repeals; Qualification.* The rule of construction, (Gen. Stat. p. 999,) that "The provisions of any statute so far as they are the same as those of any prior enactment, shall be construed as a continuation of such provisions and not as an amendment," is subject to the qualification, "unless such construction would be inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute."
2. ——— *Legislative Intent, Ascertained.* In determining the intent of the legislature, the court is not limited to a mere consideration of the words employed, but may properly look to the purpose to be accomplished, the necessity and effect of the statute, under the different constructions suggested. [*Jones v. State*, 1-273; *Dudley v. Reynolds*, 1-235; *Fitzpatrick v. Gehart*, 7-35].
3. ——— It will not be imputed to the legislature that it intended to go through the form and time and expense of legislation to accomplish

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nothing, or to do that already fully and completely done. [*Prohibitory Amendment Cases*, 24-716.]

4. ——— *Reenactment of Laws.* It may be stated as a general rule, that where the legislature enacts a law which is the same in terms as a former statute, if such former statute has prior thereto wholly accomplished its purpose, and exhausted its force, the latter law must be held, notwithstanding the rule of construction quoted in the first paragraph of this syllabus, to be a new enactment, and not merely a continuation of the former.

Motion for Rehearing.

THE action of *Norton* and others was for an injunction against the treasurer of Lyon county, the *City of Emporia*, and others, to restrain the collection of certain "assessments" levied by the city of Emporia in 1871 on the lots of the plaintiffs to pay contractors for macadamizing, curbing and guttering Commercial street in said city. The case was in this court first at the July Term 1872, and is reported in 10 Kas. 491, as *Gilmore v. Norton*. It came here again, and is reported in 18 Kas. 569, as *City of Emporia v. Norton*. In each instance the district court had decreed a perpetual injunction in favor of *Norton* and others, and in each this court reversed the decree of the district court. *Norton* and others now move for a *rehearing* in the case last mentioned — *City of Emporia v. Norton*, 18 Kas. 569. The work for which the special taxes or "assessments" were levied on the lots of the adjacent lot-owners was done in 1871, under a contract with the city. When this contract was let, the city of Emporia was governed by the city-charter act of 1868, (Gen. Stat., ch. 19,) and the amendatory act passed and approved March 2d 1871, (ch. 62, Laws 1871, p. 144.) Said act of 1868 contained the following provision:

"SEC. 31. *Before* the city council shall make any contract for building bridges or sidewalks, or for any work on streets, or for any other work or improvement, an estimate of the cost thereof *shall* be made by the city engineer, and submitted to the council, and no contract shall be entered into for any work or improvement for a price exceeding such estimate, and in advertising for bids for any such work, the council shall cause

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the amount of such estimate to be published therewith." (Gen. Stat., p. 169.)

The district court decided that this section had not been complied with in this, that no *estimate* had been made of the cost of the improvements before the contract was made. Said ch. 62, laws of 1871, is entitled "An act relating to the powers and government of cities of the second class," etc., and it contains the following curative provision:

"SEC. 20. In case the corporate authorities of any city have attempted to levy or assess any taxes for improvement, or for the payment of any bonds or other evidences of debt, which taxes or bonds are or may have been informal, illegal or void, for the want of sufficient authority or other cause, the council of such city, at the time fixed for levying general taxes, shall relevy and reassess any such taxes in the manner provided in this act, or shall bond such taxes and assessments as herein provided for their city indebtedness."

Said acts of 1868 and 1871 were in force when the action below was commenced in October 1871. While said act was pending, and before it was decided in this court, when first here, the legislature passed ch. 100, laws of 1872, entitled "An act to incorporate cities of the second class, and to repeal former acts." (Laws of 1872, p. 192.) Said act contains most of the provisions of the charter-acts of 1868 and 1871. It also contains this section:

"SEC. 41. In case the corporate authorities of any city have attempted to levy any taxes or assessments for improvement, or for the payment of any bonds or other evidence of debt, which taxes, assessments or bonds are or may have been informal, illegal or void, for the want of sufficient authority or other cause, the council of such city at the time fixed for levying general taxes shall relevy and reassess any such assessments or taxes in the manner provided in this act." (Laws of 1872, p. 204.)

In 13 Kas. 569, 588, this court held that said § 41 was constitutional and valid, and its effect was to cure the defect in the original levy of the taxes or assessments complained of. The motion for a rehearing is addressed mainly to the construction and effect of the several provisions above quoted.

R. M. Ruggles, for Norton and others, in support of the motion for rehearing.

The opinion of the court was delivered by

BREWER, J.: A motion for a rehearing in this case has been made, and an extended written argument filed in support thereof. The point made is this: The court in the prior opinion rested the decision upon the curative effect of the 41st section of ch. 100 of the laws of 1872. The work, payment for which the city was seeking to collect, was done in 1871. This curative section was enacted subsequently, in 1872, and we held it valid, and applicable to the proceedings in question. Now counsel contends that this 41st section is substantially the same as the 20th section of ch. 62 of the laws of 1871, and must therefore be considered as enacted in 1871, and *before* instead of *after* the work. He rests this claim upon a rule for the construction of statutes found on page 999 of the Gen. Stat., which reads:

"The provisions of any statute, so far as they are the same as those of any prior enactment, shall be construed as a continuation of such provisions, and not as a new enactment."

This, as are all the other rules of construction, is subject however to this important qualification which prefaces them: "In the construction of the statutes of this state the following rules shall be observed, *unless such construction would be inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute.*" Now in determining the intent of the legislature we are not limited to a mere consideration of the language employed. We may properly look to the purposes to be accomplished, the necessity and effect of the enactment under the different constructions suggested. Thus, if the legislature should pass at one session an act for raising revenue, which should specify no year, but simply direct the levy of a certain tax, and the succeeding legislature should pass an act in exactly the same language, no one would contend that the second was a mere continuation of the first,

taking effect as of its date, and providing for no new levy. For the manifest intent of the legislature, an intent not manifested by the form of words, but by the purposes to be accomplished, and the surrounding circumstances, repudiates such a construction. So, if in 1875 the legislature had passed an act in exactly the same language as ch. 20 of the laws of 1874, appropriating \$7,000 to the Leavenworth Protestant Orphan Asylum, is it not plain that the same would have accomplished a new donation? So again, if year by year we found the legislature passing acts in the same terms, validating defective tax proceedings, and curing irregularities therein, would not every one be constrained to say that these successive acts should be construed as separate enactments, each operating upon all defects and irregularities prior to it, and not as simply a continuation of the first and operating only upon matters prior to that? For otherwise, why this repetition of laws? In the illustration last cited the first enactment would cure (so far as remedial legislation can cure) all the preëxisting irregularities and defects; and a mere repetition would add nothing to its curative power. And to impute to the legislature an intent to go through the form and time and expense of legislation to do that already fully and completely done, is unwarranted.

Now, is there any principle underlying these several cases of legislation which serves to indicate the legislative intent—any fact which makes plain its purpose? This fact is evident in reference to them all. The earlier act had accomplished its purpose, and spent its force prior to the enactment of the second. Much of legislation, perhaps most, is prospective in its reach, and, so to speak, of continuing operation. That is, it establishes a rule of action for future and indefinite time, operating upon all matters which may thereafter arise coming within its terms. Thus, the crimes act, defining what shall constitute certain offenses, and prescribing penalties therefor, operates upon all acts thereafter done coming within its terms. In case of a repetition of such legislation it may well be held, in view of the rule of construction above quoted, that in the

absence of any particular matters indicating a contrary intent, the second enactment simply keeps alive and continues in force the prior. This preserves that continuity in legislation which is the evident purpose of the rule. It prevents those unfortunate breaks and interruptions, with their deplorable results, which in the absence of such a rule have been so often felt and so frequently noticed by courts here and in other states. But there is some legislation which, though prospective, operates only for the performance of a single definite act; and some retrospective, operating upon existing and past circumstances, and defining the rights and obligations derived therefrom. In both such cases the law is without any continuing force. In the first case, when the act authorized or required has been done, the law has exhausted its purpose, and spent its force. And in the second, it accomplishes its purpose at the very moment of its passage. In a certain sense it dies at the moment of its birth. Thus, an act authorizing an appropriation, accomplishes its purpose and exhausts its force when the appropriation has actually been made; and an act validating prior defective acknowledgements, or irregular tax proceedings, accomplishes its purposes as soon as it is passed. It becomes no stronger by lapse of time, and reaches and operates upon no other matters. Now in such cases, if a succeeding legislature enacts a similar law it cannot be that the legislature intended simply a continuation of the prior law, for there is really nothing to continue—that law has ceased to have force. It has no living, present operation, nothing to be continued. And the only way in which an intent to accomplish anything can be established is by construing the later law as a new enactment. It must be presumed that the legislature was familiar with the rules it had laid down for the construction of its own enactments, understood the scope and effect of its legislation, and by every law intended to accomplish something. We think therefore that this may be stated as a general rule, that where the legislature enacts a law which is the same in terms as a prior statute, if such prior statute has wholly accomplished its purpose, and spent its force, the latter law must be held, notwithstanding

the rule of construction quoted, to be a new enactment, and not merely a continuation of the former. We have given this subject careful thought, for our first impression, after reading the brief of counsel, was, that his point was a good one. But the disastrous results which would flow from making this rule one of general application caused us to hesitate and reëxamine the matter. That reëxamination has satisfied us of the soundness of the distinction we have drawn between the classes of legislation as affected by this rule. Upon that, this motion is decided. We may be pardoned also for suggesting this query: Does the rule in any case prevent the later law from operating as a law of the date of its passage upon all matters within its terms? Is it not satisfied when it preserves a continuing force to the legislative command, a continuing operation to the legislative rule, leaving to each law to act as a present expression of legislative intent upon all matters within its terms? Must both laws in effect bear date as of the time of the enactment of the first? We have assumed in this case that the law of 1871 was purely retrospective in its operations; that it applied only to prior defects and irregularities, and was not intended to apply to defects that might thereafter arise in subsequent tax proceedings. Such is the claim of counsel, and for the purposes of this case and argument we do not question the claim. We have also assumed that there is such a similarity between the two statutes as to bring them within the terms of the quoted rule, although the latter law speaks of "taxes and assessments for improvements," while the language of the former is "taxes for improvements." The claim of counsel is, that the context makes it plain that this expression was intended to include both taxes and assessments in the sense that these terms are generally used. To sustain this claim he has devoted a large portion of his argument. Yet conceding both these matters to be as counsel claims, we are constrained, for the reasons given, to decide adversely upon the main question, and must overrule his motion.

All the Justices concurring.

O. H. P. POLK, *et al.*, v. JEHIL ANDERSON.**WRITTEN CONTRACT; Terms and Conditions; Contemporaneous Parol Contract.**

On December 22d 1873, Anderson received of P. and another 203 Texas steers, to be taken care of and fed by him for P. until July 10th 1874, and Anderson was to receive, as compensation therefor, five cents for each pound which each steer should, at the end of that time, weigh over and above eight hundred and fifty pounds. Afterward, and on March 4th 1874, said contract was superseded, as both parties admit, by another contract, under which second contract P. received back all of said steers except 100 head. At the time this second contract was entered into a written instrument was executed by Anderson, which reads as follows: "This agreement, witnesseth, that whereas we have become satisfied we cannot carry out and fulfill our contract made and entered into with P. on the 22d of December 1873, about feeding their cattle, we therefore hereby agree to release to them all but 100 head of heaviest steers which we agree to take at 1,000 pounds each and feed according to our original contract at five cents per pound for all they may gain by the first of July next." *Held*, that notwithstanding said written instrument, the plaintiff Anderson might show that P. by a parol contract entered into at the time or before the execution of said written instrument, agreed to pay the plaintiff as compensation for taking care of and feeding said 203 head of steers from December 22d 1873 until March 4th 1874, what was reasonable and right, to-wit, compensation for the admitted gain of the 100 head which Anderson was to keep after March 4th, and reasonable compensation for feeding and taking care of the others, less what P. had already paid him. [As to permissible defenses to written instruments, not denied under oath, see *Washington v. Hobart*, 17-275; *Neil v. Case, et al.*, 25-510; *Nutt v. Humphrey*, 32-100.]

Error from Miami District Court.

ACTION by Anderson as plaintiff to recover a balance alleged to be due him from Polk and another on contract. His account as stated in the petition amounted to \$2,695, and he admitted payments in the sum of \$515; balance claimed, \$2,090. Answer, a general denial, and a counterclaim for damages. The material facts are stated in the opinion. Trial at the June Term 1874 of the district court. Verdict and judgment in

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favor of *Anderson* for \$1,700, and the defendants bring the case here on error.

W. R. Wagstaff, and *V. D. Craig*, for plaintiffs in error:

Anderson claims reasonable compensation for feed and care of cattle. Polks deny, and set up two written contracts, covering the subject-matter in the petition. Anderson in reply admits the execution of the written contracts. Then there can be no issue as to damages as set up in the petition. The issues for trial to jury are on the new matter in the answer and reply. There can be no issue on the first written contract, because that was mutually adjusted by the parties, as shown by the second contract. The remaining issues of fact arise on the second contract, and the new matter in the third defense, and the new matter set up in the reply. All the evidence proves the written contracts, and none contradicts; all the evidence shows a settlement under the second contract, and none contradicts; all the evidence shows that Anderson commenced feeding the 101 head under the second contract on the 4th of March, and none contradicts; all the evidence shows that the Polks took the 101 head of cattle into custody on the 20th of March, and none contradicts; all the evidence shows that after March 20th, Anderson never expended either time or money in caring for said stock, and none contradicts; all the evidence shows that Anderson had the charge, care and feeding of said stock—101 head—16 days and no more; all the evidence shows that before the 20th of March, Anderson sent word to the Polks that he would feed the cattle no more corn than he had on hand, unless Polks would send him more money; all the evidence shows that Anderson had not sufficient feed on hand to provide for said cattle under said contract without making additional purchases; all the evidence shows that the 101 head of cattle, from March 4th to March 20th, had not increased in weight; all the evidence shows that Anderson by contract was to receive five cents per pound for increase of

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weight over 1,000 pounds on each steer, and no more. There is no evidence to show the reasonable and probable increase of each steer with proper feed under the contract to March 20th. It seems clear from a general view of the pleadings and the evidence, that the jury, in making up a verdict in the sum of \$1,700, disregarded all the issues made up in the case, disregarded the binding obligations of the written contracts, and attempted to and did make up their verdict on the theory of a reasonable compensation as alleged in the petition, not upon issues joined, and in violation of the established rules of the courts of law. 12 Kas. 152; 8 Kas. 497; 12 Am. L. Reg. 442; 12 Ohio St. 360.

The verdict and judgment ought to be set aside and a new trial granted, on the ground of newly-discovered evidence; for misconduct on the part of officers of the court pending the trial; for misconduct and unlawful combinations of witnesses on the part of the defendant in error pending the trial, by which the rights of the plaintiffs in error were prejudiced.

Simpson & Brayman, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by Jehil Anderson against O. H. P. Polk and John W. Polk, for taking care of and feeding 203 head of cattle from December 22d 1873 to March 22d 1874. We do not think that the issues in the court below were what the plaintiffs in error (defendants below) now seem to claim them to have been. The case was certainly not tried in the court below as though such were the issues, but was tried upon a very different theory. By the original contract between Anderson and the Polks, Anderson was to receive as compensation for taking care of and feeding said cattle, from December 22d 1873 until July 10th 1874, five cents for each pound which each steer (for they were all Texas steers) should at the end of that time weigh over and above eight hundred and fifty pounds. Afterward, and on March

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4th 1874, this contract was superseded, as both parties admit, by another contract, under which second contract the Polks received back all of said cattle except 100 head. The Polks claim that said original contract was superseded by a contract *wholly* in writing. Anderson claims that it was not. This issue we think was sufficiently raised by the pleadings; and the whole case was tried in the court below upon the theory that this question was put in issue by the pleadings. It is admitted by the pleadings that at the time said second contract was made the following written instrument was executed, to-wit:

"THIS agreement, signed and delivered this 4th day of March 1874, witnesseth; that whereas, we have become satisfied we cannot carry out and fulfill our contract made and entered into with John W. Polk and O. H. P. Polk on the 22d December 1874 about feeding their cattle, we therefore hereby agree to release to them all but 100 head of heaviest of steers, which we agree to take at 1,000 pounds each, and feed according to our original contract at five cents per pound for all they may gain by the first of July next. Witness our hands.

TEMPY ANDERSON.
JEHIL ANDERSON."

The Polks claim that this embodied the whole of the second contract, and that by virtue of it Anderson was to have nothing for feeding said 208 head of cattle from December 22d 1873 to March 4th 1874. Anderson on the contrary claims that this did not embody the whole of said second contract; but by virtue of the terms of said second contract, as it was in fact made, he was to receive as compensation for feeding said cattle from December 22d to March 4th what was reasonable and right, to-wit: he was to receive compensation for the admitted gain of the 100 head which he was to keep after March 4th, and reasonable compensation for feeding and taking care of the others, less what the Polks had already paid him. This, the pleadings as well as the evidence show. But the question arises, could Anderson show this, either by the pleading or the evidence, after he had admitted the execution of said written instrument. We think he could. It would not tend to vary

or contradict the terms of said written instrument. Said written instrument evidently does not contain the whole of the contract as made by the parties. It does not show what the Polks agreed to do. All that they agreed to do rests wholly in parol. They admit that they agreed to receive the cattle which Anderson released; and to dispense with said original contract; but this is not shown by said written instrument. It rests wholly in parol. And why may not the balance of Polk's agreement, as claimed by Anderson, rest in parol? The written instrument does not pretend to show that Anderson was to receive no compensation for his care and feed furnished to the cattle prior to March 4th. And Anderson claims that the Polks agreed that he should. Besides, it is shown both by the pleadings and Anderson's evidence that Anderson is an illiterate man, that he cannot read, that he relied upon the statements of the Polks, or rather upon the statements of Polks' agents, as to what said written instrument contained, and that, from such statements he believed at the time he authorized his name to be signed to said written instrument that it contained all that he now claims was included in said second contract as it was in fact made by the parties. But, however said written instrument might be construed, still the verdict should have been for Anderson and against the Polks for some amount; for, taking the second contract as the Polks claim that it was, they violated even it. They drove away said 100 head of cattle on March 20th without the consent of Anderson. This substantially disposes of this case in this court. It is wholly unnecessary to discuss the points made, that the verdict is against the evidence, or is excessive, for it is certainly not more so than numerous verdicts which this court has already sustained.

The plaintiffs in error also moved for a new trial because of newly-discovered evidence. Now so far as the newly-discovered evidence was relevant and competent, it was merely cumulative, and we think by the exercise of reasonable diligence it could have been obtained for the trial. The testimony of Ira Allison would have been merely cumulative.

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It would have had scarcely any weight in the case, and probably by the exercise of the slightest diligence it could have been procured. It would seem from the evidence that Allison was a half-witted boy; that he came to Paola, and into the court-room, without a subpoena, for the purpose of testifying for the Polks; that some of the witnesses for Anderson, and one of the bailiffs of the court, played what they considered a practical joke upon him, and scared him out of town. Now this conduct may have been reprehensible, but the plaintiff Anderson was not responsible for it. He knew nothing of it till after the trial.

We think there was no error or irregularities in any of the proceedings that would authorize a reversal of the judgment below.

The judgment will therefore be affirmed.

All the Justices concurring.

WILLIAM SIMPSON V. EZEKIEL J. BORING.

EJECTMENT; What Title is Sufficient to Maintain Action. Any kind of an estate in land, legal or equitable, is sufficient to enable a plaintiff to recover in an action in the nature of ejectment, under § 596 of the civil code, as against a party who has no interest in the property. The question of who shall recover, in such an action, depends entirely upon the question, which party has the paramount right to the property in controversy. [*State v. Stringfellow*, 2-263; *Bancroft v. Chambers*, 10-364; *K. P. Rly. Co. v. McBratney*, 10-415; *Stout v. Hyatt*, 13-232; *O'Brien v. Wetherell*, 14-622; *Duffy v. Rafferty*, 15-9; *Mooney v. Olsen*, 21-691; *A. T. & S. F. Rld. Co. v. Pracht*, 30-71; *Hollenback v. Ess*, 31-88; *A. T. & S. F. Rld. Co. v. Rockwood*, 25-302; see cases cited in *Everett v. Lusk*, 19-195.]

Error from Bourbon District Court.

EJECTMENT, brought by *Boring*, to recover possession of eighty acres of land. Plaintiff claimed to be the legal and equitable owner, and to be entitled to the immediate possession. *Simpson* answered, first, a general denial; second, para-

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mount title in himself; third, "that the matter in dispute was *res adjudicata*, having once been litigated and decided in an action between the same parties in the same court," making a profert and an exhibit of the record in an action of trespass formerly tried in said court, wherein "said William Simpson was plaintiff, and said E. J. Boring was defendant." [Said "exhibit" shows among other things that Simpson, in September 1872, filed a petition in trespass, which petition contains two counts—the first, alleging that Simpson in and previous to the year 1871 was in the possession of certain lands, (being the same lands in controversy in this action,) and that Boring in March 1871, and on divers days since that date, had broken and entered his (Simpson's) close, and committed injuries to the grass growing thereon, and had broken and destroyed the fences, etc. In the second count, Simpson alleged that he was "the owner of certain boards, rails, posts and stakes, and other fencing materials, which property was in March 1871" on said lands, and that Boring had "seized, taken, broken, cut, knocked down, injured and destroyed said personal property, to the damage," etc. To said petition, (as shown by the record,) Boring, in October 1872, filed an answer, which contained, first, a general denial; second, that he at the time of the alleged trespasses was "in the actual and lawful possession of the lands described in plaintiff's petition;" and third, that he (Boring) "is, and at the times mentioned was, the rightful owner of said premises," etc. A reply was filed, and the record shows that said action of "Simpson against Boring," for alleged trespasses, was tried at the July Term 1873 of the Bourbon district court, and that judgment therein was rendered in favor of said Simpson for one cent damages.] To the answer in this case, setting up said matters in defense of plaintiff's right to recover the possession of the land, Boring replied, a general denial. A trial was had at the June Term 1874, E. M. H., judge *pro tem.*, presiding. The court refused to admit any testimony in support of Simpson's *third* defense. The jury returned a verdict as follows.

(*Title.*) "We the jury find for the plaintiff Ezekiel J. Boring,

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that at the commencement of this action the said plaintiff was entitled to the possession of the land described in the petition, and that the defendant, Wm. Simpson, wrongfully withheld possession thereof from the plaintiff. And we assess plaintiff's damages for injuries sustained to said premises at the sum of one cent."

New trial refused, and judgment on the verdict. *Simpson* brings the case here on error.

McComas & McKeighan, for plaintiff in error.

W. C. Webb, and *W. J. Bawden*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action in the nature of ejectment, brought by Ezekiel J. Boring against William Simpson to recover certain land in Bourbon county. The pleadings show that the title to the land passed originally from the government of the United States to the Missouri River, Fort Scott & Gulf Railroad Company, and that the plaintiff claims title under and through said railroad company. The pleadings also show that the defendant claims adversely to both the plaintiff and the railroad company. He claims that at the time the patent for the land was issued by the government to said railroad company, one Alexander Haskins had the right under the Cherokee treaty of July 19th 1866, (14 U. S. Stat. at Large, 799, 804, § 17,) to purchase said land from the government, and that he (the defendant) has succeeded to the rights of Haskins, and that therefore the railroad company holds said property in trust for him, the defendant. The defendant set forth in his answer all the facts of his claim, fully and specifically, and upon the truth of these facts the plaintiff took issue by denying the same generally in his reply. The issues of fact thus made were submitted to a jury, and the jury on the merits of the case found in favor of the plaintiff, and against the defendant. This is about all there is of the case. The defendant failed upon the facts of the case, and not upon the law. His allegations of fact were found by the jury not to be true; and hence there is no question of law now involved in

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the case that merits much consideration from this court. If the defendant's facts had been found to be true, he would have recovered so far as the law is concerned. The case was very fairly submitted to the jury. The jury found against the defendant, and their verdict is unquestionably correct. It is true, the plaintiff did not hold the legal title (as contradistinguished from the equitable title) to the property in dispute; but that was not necessary. (Gen. Stat. 747, § 595; *Duffey v. Rafferty*, 15 Kas. 9.) The railroad company held the legal title, and the plaintiff claimed by virtue of a written contract of purchase of said property from the railroad company. Under said contract the plaintiff had the right of possession of the property as against the railroad company, or as against any person holding under the railroad company. The contract was still subsisting and in full force when this action was commenced, and when it was tried; and this we think was sufficient to enable the plaintiff to recover. The defendant had no interest whatever in the property as against the railroad company, or the plaintiff. And any kind of an estate in land, legal or equitable, is sufficient to enable a plaintiff to recover in this kind of action as against a party who has no interest in the property. The question of who shall recover in this kind of action depends entirely upon the question who has the paramount right to the property. (*Duffey v. Rafferty*, supra. See also, *K. P. Rly. Co. v. McBratney*, 10 Kas. 415; *The State v. Stringfellow*, 2 Kas. 263.)

The former case of *Simpson v. Boring* can have no possible bearing upon the present case. Simpson might have recovered in that case upon the second count of his petition for the "boards, rails, posts and stakes, and other fencing materials," "personal property," which he alleges Boring injured and destroyed, without showing that he (Simpson) ever had the least interest in the real estate now in controversy, or that he had ever been in the possession thereof, or even that he had ever seen or heard of the same.

The judgment of the court below is affirmed.

All the Justices concurring.

THE A. T. & S. F. RAILROAD CO. v. ABRAHAM BALES.

1. **NEGLIGENCE; Escape of Fire; How Proven.** Negligence on the part of a railroad company in permitting fire to escape from its engines may be shown wholly by circumstantial evidence, and it is not necessary in such a case that any direct proof of any particular act of negligence should be introduced. [*A. T. & S. F. Rld. Co. v. Stanford*, 12-354; *St. J. & D. Rld. Co. v. Chase*, 11-47; *A. T. & S. F. Rld. Co. v. Campbell*, ante, 200; *Mo. Pac. Rly. Co. v. Kincaid*, 29-654.]
2. ——— **Question of Fact, for the Jury.** Where circumstantial evidence, tending to show negligence on the part of a railroad company in permitting fire to escape from its engines, is introduced by the plaintiff, and the defendant company afterward introduces direct and positive evidence tending to show the contrary, *held*, that it is a question for the jury to determine which evidence is entitled to the greatest credit. [*St. J. & D. Rld. Co. v. Chase*, 11-47; *A. T. & S. F. Rld. Co. v. Campbell*, ante, 200; *White v. Mo. Pac. Rly. Co.*, 31-280.]
3. **RUNNING FIRES; Where Set; Remote Cause.** Where fire, which is negligently permitted to escape from an engine of a railroad company, does not fall upon the plaintiff's property, but falls upon the property of another, setting it on fire, and then spreads by means of dry grass, stubble and other combustible materials, and passes over the lands of several different persons before it reaches the property of the plaintiff, and finally reaching the property of the plaintiff at a great distance from where the fire was first kindled sets it on fire and consumes it: *Held*, that the negligence of the railroad company, in such a case, is not too remote from the injury to the plaintiff's property to constitute the basis of a cause of action against the company. [*A. T. & S. F. Rld. Co. v. Stanford*, 12-354; *St. J. & D. Rld. Co. v. Chase*, 11-47; *A. T. & S. F. Rld. Co. v. Campbell*, ante, 200.]
4. ——— **Questions to be Considered by the Jury.** The proper questions to be considered in such a case are as follows: 1st, Was the railroad company negligent in permitting the fire to escape? 2d, Would the plaintiff's property have been destroyed by fire as it was destroyed, except for the fire permitted to escape from the company's engine? 3d, Could the railroad company, by the exercise of reasonable diligence, at or before the time of permitting said fire to escape, have anticipated the burning of the plaintiff's property as likely to occur, and as the natural and probable consequence of permitting said fire to escape? And these are all questions of fact entirely for the jury to consider and determine under proper instructions from the court. [*A. T. & S. F. Rld. Co. v. Stanford*, 12-354; *A. T. & S. F. Rld. Co. v. Campbell*, ante, 200.]

Error from Chase District Court.

BALES sued the *Railroad Company* for damages resulting from a fire alleged to have been negligently set out by the

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company. He alleged in his petition that the engine was old and out of repair, that the servants of the company were careless in the management of such engine, and by such careless management fires were set to the prairie every few rods between Topeka and Newton; that at least a dozen fires were set by said engine in Chase county, and by reason of said fires as aforesaid certain property of plaintiff's, 80 rods of post-and-rail fence, three corrals, one granary, fifty tons of hay, one stable, 125 bushels of corn, 150 bushels of oats, etc., etc., was burned up, to his damage \$1,094. The company answered by a general denial of all the averments in the plaintiff's petition, and specially set up that the engine was in good order, and the servants in charge thereof competent and careful. Trial at the May Term 1874. Verdict and judgment for *Bales* for \$500, and costs. The *Railroad Company* brings the case here.

Ross Burns, and *J. G. Waters*, for plaintiff in error.

Ruggles & Sterry, and *S. N. Wood*, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This is another of those actions brought against the Atchison, Topeka & Santa Fé Railroad Company for damages claimed to have resulted from the negligence of the company in permitting fire to escape from its engine No. 9, on October 12th 1871. We have already decided four of those cases, to-wit, that of William M. Stanford, (12 Kas. 354,) of Neil Campbell, of Joseph Rickabaugh, and of Stephen Shaw, (*ante*, 200, 209.) In deciding those cases we have decided every question involved in this case, and several others besides. In fact, only the main questions involved in those other cases are involved in this, to-wit: 1st, May negligence on the part of the railway company in permitting fire to escape from its engines, be shown wholly by circumstantial evidence, or must it be shown by some direct proof of some particular act of negligence? 2d, Where the fire which is negligently permitted to escape from the engines of the rail-

way company, does not fall upon the plaintiff's property, but falls on the property of another, setting it on fire, and then spreads by means of dry grass, stubble and other combustible materials, and passes over the lands of several different persons before it reaches the property of the plaintiff, and finally reaching the property of the plaintiff, at a great distance from where the fire was first kindled, sets it on fire, and consumes it, is the negligence of the railway company in such a case too remote from the injury to the plaintiff's property to constitute the basis of a cause of action against the company?

As to the first question, we have decided that circumstantial evidence is sufficient; as to the second question, we have decided that the injury is not too remote to constitute the basis of a cause of action; and we are entirely satisfied with our decision of both of these questions. As to the first question, this case furnishes the strongest kind of evidence of the correctness of the decision. It was not within the power of the plaintiff to furnish any direct evidence of any particular act of negligence. It was shown by the defendant's witnesses that the engine from which the fire escaped was a first-class engine, that it was in good order and condition, and that it was operated by a careful and skillful engineer, to the best of his knowledge and ability. Now for the purposes of this case we will suppose that all this is true, except the mere fact of operating the engine; and indeed the jury so find. The only negligence that they find is carelessness on the part of the engineer in operating the engine. Now how could the plaintiff prove this carelessness or negligence on the part of the engineer by any direct evidence? If the engineer was guilty of any carelessness or negligence, probably he alone knew it; and possibly even he himself would not have been fully aware of his own carelessness or negligence. Now the plaintiff proved that said engine on said 12th of October caused a large number of fires, a dozen or more; that other engines operated over the same track on the same day, and before and since, did not produce any such result; and that good engines properly managed

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would not under the same circumstances be likely to produce any such result. Now it would seem to us that such evidence would lead irresistibly to the conclusion that there was negligence somewhere. Of course it would not locate the negligence. It would not show whether the fault was with the engine, or with the engineer; whether the engine was good, but was out of order; or bad, though in order; whether the engineer was competent, but acted carelessly; or incompetent, though he acted as well as he knew. And if the engine was bad or out of order, it would not show in what particular it was bad or out of order. And if the engineer acted unskillfully or carelessly, it would not show in what particular he acted unskillfully or carelessly. Yet such evidence is competent, and it would be about the best that the plaintiff could from the nature of the case produce. Now when the jury found that the engine was good, and in proper condition, then they had to weigh the foregoing circumstantial evidence with the direct testimony of the engineer who testified that he managed the engine skillfully and carefully. And the jury had the unquestionable right to weigh both, and determine the value of each. If they believed from all the circumstances of the case that the testimony of the engineer was wholly unworthy of credit or belief, they had the undoubted right to so find, and to wholly disregard it. They had the right to say that the circumstantial evidence of the plaintiff tending to prove negligence immeasurably outweighed the direct and positive testimony of the engineer declaring that there was no negligence. The court could not weigh the evidence. The law does not undertake to define what such evidence is worth. But the whole matter comes within the legitimate scope and province of the jury. We would further refer to the case of the *A. T. & S. F. Rld. Co. v. Stanford*, 12 Kas. 370-372, and cases there cited. The decisions in Missouri are peculiar, and to some extent conflicting. (*Smith v. H. & St. J. Rld. Co.*, 37 Mo. 287, 391, et seq.; *Fitch v. Pacific Rld. Co.*, 45 Mo. 322, 325, et seq.; *Coates v. M. K. & T. Rld. Co.*, 61 Mo. 36; same case, 3 Central Law Journal, 209.)

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As to the second question, it is scarcely necessary to do more than to refer to the decision of this court in the case of the *A. T. & S. F. Rld. Co. v. Stanford*, 12 Kas. 375 to 379, where the question is discussed at length, and the authorities cited. We would however refer to the following additional authorities: *Annapolis & Elkridge Rld. Co. v. Gantt*, 39 Md. 116; *Balt. & Ohio Rld. Co. v. Shipley*, 39 Md. 252; *Penn. Rld. Co. v. Hope*, 1 Law & Eq. Rep. 272, case decided by the supreme court of Pennsylvania, Feb. 1876; *Webb v. R. W. & O. Rld. Co.*, 49 N. Y. 420; *Pallett v. Long*, 56 N. Y. 200.

Since the promulgation of the decision in the *Stanford* case, an elaborate article on this same question has been written by Dr. Francis Wharton, and published in the *Southern Law Review*, (Vol. 1, New Series, page 729.) That article controverts the doctrine enunciated in the *Stanford* case. But we think the argument of the learned Doctor will be found to be wholly unsatisfactory, and the conclusion reached by him not founded upon either reason or authority. Even the decisions which he refers to, with some exceptions, do not as we think sustain his views. With reference to the irrelevant matters discussed by the Doctor we do not take issue. It is only upon the main proposition, that is, that the railroad company is responsible only for property destroyed by it by fire where the company *directly* communicates the fire to such property, that we take issue. He claims that where the railroad company does not directly set fire to the plaintiff's property, but sets fire to some other person's property, and that sets fire to the plaintiff's, that the act of the railroad company is too remote a *cause* of the burning of the plaintiff's property to constitute the basis for an action against the railroad company. Now, the word "cause" has various meanings, and shades of meaning. Philosophically speaking, the sum of all the antecedents of any event, constitutes its cause. Ordinarily however we consider each separate antecedent of an event as a cause for such event, provided however that the event could not have happened except for such antecedent. Taking this view of cause and effect, there may be many causes conjointly and consecutively

contributing to produce one and the same final result. And these causes may differ vastly in their proximity or remoteness to or from such final result. But still, any one of them may, as we think, be selected as the responsible cause for such final result, provided it be selected in accordance with the rules of law settled and established by the numerous adjudications of the courts. In the first place, such antecedent cause must be *wrongful*. For the rightful and *bona fide* exercise of a lawful power or authority can never be considered as the basis for a cause of action. Even if the fire from a railroad engine should fall directly upon the plaintiff's property and consume it, the railroad company would not be responsible unless such company were guilty of some wrong. If the company should exercise reasonable diligence in procuring a good engine, and then should carefully manage the same, it would not be responsible for any unforeseen and fortuitous event which might result from the escape of fire from such engine, however disastrous the same might be to the interests of individual persons. The company can in no case be held liable for the escape of fire from its engines unless it is guilty of negligence in permitting the fire to escape. Secondly, the circumstances of the case should be such that the author of such wrongful cause could by the exercise of reasonable diligence be able to anticipate the final injurious result as likely to occur, and as the natural and probable consequence of his wrongful act. For if some new cause, not the result of the first wrongful cause, not under the control of the wrongdoer, not such as he could by the exercise of reasonable diligence anticipate as likely to occur, and except for which the final injurious result could not happen, should intervene between the first wrongful cause and the final injurious result, such wrongdoer would not be liable. His cause would be too remote to constitute the basis of a cause of action against him. It would be placed back of and behind another efficient cause, which he could not have had in contemplation when he put into operation his cause. Observing these rules and limitations, an unlimited number of causes and effects may intervene between the first wrongful cause and the

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final injurious result, and still the author of such wrongful cause be held responsible for the last as well as the first, and for every intermediate result. In the burning of prairie grass, like the case at bar, the number of causes and effects that may intervene between the first cause and the final result is illimitable. Each blade of grass is a separate and distinct entity, and the burning of each blade is both an effect and a cause. It is the effect of the burning of the blades immediately preceding it, and the cause, along with other blades, of the burning of the blades immediately succeeding it. And yet all these causes and effects are so intimately interlinked and blended with each other that we look upon the whole of them as constituting but one grand, united, continuous and single whole. We look upon the whole fire as only one fire, and the whole of these separate causes as merely one cause. The question then of liability in cases of this kind does not depend upon the number of causes contributing to produce the final result, nor upon the location of these causes with reference to each other in any grand concatenation or net-work of causes coöperating consecutively or conjointly, or both, to produce the final result; but it depends upon whether the cause put in operation by the defendant was wrongful, whether it was efficient, and whether the author thereof could at the time of putting it in operation have anticipated the final injurious result as likely to occur.

The questions in this case are as follows: 1st, Was the railroad company negligent in permitting the fire to escape? 2d, Would the plaintiff's property have been destroyed by fire as it was destroyed, except for the fire which the railroad company permitted to escape? 3d, Could the railroad company by the exercise of reasonable diligence at or before the time of permitting said fire to escape have anticipated the burning of the plaintiff's property as likely to occur, and as the natural and probable consequence of permitting said fire to escape? If the first and third of these questions should be answered in the affirmative, and the second in the negative, the company would be held liable. And these are questions of fact entirely

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for the jury to consider and determine, under proper instructions from the court.

The judgment of the court below is affirmed.

All the Justices concurring.

HENRY WRIGHT V. ALLIE B. BACHELLER.

1. AMENDMENTS TO PLEADINGS; *Error to Refuse*. Courts may sometimes commit substantial error by refusing to permit amendments to be made to pleadings during the progress of the trial [*Hunt v. Fyffe*, McC.-75; *Gaylord v. Stebbins*, 4-42]; and held, under the circumstances of this case, that the court below did commit substantial error, by refusing, during the trial, to permit the plaintiff below to so amend his reply as to put in issue the truth of certain portions of the defendant's answer.
2. DEFENSES—*Inconsistent*. Inconsistent pleas should not be encouraged. [*Munn v. Taulman*, 1-254; *Auld, et al., v. Butcher, et al.*, 2-136; *Butler v. Kaulback*, 8-672; *Map Co. v. Jones*, 27-177; *Cole v. Woodson*, 32-272; *Bierer v. Fritz*, 32-330; see cases cited in *K. P. Rly. v. Kunkel*, 17-145.]
3. CROSS-PETITION—*To be Full and Complete*. Where defendant sets forth in his answer a cause of action of his own, by way of counter-claim, and asks affirmative relief thereon, he must set forth such cause of action with the same particularity, completeness and exactness that he would if he were the plaintiff, and were setting it forth in his petition. [*Mal-lory v. Leiby*, 1-97; *Allen v. Douglass*, 29-412.] Hence, it is not sufficient for a defendant, when sued on a mortgage, to allege, for the purpose of obtaining affirmative relief thereon, that he never executed any mortgage, but if he did it was done under duress.

Error from Lyon District Court.

FORCLOSURE of mortgage, brought by Wright against C. B. Bacheller and Allie B. Bacheller. The material facts, pleadings, issues and proceedings, are sufficiently stated in the opinion. At the March Term 1874 of the district court, Wright recovered judgment *in personam* against C. B. Bacheller for the amount of the note, but the court made a decree in favor of Allie B. Bacheller setting aside and canceling the mortgage. From this decree Wright appeals, and brings the case here on error.

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John V. Saunders, for plaintiff.

Ruggles & Sterry, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: This was an action upon a promissory note and a real-estate mortgage made to secure said note. The action was commenced by Henry Wright against C. B. Bacheller and Allie B. Bacheller. The court below rendered a personal judgment in favor of Wright and against C. B. Bacheller for the amount of the note; but rendered a judgment in favor of the other defendant, the said Allie B., that said mortgage should be delivered up and canceled, and held to be no cloud upon the mortgaged premises. It is this latter judgment of which the plaintiff in error now complains. The principal questions involved in the case are, whether the court below erred in refusing to allow Wright to amend his replication, and whether the answer of the defendant Allie B. is sufficient to sustain the judgment rendered in her favor. There are several other questions however involved in the case, which we may consider as we pass along. The discussion of the first question will require that we shall give substantially a history of the proceedings in the court below. The petition was described the note and mortgage, alleging the execution of the note by the defendant C. B. Bacheller, and the execution of the mortgage by both defendants, and giving a copy of the note, but not giving a copy of the mortgage. The defendant C. B. Bacheller never filed any pleading or motion in the case, or made any appearance as a party therein. The defendant Allie B. contested the plaintiff's cause of action. She filed an answer, but before doing so moved the court below "to compel the plaintiff to file with and make a part of his said petition a copy of said mortgage-deed mentioned in said plaintiff's petition." The court sustained the motion, and a copy of said mortgage was so filed. There was a clerical mistake however made in the petition in describing said mortgage. In one

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place, where the word "exchange" occurred in the original mortgage the word "chenange" was written in the petition. In all other respects the mortgage seems to have been correctly described. But the copy of the mortgage filed in the case in pursuance of said motion of the defendant, and of the order of the court below, seems to have been an exact and literal copy in every particular of the original mortgage as the same was executed by the two defendants. Afterward, the defendant Allie B. filed an answer to the plaintiff's petition, containing two defenses. The first defense was substantially a denial of the very existence of said mortgage. It reads as follows, (omitting the heading,) "That she denies each and every allegation in plaintiff's petition contained, so far as the same in any manner refers to the mortgage-deed mentioned in plaintiff's petition." *This defense was verified by the oath of said Allie B. Bacheller*, and of course put in issue the execution of said mortgage, and threw the burden of proving its execution and its existence upon the plaintiff. The second defense reads as follows:

"The defendant Allie B. Bacheller, further answering, separately, for herself, and for a cross-petition says: That if she ever executed any mortgage-deed (which she denies,) to said plaintiff, either separately or conjointly with her husband C. B. Bacheller, the execution of the same was while the married relation between her and the defendant C. B. Bacheller subsisted, and she, this defendant, was a *feme covert*; and that said mortgage-deed, if any was given (which she denies,) was given to secure the payment of a pretended promissory note to the consideration of which said pretended promissory note this defendant was an entire stranger, (if there was any consideration for the said note, which this defendant denies;) and that said mortgage-deed (if any was executed, which she denies,) was for the premises which were used and occupied at the time as a homestead by this defendant and her family, and which said premises has ever since been and now is used and occupied as a homestead by this defendant and her said family, (consisting of three minor children;) that said mortgage-deed (if any there was executed by this defendant, which she denies,) the execution of the same was not the voluntary act and deed of this defendant, but the execution of the same

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(if any execution there was,) was extorted from and forced upon her, this defendant, by her said husband, said C. B. Bacheller, while the marriage relation existed as aforesaid, by threats and intimidations by the said C. B. Bacheller to her (this defendant) made, that he the said C. B. Bacheller would kill her, the said defendant, if she, the said defendant, did not execute the same; and that he, the said C. B. Bacheller, would do this defendant grievous and great bodily harm unless she, the said defendant, did execute the said mortgage-deed to said plaintiff for the said premises, and that he the said C. B. Bacheller would turn this defendant, then his lawful wife, out of house and home, unless she, the said defendant, would execute the said mortgage deed, (if said mortgage-deed ever was executed,) and that he the said C. B. Bacheller would drive her, the said defendant, from her said home and send her to her father in the state of Kentucky, unless she the said defendant would execute the said mortgage-deed to said plaintiff; and that he the said C. B. Bacheller, who was at that time the lawful husband of this defendant, would separate himself from and abandon this defendant, together with her children, unless she the said defendant would execute said mortgage-deed; and that this defendant, believing that the said C. B. Bacheller would put his said threats and intimidations into execution if she the said defendant should not execute the same, and by reason thereof, and out of fear that he would do so, she the said defendant was constrained, forced, and compelled, by fear of great bodily harm, to execute the same against her (the said defendant's) will and consent, and contrary to her expressed wishes; and this defendant paid out of her own private earnings, and her separate property, a great portion of the purchase-money of said premises.

"Wherefore this defendant prays that said pretended mortgage-deed (if any there was executed,) be set aside and held for naught, and this defendant's title to said premises so as aforesaid occupied by her as a homestead be forever quieted against any claim of the said plaintiff thereto, and for such other and further relief as to the court, in equity and good conscience, may seem just and proper, besides the cost of this action."

Afterward, on the 27th of April 1873, the plaintiff filed his reply to this answer, which reads as follows:

(Title.) "And now comes the plaintiff by O. M. his attor-

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ney, and for reply to the defendant Allie B. Bacheller's answer herein, denies each and every allegation therein."

On the 23d of May the plaintiff filed his motion for leave to file an amended replication in said action, which motion was granted, and the court entered an order allowing the plaintiff to file an amended reply; and on the same day the plaintiff filed an amended reply, which is duly entitled in the name of the court, and names of plaintiff and both defendants, and which then reads as follows:

"And now comes the said plaintiff, Henry Wright, and for his amended and special replication herein, (leave of court first had,) says, first, he admits that at the time of the execution of the mortgage in question the said Allie B. Bacheller was the lawful wife of the defendant C. B. Bacheller.

"The plaintiff for a further special replication to the second defense of defendant Allie B. Bacheller stated in her answer filed herein, states that on the 24th of December 1872, and after the execution of the mortgage in dispute, the defendant C. B. Bacheller, by a judgment rendered in this court, obtained a divorce from the defendant Allie B. Bacheller; that a judgment was rendered in said divorce suit, directing the said C. B. Bacheller to convey to the said Allie B. Bacheller the house and lot mentioned in plaintiff's petition, said conveyance to be by quitclaim deed, which the defendant C. B. Bacheller did execute and deliver to the defendant Allie B. Bacheller on the 1st day of January 1873; that by agreement between the defendants, the defendant Allie B. Bacheller was to pay off and discharge the said mortgage; that she well knew that the amount claimed was due and owing to the plaintiff for money borrowed of him to pay off a mortgage, which last-mentioned mortgage was given for the balance due for the purchase-money of said house and lot; and that the defendant Allie B. Bacheller, then and there promised the defendant C. B. Bacheller to pay the sum due the plaintiff on the mortgage in the petition mentioned, if the said C. B. Bacheller would so deed her said house and lot, the said C. B. Bacheller at the time having the legal title to said house and lot. Wherefore plaintiff asks judgment," etc.

The case was afterward tried by the court below, without a jury. The record shows that when the plaintiff first offered upon the trial to introduce his evidence, "the defendant Allie

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B. objected to the introduction of any evidence being given by the plaintiff against her, because no evidence was admissible under the pleadings, which objection was overruled by the court, to which ruling of the court the said Allie B. Bacheller excepted." The plaintiff then introduced his evidence, to nearly all of which the defendant Allie B. objected, as being "irrelevant, incompetent, and immaterial." At one time the objection was, that the evidence was "incompetent and irrelevant, and no issue joined, and inadmissible under the pleadings." The said evidence of the plaintiff was introduced for the purpose of proving the due execution of said mortgage, and *prima facie* it unquestionably did so prove the same. After the plaintiff rested his case, the defendant Allie B. demurred to the plaintiff's evidence on the grounds, as alleged by her, "that the plaintiff has not adduced sufficient evidence in this case to entitle him to any relief against the defendant, or to prove a cause of action," which demurrer the court overruled, and the defendant excepted. The defendant Allie B. then introduced several witnesses for the purpose of proving that she did not execute said deed voluntarily, but that she executed it because her husband threatened to drive her from the premises if she did not execute it. She herself testified that she executed the mortgage, but that she did not do it voluntarily. The defendant then rested, and the plaintiff proceeded to offer rebutting evidence, and while introducing such evidence the defendant for the first time raised the specific question that there was no sufficient reply in the case putting in issue the allegations of the defendant's answer. "Defendant Allie B. Bacheller moved to strike out all the evidence introduced by plaintiff in rebuttal on the ground that it was incompetent, irrelevant, and immaterial under the issues made by the pleadings, and no general denial in; overruled, and excepted to by defendant Allie B. Bacheller. But afterward, the court having minutely examined the pleadings decided that there was no general denial in reply, and ruled out the plaintiff's evidence in rebuttal so far as Ed. S. Waterbury's testimony, and that part of exhibit A of this bill of exceptions, which

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purports to be the acknowledgment of Allie B. Bacheller—to which ruling of the court the plaintiff excepted.” Exhibit A was the said mortgage, and the acknowledgment thereon, as the same appears to have been executed and acknowledged by the two defendants. The mortgage and acknowledgment were in due form, and appeared on their face to be properly executed, and both had previously been read in evidence. It is evident from the foregoing, as well as from the absence of every thing in the record showing the contrary, that the precise question as to whether the plaintiff had a general denial in the case, had not previously been raised. The “Defendant Allie B. Bacheller then moved the court for judgment in her favor upon the pleadings in the case, to which plaintiff objected. The plaintiff then filed a motion for leave to amend his amended reply, supported by affidavits,” which motion reads as follows:

(*Title.*) “Comes now the plaintiff in the above-entitled cause, and moves the court for leave to amend his amended reply so as to deny each and every allegation of the second defense set forth in the answer of defendant Allie B. Bacheller, except that she was the wife of C. B. Bacheller—for the reason that the attorney of said plaintiff was of the opinion, until the present ruling of the court, that the original reply filed herein (which was a general denial) was to still stand, and was not superseded by the amended reply filed herein, but that in point of law said amended reply was only additional to the original reply. O. M., Att’y for Plaintiff.”

The affidavit of said O. M. in support of said motion reads as follows:

(*Title and Venue.*) “O. M. being duly sworn deposes and says, that he is the attorney for the plaintiff in the above-entitled cause, who made up the pleadings for the plaintiff in said cause, and that when he filed the amended reply herein he had no intention of abandoning the original reply then on file in said cause, but intended the amended reply to be only an addition to said original reply, and then believed (and did believe until the ruling of the court this morning) that such was the legal effect of said amended reply, and that it did not supersede said amended reply but that both stood together.”

The court below overruled the plaintiff’s motion for leave to

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amend his reply, and then overruled the defendant's motion for judgment on the pleadings. Afterward; other and additional evidence was introduced by each of the parties.

Under the circumstances of this case we think the court erred in overruling the plaintiff's motion to amend his reply. The plaintiff seems to have prosecuted his action in the utmost good faith in every particular, from beginning to end. He seems to have been entirely willing and desirous to have the case tried and decided upon its merits, notwithstanding the extraordinary answer filed by the defendant. He made no attack upon the sufficiency or good faith of such answer, but seemed desirous only of showing by evidence that the allegations thereof most favorable to the defendant were not true. And up to the time that the court ruled that he had no general denial in the case, he thought he could do so. He seems to have supposed that his "amended and special replication," was only a *special* replication in the case, and that his "general denial" was still his *general* plea therein, putting in issue all the material allegations of the second defense stated in defendant's answer. He in good faith intended that such should be the case, and with a few additional words in his reply such might have been the case.

Amendments may be made in the manner the plaintiff intended to amend his original reply. (*Fitzpatrick v. Gebhart*, 7 Kas. 35, 44; *Hill v. Supervisors*, 10 Ohio St. 621.) But the plaintiff by the omission of a few words failed to make the amendment he desired to make. Now, replies may sometimes be waived by the parties going to trial without them. (*Wilson v. Fuller*, 9 Kas. 177, 189, 190; *Russell v. Smith*, 14 Kas. 336.) A reply may sometimes be filed during the progress of the trial. (*Taylor v. Hosick*, 13 Kas. 518, 526; *Grant v. Pendery*, 15 Kas. 236.) Amendments may sometimes be made to pleadings during the progress of the trial, or even subsequent thereto, upon such terms as may be just. (Code, § 189.) Courts may sometimes commit substantial error by refusing to permit amendments to be made. (*Koons v. Price*, 40 Ind. 164.) And they

1. Amendment
to pleadings;
error to
refuse.

may even commit substantial error in some cases by refusing to permit amendments to be so made during the progress of the trial. (*Gaylord v. Stebbins*, 4 Kas. 42; *Hunt v. Fyffe*, McCahon, 75; *Stringer v. Davis*, 30 Cal. 318; *Schieffelin v. Whipple*, 10 Wis. 81, 82; *Bailey v. Kay*, 50 Barb. 110.) But when we examine the defendant's answer, the reason becomes still more apparent why the plaintiff should have been allowed to amend his reply. The plaintiff desired to amend his reply so that it would put in issue those allegations of the defendant's answer which declared that she was forced by her husband to execute said mortgage against her will. He wished to deny what she had already in one sense denied. He wished to deny that she had involuntarily executed the mortgage. She had already denied that she had executed it either voluntarily or involuntarily. This she did in the same defense in which the allegations are which the plaintiff wished to deny. But in verifying the first defense she *swore* substantially that she never executed said mortgage in any manner, either voluntarily or involuntarily. In the second defense she denies that "she ever executed *any mortgage-deed* to said plaintiff, either separately or conjointly with her husband." These allegations are inconsistent with the affirmative allegations of the answer; for it cannot be true that she executed a mortgage under duress which she never executed. The setting up of inconsistent defenses like these should never be encouraged. (*Buller v. Kaulback*, 8 Kas. 672, 673.) Under the circumstances of this case we think the court below should have allowed the plaintiff to amend his reply so that he could have litigated the question of duress upon its merits.

2. Inconsistent defenses.

The defendant claimed that her second defense was not merely a defense to the plaintiff's action, but that it also set forth a cause of action on her part by way of counterclaim, for which she asked affirmative relief. Said second defense was filed as a cross-petition, and the court below granted the affirmative relief which she asked. Now if said answer was what the defendant claimed it to be, and what the court below

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held that it was, then the plaintiff could not dismiss the whole action so as to commence again, for he could not dismiss the defendant's cross-petition, or counterclaim; (Code, § 398.) And the plaintiff should not have been required under the circumstances to take the chances as to whether said second defense stated a good affirmative cause of action on the part of the defendant or not. We think the amendment ought to have been allowed without costs.

We have assumed in this opinion that the second defense stated in the answer was sufficient, *as a defense*, to require a reply thereto, but we do not so decide. We simply express no opinion upon that subject. If it was not sufficient, ^{a. Cross-action, or petition: sufficiency.} then of course the judgment of the court below founded thereon cannot be sustained. As a cross-petition, setting forth an affirmative cause of action, a counterclaim, we think it was wholly insufficient. In such a case the cause of action must be set forth with the same particularity, completeness and exactness as it would be if it were set forth in a petition by a plaintiff. Viewed in this light, is said count sufficient? May a plaintiff allege in his petition that he never executed any mortgage, but if he did it was done under duress, and then ask the court to have it canceled and held null and void? We think not; and therefore we think that the second defense in defendant's answer is not sufficient to sustain the judgment rendered thereon. This might be otherwise if the judgment were attacked collaterally. But when attacked directly by a petition in error, as in this case, we do not think that the judgment can be sustained.

The plaintiff in error raises several other questions. For instance, he claims that the court below erred in permitting the defendant to introduce certain evidence of one R. M. Bradley, a witness for the defendant, which evidence reads as follows:

"By some means, one or more of the letters I wrote to her fell into the hands of Bacheller, who answered it in an insolent manner, stating that unless his wife should unite with him in such mortgage, she should leave his premises, as he intended

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to do as he pleased with his own family, and his own business. There were several other threatening declarations in the letter against his wife, all tending in the same direction. These letters were destroyed by me, together with some others of the same character. As Bacheller and his wife were still living together as man and wife, deponent supposed that they would continue to do so, and did not want said letters to be seen by others."

Now there is no evidence in the case that shows that Bradley ever saw Bacheller, or knew anything about his handwriting; and nothing to show how Bradley knew that the answer he received was written by Bacheller, or came from him. There is nothing in the record that shows that Bacheller's wife ever knew, till the day of the trial, that Bacheller ever wrote any such letter to Bradley, or that he ever wrote any letter of any kind. There is nothing to show when Bacheller wrote this letter, or that it had any reference whatever to the mortgage in controversy. There was some illegal testimony offered and ruled out that tended to show that it had reference to the Wright mortgage. The genuineness of the letter, or its relevancy to the case, was not in any manner proved or shown, except by the foregoing evidence of Bradley. Whether this evidence of Bradley was erroneously permitted to be introduced, it is now wholly unnecessary for us to decide.

If the issues had been properly made up, the court would have erred in striking from the plaintiff's evidence the defendant's acknowledgment appended to said mortgage; for in such a case the acknowledgment should have been considered for what it was worth. (Gen. Stat. 188, §26.)

The judgment of the court below in favor of the defendant in error and against the plaintiff in error will be reversed, and cause remanded for further proceedings in accordance with this opinion.

All the Justices concurring.

CHAMBERS BROS. & Co. v. THE KING WROUGHT-IRON BRIDGE
MANUFACTORY.

1. **VOID JUDGMENT; Collection May be Enjoined.** An action may be maintained to perpetually enjoin the enforcement of a void judgment [*McNeill v. Edie*, 24-110; *Meisell v. Kirkpatrick*, 28-315], where such judgment appears to be valid and regular upon its face; and this is especially true where the judgment is also unjust.
2. ——— Such an action may be maintained against any person who attempts to put such judgment in force, and who has apparent authority for so doing.
3. **JURISDICTION—Action to Enjoin.** The action may be maintained in any county in which an attempt is made (to the injury of the party seeking the relief) to put such judgment in force, although such judgment may have been rendered in another county.
4. ——— **Void Judgment.** A judgment rendered against any person, where the court has no jurisdiction of such person, is void. [*K. P. Rly. Co. v. Streeter*, 8-133; *Litowich v. Litowich*, 19-451.]
5. ——— A court can obtain jurisdiction of a person for the purpose of rendering a judgment against him, only by the service of process upon him (actual or constructive,) or by his voluntary appearance in the case.
6. **SERVICE ON CORPORATION; Agent, Clerk, Book-keeper.** A service of a summons on a person who keeps books for a corporation, but who is not the secretary or the clerk of the corporation, or any other officer or agent of the corporation upon whom a legal service may be made, is not a valid service upon the corporation. A service in such a case must be made upon the person who holds the office of secretary or clerk of the corporation. [*Brinkman v. Shaffer*, 23-528; *McNeill v. Kane, et al.*, 24-108.]
7. **SHERIFF'S RETURN—When May be Impeached.** A sheriff's return with respect to service of original process may be impeached, so far as it states facts upon which jurisdiction depends, where the facts stated do not come within the personal knowledge of the sheriff, but must be ascertained by him from inquiry. [*Martin v. Gray*, 19-458.]

Error from Shawnee District Court.

INJUNCTION, to restrain the collection of a judgment, brought by *The King Wrought-Iron Bridge Manufactory & Iron Works of Topeka*, against Chester Thomas, jr., as sheriff, and Wm. Chambers and four others as "*Chambers Bros. & Co.*" Trial at the June Term 1874. The district court found, as conclusions of law, that the judgment complained of was void,

Brief of Plaintiffs in Error.

and made a decree perpetually enjoining its collection. *Chambers Bros. & Co.* appeal, and bring the case here on error. All the material facts are given in the opinion.

Green & Foster, for plaintiffs in error:

1. The district court of Shawnee county has no jurisdiction to enjoin an execution issuing from the district court of Leavenworth county, on a judgment rendered therein, on account of any irregularities in obtaining the judgment, or defect of jurisdiction. 22 Wis. 482; 14 How. (U. S.) 584; 2 Edw. Ch. 289; 5 Sandf. 612; 16 How. Pr. 244; 2 Paige, 26; Hilliard on Inj. 180, § 4.

2. A court of equity will not enjoin an execution on a judgment at law, even though it may be void because of service on the wrong person; and more especially if the party against whom it is rendered, having notice of the action, neglects to take any steps to prevent the rendition of such judgment. High on Inj. §§ 89, 99, 181; 7 Wis. 595; 21 Cal. 438; 1 Beasley, 181; 26 Geo. 485; 17 How. (U. S.) 443; 9 Leigh, 478.

8. In an injunction suit to restrain the collection of a judgment claimed to be void because of the falsity of a sheriff's return, the testimony of a single witness ought not to be deemed sufficient to justify the allowance of the injunction, if it should be allowed at all, which we deny. Plaintiffs in error allege in their answer in the suit below, that Johnson (the person on whom service was had,) was the secretary of the defendant in error, duly authorized, etc. And in its reply, defendant in error says he was its book-keeper, etc. By his testimony Johnson himself shows that he was a clerk, or book-keeper, performing the duties of the secretary. Hence we claim, that service on such clerk or book-keeper is a good service on the corporation; and that the reply not being verified, the allegations in the answer in reference to Johnson's being the secretary of defendant in error must be taken as true, (§108 of the code,) and that the court erred in admit-

ting the testimony of Johnson that he was not such secretary.

Alfred Ennis, and *C. M. Foster*, for defendant in error:

1. If this action can be maintained it was properly brought in Shawnee county. *Clay v. Hoysradt*, 8 Kas. 74. The district court of Shawnee county had jurisdiction: 15 Iowa, 171; 17 Iowa, 131.

2. Johnson was not a person on whom service of summons could be made under § 68 of the civil code: Law Rep. 149; 16 M. & W. 438. And the return of the sheriff being false, the execution may be enjoined. High on Inj. § 126; 11 Humphrey, 523.

3. The proof shows that the plaintiffs in error had no cause of action against the defendant in error, and for that reason there is nothing inequitable in enjoining the execution when there is no legal service. The judgment was valid on its face, and for that reason the authorities cited by the plaintiffs in error to the effect that equity will not enjoin "a void judgment," (meaning judgments void on their face,) are inapplicable. The reason for this doctrine in many of the states is, that a motion could be made to set aside the judgment, and the judge at chambers would have the power to stay execution; but under our code execution can only be stayed by injunction, or by order of the judge pending a motion for a new trial. But in the present case the defendant in error had no occasion to ask for a new trial. Its objection was to the jurisdiction of the court to try the case at all. The fact that Johnson notified the officers of the company, cuts no figure in the case. The service of the summons was wholly unauthorized and illegal, and the defendant was under no legal or moral obligation to pursue any particular line of conduct. It owed no duty to plaintiffs in error, and they have no cause of complaint against defendant in error for waiting until judgment was rendered. They cannot complain that defendant in error did not go to a distant county to make a motion to set aside the service, or

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to let its property be sold and then sue the sheriff for false return.

4. It is not admitted by the pleadings that Johnson was secretary of defendant in error. The petition alleges that no service was made on defendant in error, or any officer on which by law service could be made, and that service was not made in any manner prescribed by law. That was an affirmative fact alleged by defendant in error, and necessary to be proved by it in order to recover. The answer of defendant sets up a state of facts inconsistent with and contradictory to the facts set forth in the petition. It was not a confession and a avoidance, and therefore not new matter; and therefore that part of the answer needed no reply. 8 Kas. 370.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought for the purpose of perpetually enjoining the enforcement of a judgment claimed to be unjust and void. The facts necessary to be considered in this case are substantially as follows: On the 10th of July 1878, plaintiffs in error, Chambers Bros. & Co., commenced an action against defendant in error in the district court of Leavenworth county. Summons was duly issued therein, and delivered to the sheriff of that county for service. The sheriff afterward returned the summons with the following indorsements thereon, to-wit:

"I received this summons on the 10th of July 1873 at 3 o'clock P. M.; and I served the same summons in my county of Leavenworth, Kansas, on the within-named defendant, The King Wrought-Iron Bridge Manufactory and Iron Works of Topeka, Kansas, by delivering to Walter F. Johnson, the clerk and secretary of said defendant, personally, a copy of the written summons on this 10th of July 1878. I so served said summons as aforesaid upon said clerk or secretary, being unable to find, in the county of Leavenworth, Kansas, the president, chairman of the board of directors or trustees, or other chief officer of said defendant. T. L., Sheriff," &c.

The statute provides that "A summons against a corporation may be served upon the president, mayor, chairman of
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the board of directors or trustees, or other chief officer; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent," etc. (Civil code, § 68.) The only objection to said service is, that said Walter F. Johnson was not clerk, or secretary, or any other officer, or agent, of the defendant, upon whom service of summons could be legally made. The defendant, which we shall designate as the "bridge company," made no appearance in the case. Afterward, and on September 1st 1873, the district court of Leavenworth county rendered a judgment in favor of the plaintiff and against the defendant, the bridge company, for the sum of \$1,189.68. Another objection to this judgment is, that there was nothing due from the defendant to the plaintiff. Afterward, an execution was issued on said judgment by the clerk of the district court of Leavenworth county, and placed in the hands of the sheriff of Shawnee county for collection. Said sheriff immediately caused said execution to be docketed in the office of the clerk of the district court of Shawnee county, and then by virtue thereof levied on the property of the bridge company, greatly to its injury. The bridge company then commenced this action in the district court of Shawnee county against the sheriff of said Shawnee county, and against said Chambers Bros. & Co., the parties who obtained said judgment, to perpetually enjoin the enforcement of said judgment. A trial was had in the case in the district court of Shawnee county, and the court found in favor of the bridge company, and against Chambers Bros. & Co., and rendered a judgment perpetually enjoining the enforcement of said judgment. It was shown on the trial of the case that the present defendant in error, the bridge company, was a corporation at the time of said service of summons, doing business in the city of Topeka, Shawnee county; that said Walter F. Johnson was a book-keeper in their employ; that he was not the secretary, or clerk of the corporation, or any general agent thereof; in fact, that he held no position in the company, or from the company, except that he merely kept books, under the secre-

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tary, as aforesaid; that he went to the city of Leavenworth, in Leavenworth county, to attend court as a witness in a bankruptcy case; that while there he was served with summons in said case as aforesaid; and when he returned from Leavenworth to Topeka, which was on the same day that he was summoned, he immediately told the officers of the bridge company that he had been so served with summons. It also appears that the debt claimed to be due to Chambers Bros. & Co., on which said judgment was rendered, was not the debt of the bridge company which is a party in this case, but it was a debt due from an entirely different corporation, a bridge company doing business at the city of Iola, Allen county. The said judgment and said execution, with all the proceedings connected therewith, appear to be regular and valid upon their face. With this statement of the facts we shall now proceed to decide the questions of law involved in the case.

I. An action may be maintained to perpetually enjoin the enforcement of a void judgment, where such judgment appears to be valid and regular upon its face; and this is especially true where the judgment is also unjust. *Caruthers v. Hartsfield*, 8 Yerger, 366; *Ridgeway v. The Bank of Tennessee*, 11 Humphrey, 528; *Crafts v. Dexter*, 8 Ala. 767. There are decisions apparently adverse to the above proposition; but generally such decisions are in cases which differ from this. They are generally in cases where the judgment is not void, but only voidable, or where it would be inequitable for the courts to interfere, or where a party has negligently slept upon his rights, or has some other plain and adequate remedy, or where the judgment itself is incurably void upon its face.

II. Such an action may be maintained against any person who attempts to put such judgment in force, and who has apparent authority for so doing.

III. The action may be maintained in any county in which an attempt is made (to the injury of the party seeking the relief) to put such judgment in force, although such judgment may have been rendered in another county.

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IV. A judgment rendered against any person, where the court has no jurisdiction of such person, is void.

V. A court can obtain jurisdiction of a person for the purpose of rendering a judgment against him, only by the service of process upon him (actually or constructively,) or by his voluntary appearance in the case.

VI. A service of a summons on a person who keeps books for a corporation, but who is not the secretary, or the clerk of the corporation, or any other officer or agent of the corporation upon whom a legal service may be made, is not a valid service upon the corporation. It is true, a book-keeper is in one sense a clerk. Any person who performs clerical duties is in one sense a clerk. But the service of a summons on a corporation cannot be made on every person who may in some remote sense be styled a clerk of the corporation. It could not be made on a deputy or under-clerk. It must be made on *the clerk*, the principal clerk of the corporation, if made on a clerk at all. It must be made upon the person *who holds the office* of clerk, or secretary, as the case may be. In proper cases a service on the person who holds the office of clerk or secretary of the corporation would be a good service, although such person might not in fact perform any of the clerical duties for the corporation. For instance, if the service had been made on Haywood, *the secretary* of the corporation in this case, instead of on Johnson, *a book-keeper*, the service would have been a valid service, whether Haywood performs any of the clerical duties or not. As the service was void however, everything following the service was also void.

VII. A sheriff's return with respect to service of original process may be impeached so far as it states facts upon which jurisdiction depends, where the facts stated do not come within the personal knowledge of the sheriff, but must be ascertained by him from inquiry. (*Bond v. Wilson*, 8 Kas. 228; *Starkweather v. Morgan*, 15 Kas. 274.)

The judgment of the court below enjoining said judgment will be affirmed.

All the Justices concurring.

FRANCIS RAHM V. KING WROUGHT-IRON BRIDGE MANUFACTORY
OF TOPEKA.

1. **MANAGING OFFICERS OF CORPORATION; No Power to Bind Corporation to Pay Debts of Another Person.** The vice president and secretary of a manufacturing corporation, although the active managers of the business of the corporation, superintending the erection of its buildings, making its contracts, and signing its drafts, checks and notes, have not by virtue thereof authority to bind the corporation by a promise to pay the debts of another and distinct corporation.
2. ——— Where one corporation buys a portion of the assets of another corporation, and in consideration thereof agrees to assume and pay certain specific debts of the latter, those creditors whose debts are thus assumed can maintain their actions directly against the former, but the other creditors cannot, even though a portion of the indebtedness thus assumed is fictitious.
3. **NEGOTIABLE PAPER; Indorsement—Maturity; Pleading; Issue; Defense.** Where the indorsement of a note is in blank, and without date, and the allegation of the petition that it was indorsed before due is denied in the answer, and there is no evidence as to the date of the indorsement, any defense good against the payer must also be held good against the indorser and holder. [Overruled on rehearing, *post*, 530.]

Error from Shawnee District Court.

ACTION by *Rahm* as plaintiff on two promissory notes, one for \$4,915.57, the other for \$5,561.57. The notes were dated "Nov. 9th 1872," payable at four and five months respectively. The petition alleged that they were endorsed to plaintiff before maturity. The defendant, the *Bridge Manufactory of Topeka*, answered, *first*, a general denial; *second*, special denials, that it ever executed the notes sued on; that it ever authorized or empowered T. B. Mills and B. M. Smith, or either of them to execute and deliver said notes; that said Mills and Smith or either of them ever had authority from it to execute and deliver said notes; that said notes were ever in good faith in-

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dorsed to plaintiff for a valuable consideration—and alleging, that said notes were executed and delivered without any consideration therefor to defendant, which fact was well known to plaintiff at and before the time of the alleged transfer of the said notes to him; *third*, an averment that said notes were executed and delivered by said Mills and Smith (whose names are signed thereto) to Coleman, Rahm & Co., in settlement of a debt due to the said Coleman, Rahm & Co., from the “King Wrought-Iron Bridge Manufactory and Iron Works of Iola;” that the defendant in error was in no manner liable for the payment of said debt, nor did the payment or settlement of the same in any manner pertain to the business of the defendant; that at the time of the execution and delivery of said notes plaintiff was a member of the firm of Coleman, Rahm & Co., and had full knowledge of all the facts herein stated at and before the time of the alleged transfer of said notes to him. The second defense was verified by affidavit. The reply of plaintiff was a general denial. Trial at the June Term 1874, and judgment for the defendant. The plaintiff brings the case here on error. The material facts are stated in the opinion.

Thacher & Stephens, for plaintiff:

1. We claim that by the by-laws of defendant company, which defendant introduced in evidence, the vice-president had power to execute the notes. They provide that the president shall “execute all contracts, deeds, certificates of stock, and other instruments of writing necessary for the transaction of the business of the company when properly authorized so to do by the board of directors, as hereinafter provided;” and that in the absence of the president the vice-president shall perform his duties; also, that the secretary shall countersign instruments in writing when signed in accordance with said by-laws. The note in this case is attested by the secretary, which is an official declaration by the company that the power if required had been conferred. Said by-laws also provide for an executive

Brief of Plaintiff.

committee whose business it shall be to have advisory supervision of the business of the company, and who shall have all the authority of the board of directors in cases of emergency requiring immediate action, and which cannot await the time necessarily elapsing before a regular or called meeting of the board. We submit that in these provisions alone is ample power to make the notes in suit. As to what are cases of emergency, the by-laws do not provide, and therefore the matter is left to be determined by the executive committee.

That there is a further provision for the ratification of their action by the board of directors, is immaterial, for the attestation of the secretary is an affirmation that all these acts have been complied with; and the plaintiff being a purchaser in good faith, the defendants should not now be heard to deny it. 14 Wallace, 283. Defendant's by-laws also provide that "the treasurer shall pay all checks, drafts or orders presented to him for payment when properly executed by the president or vice-president and countersigned by the secretary." And this company held out to the world by their acquiescence in the acts of Mills, that he was authorized to do these acts. They allowed him to transact the whole business of the corporation as general manager. In fact, he and Smith were nearly the whole operators of the concern. Mills, the vice-president and acting president, signed checks, drafts, and promissory notes to various parties.

There is another view which we wish to present to the court: It appears by the testimony of both Mills and Smith that the Iola company had large assets. That Mills and Smith were the managers of that company, and that the assets of that company, except its realty and including the good will of trade, were carried to the Topeka company. That in consideration of such transfer the Topeka company assumed a large amount of real indebtedness, and about \$50,000 of fictitious indebtedness. This fictitious indebtedness went to Ennis, Adams, &c., who now object to the payment of the honest debt of the Iola company, the avails of which passed to the Topeka

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company, for if it did not all pass in iron, it must have passed in other assets. Now in equity the firm of Coleman, Rahm & Co. could pursue these assets. *Booth v. Bruce*, 32 N. Y. 139. Mills and Smith so far were the principal parties interested. They knew where the assets of the Iola company had gone, and the equities of Coleman, Rahm & Co.

They gave the notes of the new company now in suit, and the Adams draft, and Coleman, Rahm & Co. discharged the debt of the Iola company, which company was in fact merged in the Topeka company. The whole matter was one transaction. The Topeka company paid the draft, thus ratifying the transaction and sanctioning the act of Mills, and the company are now estopped from denying it. (Story on Agency, § 242; 22 N. Y. 264; 19 N. Y. 218.)

2. The court erred in admitting the books of the defendant to be read in evidence as offered by defendant. They were incompetent, and hearsay testimony only. (18 Wall. 541.) By admitting the books to be read, the court asserted that they were competent and proper evidence to be considered, and there is a high degree of probability that they were accepted by the court as conclusive evidence upon the question in controversy. Code, § 387.

Alfred Ennis, and C. M. Foster, for defendant:

The notes sued on do not of themselves purport to be the notes of the defendant. These notes are not of themselves evidence of indebtedness owing by defendant. They do not of themselves contain a promise to pay by defendant, nor do they purport to be signed by the defendant. The plaintiff claims that the notes were *intended* to be the notes of the defendant. This fact was attempted to be shown by extrinsic evidence. Defendant insists that if the notes do not purport to be the obligations of defendant, and are not of themselves such obligations, then they cannot be made such by extrinsic

Brief of Defendant.

facts. (6 Kas. 27.) It is an uncontroverted fact, that the notes are written upon *letter paper*, which letter paper had a printed heading; and that the words "King Iron-Bridge Manufactory and Iron Works," at the top of the notes, is such printed letter-head, and nothing more. Hence the same is no part of the notes.

The evidence shows that the defendant is a private manufacturing corporation, organized for the sole purpose of manufacturing bridges; that the notes were signed and delivered for a debt of the Iola Bridge Company, for the payment of which debt the defendant was in no manner liable, nor did the settlement or payment of such debt in any manner pertain to the business of the defendant; that defendant received no consideration for the notes sued on; that Rahm, the plaintiff, a member of the firm of "Coleman, Rahm & Co.," was present at the time the notes were signed and delivered, and had full knowledge of all the facts; and that the defendant in error had no knowledge of the existence of the notes sued on at the time of the payment of the draft of \$4,924.48.

A private corporation can make no valid or binding contract except such as relates to the business and objects of the corporation. Gen. Stat. 187, §26; 33 Ind. 185; 21 Howard, 441; 13 N. Y. 309; 22 N. Y. 258; 18 Peters, 519. The assuming of a debt owing by a third party is not in the usual course of business, nor within the ordinary powers of a private corporation. 34 Vt. 144; 43 Geo. 187.

Officers of a private corporation are special and not general agents of the corporation, and consequently have no power to bind the corporation except within the limits prescribed by its charter and the by-laws; and persons dealing with such officers are charged with notice of the authority conferred upon them, and of the limitations and restrictions upon the powers of such officers by the charter and by-laws. 52 Barb. 399; 22 Wis. 194; 38 Cal. 590; 6 Blatch. 189; 2 Sweeney, (N. Y.) 415; 40 How. Pr. Rep. 340; 15 How. Pr. Rep. 428; 20 N. Y. 312.

The opinion of the court was delivered by

BREWER, J.: Plaintiff in error, plaintiff below, brought his action upon two promissory notes. The case was tried by the district court without a jury. No special findings of fact were made, but only a general finding for defendant.

But a single question really is presented, and that is, whether upon the testimony the plaintiff was entitled to a judgment. For, while counsel speak of error in the admission of certain books of the defendant, yet, as not a line out of the books was read in evidence, and no reference made to them after their admission, it seems hardly necessary to inquire whether the court ruled correctly in admitting them. Upon the facts then, was the plaintiff entitled to judgment? And the question, it must be remembered, is, not whether upon the testimony a judgment in favor of the plaintiff could be sustained, but whether upon that testimony the judgment must have been for him. In other words, cannot the finding in favor of the defendant be sustained? Turning to the record, these things appear: One note was as follows—and the other was in form similar:

King Iron-Bridge Manufactory and Iron Works,
\$4,915.57. TOPEKA, Nov. 9th, 1872.

Four months after date, we promise to pay to the order of A. J. Baker, forty-nine hundred and fifteen and 57-100 dollars, for value received, without defalcation.

T. B. MILLS, V. P.

B. M. SMITH, Sec'y K. B. Co.

Indorsed: "A. J. Baker," "Coleman, Rahm & Co."

The president of the company during the fall of 1872 was Zenas King, who was absent from the state. Messrs. Mills and Smith were respectively vice-president and secretary, and apparently the active managers of the affairs of the corporation, superintending the construction of the buildings, making contracts, signing notes, drafts and checks. The "Iola Bridge Company," a corporation located and doing business in Iola, had been engaged in the same business as the Topeka Bridge

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Company (defendant herein) was purposing to engage in, and for which buildings were being erected and other preparations made. The debt for which these notes were given was a debt due from the Iola Bridge Co. to Coleman, Rahm & Co. for iron. T. B. Mills, the vice-president of the Topeka Bridge Co., was president of the Iola company. The Topeka Bridge Co. bought of the Iola company all its assets, except the real estate, and in consideration thereof assumed the payment of certain specific indebtedness. These notes were not a part of the indebtedness thus assumed, although the draft hereinafter referred to was. These notes were taken by Mr. Rahm, of Coleman, Rahm & Co., who was at Topeka to settle the claim against the Iola company, and he took these notes in payment. They were drawn to the order of A. J. Baker, to enable him to endorse them, as at his instance in the first place the debt was created. Whether "Francis Rahm," the plaintiff, is the "Mr. Rahm" of Coleman, Rahm & Co., does not appear. Neither was there any evidence to show when the notes were endorsed to plaintiff. The indebtedness of the Iola company to Coleman, Rahm & Co. was nearly \$5,000 in excess of the amount of these notes. For this amount, at the same time, a ninety-day draft was drawn on Daniel M. Adams, who at that time had no official connection with the defendant, but who some sixty days thereafter, and before the maturity of the draft, became its vice-president and treasurer. Adams paid the draft, and was credited with the amount in his settlement with the company as its treasurer. There was nothing upon the face of the draft to show on whose account it was drawn. It was signed "T. B. Mills, President," and directed to "Daniel M. Adams, Topeka, Kansas." Mr. Mills was, as we have seen, president of the Iola company. He testified in his deposition that it was drawn by him as vice-president of the Topeka company. There was testimony tending to show that some \$45,000 of the indebtedness of the Iola company assumed by the Topeka company was fictitious, and running to the officers of the Topeka company. No express authority from the board of directors to Messrs. Mills and Smith to execute these notes was

Statement
of facts.

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shown, and no formal ratification of the act. The testimony is conflicting as to whether any knowledge of the transaction was communicated to or possessed by the directors or any of them until the presentation of the first note for payment.

This comprises, we think, all the material portions of the testimony; and upon this we remark, in support of the ruling of the district court, that Messrs. Mills and Smith had no authority from the company to bind it to the payment of the debts of another and different corporation. Even

1. Powers of managing officers of corporations.

if it were conceded that they had all the powers of general managers, still those powers did not extend to the assumption of another company's debts. Though they might bind the corporation to any debt within the scope of its ordinary business, yet beyond that they were powerless. Again, while under the contract between the Iola company and the

2. Assumption of debts. Creditors.

Topeka company by which the latter purchased a part of the assets of the former under an agreement to pay therefor certain of its debts, those creditors whose debts were thus assumed might maintain an action against the Topeka company directly, yet none of the other creditors of the Iola company could. And it matters not that a portion of the indebtedness that the Topeka company assumed to pay was fictitious. Whatever effect that might have upon the validity of the sale, as against the creditors of the Iola company, or upon garnishee proceedings instituted by such creditors, yet it does not give the right to such creditors to jump over the Iola company and institute an action directly against the Topeka company. And thirdly, as there is no evidence of the time of the indorsements, or that they were made before the maturity of the notes, and this fact is put in issue by the

3. Transfer of note—before, and after maturity.

pleadings, the exact facts in reference to the giving of the notes may be shown in evidence, and are as competent for a defense to an action by this plaintiff as to one by the payee. It seems scarcely necessary to enlarge upon these propositions. They are sufficient to support the judgment. We do not wish to be understood as saying that there was no testimony upon which, if uncontradicted, or un-

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qualified, a judgment in favor of the plaintiff could have been supported; but we do hold, that upon the facts as above stated there is enough to uphold the judgment for the defendant, and it must be affirmed.

All the Justices concurring.

CHARLES E. BRIGGS v. D. S. TYE.

1. DEFENSE; DEMURRER; PRACTICE; *When Error Becomes Immaterial*. Where the court sustains a demurrer to the defendant's answer, and the defendant afterward amends his answer, setting forth therein all that he had previously set forth and more too, and then goes to trial upon his amended answer, it is immaterial whether the court erred or not in sustaining the demurrer. [*Moore v. Wade*, 8-380; *Cannon v. Kreipe*, 14-324; *Rosa v. M. K. & T. Rly. Co.*, 18-124.]
2. SHERIFF'S DEED—*When Prima Facie Void*. When a sheriff's deed, executed December 26th 1865, founded upon a judgment of a justice of the peace, and upon an execution issued by the clerk of the district court, recites among other things the rendition of said judgment, and that the judgment-creditor afterward "sued out of the clerk's office of the 4th judicial district an execution on the said judgment," without stating or reciting that a transcript of such judgment had ever been filed in the office of the clerk of the district court, as provided by statute, held, that such sheriff's deed is not of itself, and without other evidence, *prima facie* evidence of its own validity, or of title in the grantee. [*Koehler v. Ball*, 2-160; *Challiss v. Wise*, 2-194; *White-Crow v. White-Wing*, 3-276; *N. E. M. S. Co. v. Smith*, 25-624.]
3. JURISDICTION; *Judgment, When Void*. A judgment rendered by a justice of the peace against the defendant in the action four days before the return-day of the summons, and four days before the defendant is notified to appear, is void.

Error from Allen District Court.

ACTION brought by Tye as plaintiff on the following promissory note:

\$600.00.

IOLA, KANSAS, Dec. 6th, 1870.

On or before the 1st day of July, 1871, I promise to pay James Faulkner, or order, the sum of \$600, for value received,

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bearing interest at the rate of ten per cent. per annum from date until paid.

CHARLES E. BRIGGS.

Briggs paid \$100 on said note to Faulkner, which was indorsed May 7th 1871, after which Faulkner transferred the note to *Tye*. The defense was, alleged failure of consideration, as to which both the pleadings and the facts are fully stated in the opinion. Trial in the district court at the November Term 1874. A jury was impaneled and sworn, and testimony was offered by defendant *Briggs* (on whom was the burden of proof) in support of his defense. When defendant rested, plaintiff demurred to the evidence. The court sustained the demurrer, discharged the jury, and gave judgment in favor of the plaintiff for the amount due on the note, and costs of suit. *Briggs* brings the case here on error.

Cates & Keplinger, for plaintiff in error:

1. The court erred in sustaining the demurrer to the third defense set up in *Briggs'* original answer. The question presented by the demurrer is this: Is a grantee in a deed, with covenants of title, executed by an agent, entitled to recover the purchase-money paid to the agent and not yet paid over to the principal, in a case where there has been failure of title and eviction? That he may recover, see *Story on Agency*, §§ 300, 301, and notes.

2. The court erred in refusing to permit the sheriff's deed mentioned in the bill of exceptions to be offered in evidence. The pleadings and evidence show the consideration of the note sued on was a conveyance from Gilbreath, through Faulkner the payee of the note, to plaintiff in error of certain real estate. The deed offered shows a prior sheriff's sale of the same real estate to the paramount claimant on an execution against Gilbreath issued on a justice's judgment. The objection that the deed does not show on its face that the justice's judgment had been filed in the district court is not well taken. (Code of 1859, Comp. Laws of 1862, ch. 26, § 513.) The sheriff com-

plied literally with the law, and when he came to make the deed he complied to the letter with the law which prescribes what the deed shall contain; (code of 1859, § 450.) The law points out five distinct matters which a deed shall contain. None of these have been omitted. What authority is there for holding additional recitals to be necessary?

It is further urged that the deed is void because it does not show from *which county* in the "4th judicial district" the execution issued. The deed recites that "Hull recovered a judgment against Gilbreath before Rhoades, a justice of the peace in and for *Allen county*, on the 10th of July 1860;" and that "on the 14th of April 1863 said Hull sued out of the clerk's office of the 4th judicial district court an execution on said judgment, directed to the sheriff of *Allen county*." The clerk of the *Allen county* district court was the only clerk in the 4th district who could lawfully have issued this execution. It will not be presumed that any clerk acted unlawfully. It will also be presumed that the writ issued from the proper clerk, otherwise the sheriff would have not received it. It will be presumed officers acted lawfully until the contrary appears. 14 Cal. 117. And the recital in the deed as to confirmation of the sale, is equivalent to a recital that the execution did issue from the proper clerk, and that the judgment was filed in the district court. *Buchanan v. Tracy*, 14 Mo. 438.

8. The records offered in evidence and ruled out by the court, showing the judgment before the justice, its filing in the district court, the execution, sale, and journal entry of confirmation, show the sheriff's grantee has a complete equitable title, and that she is entitled to demand of the sheriff a deed which is regular and valid. (Code of 1859, § 449; *Smith v. Myers*, 46 Mo. 440.) But it is urged that all these proceedings are invalid because of defects in the constable's return on the summons issued by the justice. Such an objection as that will not be allowed to prevail, though, in a collateral proceeding, overthrowing a final judgment.

W. A. Johnson, for defendant in error:

1. Briggs in his answer admitted the execution and delivery of the note; but as a third defense he alleges that said note was given as part consideration for the purchase of a certain tract of land, and that his title failed. To the defense plaintiff demurred, and the court sustained the demurrer. If the court did err in sustaining the demurrer, Briggs has suffered no prejudice on account of such error, for before the trial the court permitted him to file an amended answer, in which the same facts were more fully stated than in the original answer, and he had the benefit of the same defense on the trial.

2. The sheriff's deed is absolutely void on its face, and was properly rejected. (Rover on Jud. Sales, §§ 463, 464; 33 Cal. 45.) There are certain recitals requisite to the validity of a sheriff's deed. The deed must recite sufficient to show that the sheriff had authority to sell—and here the deed was fatally silent.

The record shows that on the 9th of July 1860 the justice issued a summons in the case of "Hull against Gilbreath," returnable the 14th of July, and that on the 10th, (four days before the return-day,) defendant Gilbreath did not appear, but the demand appearing just, the justice rendered judgment; and it is on a pretended sale under this judgment that it is now claimed that Gilbreath's title to the land was divested. There was no error in rejecting said deed, and said transcript.

The opinion of the court was delivered by

VALENTINE, J.: This was an action on a promissory note. Charles E. Briggs was the maker thereof, and James Faulkner was the payee. Faulkner assigned the note to D. S. Tye, and Tye commenced this action against Briggs to recover the amount thereof. Briggs answered, setting up three defenses. The plaintiff Tye demurred to the third defense, and the court below sustained the demurrer. This is the first ruling

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of the court below assigned for error. Whether such ruling was erroneous or not, it is now wholly unnecessary to determine; for after said ruling was made the defendant amended his answer, setting forth therein all that he had previously set forth in the defense demurred to, and much more, and then went to trial upon the facts as alleged in his amended answer. Under this amended answer he could prove all that he had a right to prove under his original answer, and more too. Therefore any error that the court may have committed by sustaining said demurrer was rendered wholly immaterial by these subsequent proceedings.

1. Error, when immaterial.

The defendant set forth in his answer and amended answer substantially the following as the facts: Sarah L. Larimer owned a certain piece of land, but James L. Gilbreath and Mary Ann Gilbreath pretended to own the same. Said Tye and Faulkner acted as the agents of said Gilbreaths in procuring a sale of said land. And although they knew that Gilbreaths had no title to said land, still they induced the defendant Briggs to purchase the same. Briggs, in consideration for said land and another piece of land, paid to said agents \$700 in cash, and gave to them said promissory note. Faulkner then, in consideration for said cash and note, and as attorney-in-fact for said Gilbreaths, executed to Briggs a general warranty deed for said land—said deed containing all the usual covenants. Said agents however transcended their authority by inserting said covenants. Afterward said Larimer evicted the defendant from said land. Said agents still retain the money paid to them by the defendant, not having paid any portion thereof to their principals. The said Gilbreaths are non-residents of the state of Kansas, and are wholly insolvent. The defendant has been damaged to the amount of \$1,000 by said transactions, for which amount he asks judgment. He also asks to have said note canceled, etc. The plaintiff replied to this answer by filing a general denial. The action was then tried before the court and a jury. Under the pleadings the burden of proof rested upon the defendant. He offered first to introduce a

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sheriff's deed for the purpose of showing that the title to said land had been transferred by said sheriff's deed from s. Sheriff's deed, when prima facie void. said Gilbreaths to said Sarah L. Larimer prior to the time when he purchased said land from Gilbreaths' agents. The plaintiff objected, and the court sustained the objection. This is the second ruling of the court below assigned for error. Said sheriff's deed reads as follows:

"KNOW ALL MEN by these presents that, whereas, Horace Hull recovered a judgment before Lyman E. Rhoades, a justice of the peace within and for the county of Allen, on the 10th of July 1860, against J. L. Gilbreath for the sum of \$30.19 debt, and \$3.60 costs of suit, and whereas the said Horace Hull afterward on the 14th of April 1863 sued out of the clerk's office of the 4th judicial district an execution on the said judgment bearing date the 14th of April 1863 and directed to the sheriff of said Allen county commanding him," etc., etc.

This deed is defective in not showing that a transcript of the judgment rendered by justice Rhoades *was ever filed in the office of the clerk of the district court* in and for Allen county, and in not showing that the execution was issued by the *clerk of the district court in and for Allen county*. At the time said execution was issued there were about eight clerks of the district court of the "4th judicial district." There was one for each county. The first-mentioned defect is

Presumptions.

more material, as we think, than the second. It is possible that presumptions might aid the second, but we can hardly think they could sufficiently aid the first. We do not wish however to decide that said first-mentioned defect necessarily renders the deed void. But we do think that it destroys the *prima facie* validity of the deed. That is, it renders the deed apparently void. Such a deed is not *prima facie* evidence of title in the grantee. And if in any case such a deed should be held to be valid, or any evidence of title in the grantee, other evidence than the deed itself must first be introduced to show that the proceedings upon which the deed is founded, and which the deed itself fails to show, were in fact regular and valid. The

Evidence to sustain deed.

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plaintiff in error claims that said deed contains all that the law requires that it should contain. We think differently however. The statute among other things requires that the deed "shall recite the execution or executions, or the substance thereof." (Comp. Laws, 200, § 450.) And we think that the execution should contain all the above-mentioned things which this deed omits. The execution should show upon its face that it was regularly issued, that it was issued by the proper officer, that it was issued by an officer having authority to issue it; and therefore we think it should show in this case, upon its face, that the transcript of the justice's judgment was duly filed in the office of the clerk of the district court before the execution was issued. The statute does not pretend to designate everything that shall be inserted in an execution, or in a sheriff's deed; and therefore, in the absence of statutory provisions we should think upon general principles enough should be stated in the execution or in the sheriff's deed to show *prima facie* that all the necessary proceedings to make such instrument valid were in fact had. It will hardly be presumed in the absence of all evidence that something was done which the instrument itself does not even intimate was done. The filing of the transcript of a justice's judgment is purely the act of the judgment-creditor himself. The issuing of an execution on the same is purely a ministerial act of the clerk. The clerk does not judicially determine that the transcript was filed. No judicial determination is held upon the subject. Even a decision of the court upon a confirmation of a sheriff's sale is no judicial determination of that question. (*Koehler v. Ball*, 2 Kas. 160, 172; *Challiss v. Wise*, 2 Kas. 194; *White-Crow v. White-Wing*, 8 Kas. 276.) The fact of the filing of the transcript of the justice's judgment is left to be proved *prima facie* by the sheriff's deed. But if the sheriff's deed does not show it, then it must be proved by other evidence. And until it is proved it cannot be presumed that any proceeding depending thereon is valid. Until such fact is proved it would be proper to exclude the deed as

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evidence. For if such transcript had never been filed, of course the deed would be void.

Afterward the defendant offered to introduce the justice's judgment, with all the proceedings connected therewith; the execution, and all the proceedings connected therewith, and evidence tending to show that a transcript of the justice's judgment had been duly filed with the clerk of the district court of Allen county before said execution was issued; but the plaintiff objected, and the court below sustained the objection. This ruling is also covered by the second assignment of error. The execution is about as defective as the sheriff's deed. It does not show that any transcript of the justice's judgment was ever filed in the office of the clerk of the district court. But even if the execution were perfectly formal, still the judgment itself is defective, and apparently void. The transcript thereof shows that the action was commenced on July 9th 1860; that the summons was issued on that day, made returnable July 14th, and requiring the defendant J. L. Gilbreath to appear and answer on July 14th, at 1 o'clock p. m. The summons was received by the constable on July 10th, was served by leaving a copy thereof at the defendant's residence on the same day, and was returned on July 14th. The transcript also shows that the judgment was rendered on July 10th. Whether this was before or after the justice handed the summons to the constable, is not shown. Whether it was before or after the summons was served on the defendant by leaving a copy thereof at his residence, is not shown. But it was, in any case, just four days before the justice had any jurisdiction to render any judgment against the defendant. (*Sagendorph v. Shult*, 41 Barb. 102.) The execution also shows that the judgment was rendered on July 10th 1860, and so does the sheriff's deed, and there is nothing in the record tending to show that the judgment was rendered at any other time. It does not appear that the defendant ever made any appearance in the case, either on July 10th, or July 14th, or on any other day. But it does appear affirmatively that he did not make any appear

3. Jurisdiction;
proceedings
before justice;
judgment.

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ance on July 10th, or at the time when the judgment was rendered. If this judgment was rendered on July 10th, (and the evidence unquestionably shows that it was,) it is of course void, and the court below did not err in refusing to receive it in evidence. For the reasons, if any are thought to be necessary, showing that such a judgment is void, we would refer to the case of *Sagendorph v. Shult*, supra.

The judgment of the court below is affirmed.

All the Justices concurring.

HENRY C. MALLORY V. JAMES M. BERRY.

1. **EXEMPTION LAW; When Unbroken Steer is Exempt.** Under the 5th clause of § 3 of the exemption statute of this state, which exempts "one yoke of oxen, and one horse or mule," one who is engaged in farming, and who is the head of a family, and who owns but one horse, may claim as exempt a steer which is only twenty months old, and which has never been worked or broke to work, when it appears that he contracted for two steers (this one and another) with the intention of breaking and working them together, and that he did, within a few days after the seizure and replevy thereof, actually yoke and work them together, and continued to so use them, although it also appears that he had at the time of the seizure paid for and received possession of only this one.
2. ——— **Act to be Liberally Construed.** Under the liberal construction to be given to exemption statutes, it would seem that by this statute a steer old enough to be used as a work animal, and held with the intention of so using him, would be exempt from seizure upon execution, although he had at the time never actually been worked, or even broke to work.

Error from Osage District Court.

REFLEVIN for "one steer, two years old next spring," brought by *Mallory* as plaintiff, before a justice of the peace. The justice gave judgment in favor of the defendant. *Mallory* took

Mallory v. Berry.

the case to the district court by appeal, and a trial was there had at the March Term 1872. The steer in controversy had been seized and taken by the sheriff at the suit of *Berry* against *Mallory*. *Mallory* claimed the steer as exempt. Verdict and judgment in favor of *Berry*, and *Mallory* brings the case here on error.

Erwin & Thompson, for plaintiff.

The opinion of the court was delivered by

BREWER, J.: The only question in this case is, whether a steer belonging to the plaintiff was exempt from seizure upon execution. The plaintiff, who was the head of a family, and engaged in farming, owned but one horse and this steer. It was about twenty months old, and had never been worked. He had contracted for a pair of steers, and intended to work them together. This one he had paid for and taken home; the other he had not. When the animal was taken on execution he replevied it, and having obtained possession of his mate, commenced working them together. The first time they were so yoked and worked was on the day of the trial before the justice, some few days after the seizure. Was it exempt? The district court evidently thought it was not, and charged the jury, that if it was used in good faith as a work animal, it was exempt, but if it was not, and had not been so used, it was not exempt. Was this ruling correct? The statute reads, "Two cows, ten hogs, one yoke of oxen, and one horse or mule, or, in lieu of one yoke of oxen and one horse or mule, a span of horses or mules; twenty sheep," etc. Gen. Stat., p. 474, § 8, fifth clause. It is well settled that exemption laws are to be liberally construed, though not of course that they should be so construed as to exempt articles obviously outside of the legislative purpose. Now the fact that this animal was not actually used, and had never been used as a work animal, does not seem to us properly decisive of the question of exemption. The expression, "yoke of oxen," as used in an exemption statute, does not necessarily imply cattle already broke to work.

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If they are cattle intended by the owner for use as work cattle, and old enough to be so used, it seems to us that they are fairly within the purview of the statute. A "horse" is exempt; but at what particular age an animal ceases to be a colt and becomes a horse, is not specified in the statute. Is he considered to be a colt, whatever his age, until broke to saddle, or harness? Or does he become a horse, as soon as broke, no matter how young? One fair test, it would seem, is, that he is old enough to be worked, and bought or raised by the owner therefor. We find several decisions in other states which throw light on this case. In *Carruth v. Grassie*, 11 Gray, 211, under a statute exempting a cow, a heifer only twenty months old, and not giving milk for more than a year thereafter, was held to be exempt, it appearing that the owner was raising it for his family cow. Under a like statute in *Dow v. Smith*, 7 Vt. 465, a heifer, forward with calf, was declared exempt; and later, by the same court, in *Freeman v. Carpenter*, 10 Vt. 433, a heifer not with calf was also adjudged exempt. In *Mundell v. Hammond*, 40 Vt. 641, two calves less than a year old were held to be exempt under a statute exempting a yoke of oxen or steers. See also construing exemption statutes, *Harthouse v. Rikers*, 1 Duer, 606; *Wolfenbarger v. Standifer*, 3 Sneed, 659. Under the ruling of the district court, a poor man, unable to purchase a yoke of oxen already broken and trained to work, who should purchase a couple of young, unbroken cattle, although old enough to be worked, intending to break them himself and thus save that expense, could not hold them exempt, while his more prosperous neighbor who can afford to pay the added cost of breaking buys a yoke of cattle already broken, and holds them against his creditors. This does not seem like carrying out the spirit of the exemption law, which was intended for the benefit of the poor man, and should be construed as to secure protection to those most in need of it.

The judgment will be reversed, and the case remanded with instructions to grant a new trial.

All the Justices concurring.

County-Seat of Osage Co.

COUNTY-SEAT OF OSAGE COUNTY.

1. COUNTY-SEAT ELECTION; *Second Election; Restriction to Two Places; Votes Rejected.* At an election held for the purpose of relocating the county-seat of Osage county, Burlingame, the existing county-seat, received no votes; Lyndon received 888; Osage City 791, and Shireton 785 votes. No place having received a majority, a second election was ordered, as prescribed by the statute, and the voting restricted to the two places receiving the highest votes, Lyndon and Osage City. At the second election, notwithstanding such restriction, votes were cast for Shireton, and the result was, that Lyndon received 1131, Osage City 1049, and Shireton 298 votes. Though Lyndon did not then receive a majority of the votes cast, the commissioners rejected the votes for Shireton, and declared Lyndon the duly and legally-selected county-seat: *Held*, that there was no error in such ruling and decision.
2. CONSENT OF ELECTORS, *To a Change of County-Seat; Mode of Selection.* While the constitution forbids a change of the county-seat without the consent of a majority of the electors of the county, yet there is no constitutional restriction upon the power of the legislature, after such consent has been given, to either make the selection of a new county-seat itself, or provide for the manner of its selection by the electors.
3. ——— *What is Consent.* Where at the first election a majority of the votes are cast in favor of places other than the existing county-seat, such majority is, within the meaning of the constitutional provision cited, to be deemed to have consented to a change. [County-seat cases on various points: *Jones v. State*, *ex rel.*, 1-273; *Gordon v. State*, *ex rel.*, 4-489; *State, ex rel., v. Marston*, 6-524; *State, ex rel., v. Stockwell*, 7-98; *Gilleland v. Schuyler*, 9-569; *Gossard v. Vaught*, 10-162; *Golden v. Elliott*, 13-92; *Stoddart v. Vanlaningham*, 14-18; *Conley v. Fleming*, 14-381; *Light v. State*, *ex rel.*, 14-489; *Scott v. Paulin*, 15-162; *County Seat of Linn Co.*, 15-500; *Adkins v. Doolen*, 23-659; *State, ex rel., v. Sillon*, 24-13; *State, ex rel., v. McBride*, 26-419; *Benton v. Nason*, 26-658; *Sabin v. Sherman*, 28-289; *State, ex rel., v. Etting*, 29-397; *State, ex rel., v. Smith*, 31-129; *State, ex rel., v. Comm'rs Butler Co.*, 31-460.]

Error from Osage District Court.

At an election held in Osage county May 25th 1875 for a relocation of the county-seat, three places were voted for, but no place received a majority. A second election was held on the 8th of June, to decide between Lyndon and Osage City, they being the two highest at the first election. At this second election Lyndon received 1131 votes, Osage City 1049, and Shireton 298 — total, 2478. On canvassing the vote, the county commissioners rejected the 298 votes cast for Shireton, and de-

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terminated that Lyndon had received a majority of all the votes cast, and was chosen the county-seat. This canvass took place on the 12th of June, and thereupon two of the county officers, John S. Edie, sheriff, and Thomas Donnell, clerk of the district court, removed their offices, and the records and papers thereof, from Burlingame to Lyndon, and the other county officers declared their purpose to so remove at an early day. On the 18th of June, *H. D. Shepard*, a citizen, elector, and taxpayer of Burlingame, commenced eight separate actions, two of them in the name of *The State*, (*Shepard* as relator,) to compel the sheriff and the clerk of the district court by mandamus to remove their offices, etc., from Lyndon to Burlingame, and the other six to restrain and perpetually enjoin the other county officers, *T. L. Marshall* as county treasurer, *H. A. Billings*, probate judge, *J. G. Erwin*, county attorney, *Wm. Y. Drew*, county clerk, *E. Mills*, register of deeds, and the board of county commissioners, from removing their respective offices from Burlingame to Lyndon. Alternate writs of mandamus, and temporary injunctions, were granted and issued. The sheriff and clerk of the district court showed cause. The other defendants demurred to the plaintiff's petitions. All the actions were heard at an adjourned term of the district court held on the 5th of July 1875. The district court found, as a conclusion of fact, that "the city of Lyndon is the county-seat of said Osage county," and refused peremptory writs of mandamus in the two cases, and dissolved the temporary injunctions in the other six, and gave judgment against *Shepard* for costs in each action. And from such judgments *Shepard* appeals, and brings each of said actions here by petition in error. The actions were all heard together in this court. Only one opinion was filed, and this in the case of *Shepard* against *Marshall*, treasurer, etc.

[In addition to the questions considered and decided by the court in the opinion, *infra*, counsel for *Shepard*, plaintiff in error, raised the same questions in regard to the validity of the petition praying for a relocation of the county-seat, the mode of ascertaining the whole number of electors of the

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county, and the registration-lists authorized by ch. 86, Gen. Stat., as those considered and decided in the *Linn County County-Seat* case, 15 Kas. 500.]

Lewis & Thomson, for plaintiff in error.

Ruggles & Sterry, for defendants in error.

The opinion of the court was delivered by

BREWER, J.: The facts in the case at bar, material to the proper understanding of the points to be decided, and the argument thereof, are as follows: For five years prior to June 8th 1875, Burlingame had been the county-seat of Osage county. In pursuance of an order of the board of county commissioners of said county, based upon a petition of three-fifths of the legal electors of the county praying for an election for the relocation of the county-seat of said county, an election was duly and legally held in said county on that subject on May 25th, 1875, at which election 2464 votes were cast, of which Lyndon received 888, Osage City received 791, and Shireton received 785. *Burlingame received no votes.* The vote was duly canvassed, and the result proclaimed that no place had received a majority of the votes cast, and that Lyndon and Osage City, having received the highest number of votes cast, they were the candidates and the only candidates for the county-seat of said county at a second election to be held on June 8th, 1875. On said June 8th, being the second Tuesday following said canvass, the second election was held. On the Saturday following, the vote of that election was duly canvassed, and such canvass disclosed that Lyndon had received 1181 votes; that Osage City had received 1049 votes, and said Shireton had received 298 votes; and therefore said board of county commissioners proclaimed the result, and declared Lyndon to be the county-seat of Osage county.

It is not disputed that these proceedings were in strict conformity to the statute, and the declared result warranted by its terms. Ch. 26 of the Gen. Stat., the act providing for the loca-

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the case.

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tion and removal of county seats, in its 7th section reads: "If no place receives a majority of all the votes cast, a second election shall be held, * * * and at such election the balloting shall be confined to the two places having received the highest number of votes at the preceding election." But the specific objection is, that such a result thus obtained involves a disregard of § 1 of article 9 of the constitution, which declares that "no county-seat shall be changed without the consent of a majority of the electors of the county." A majority of the electors have never, it is said, consented to a change from Burlingame to Lyndon; for, whether to be treated as blank votes or not, the 298 votes cast for Shireton are witnesses to the existence of 298 electors. A vote cast is evidence of the existence of an elector casting it; and here it is unchallenged evidence. It stands as proof of the fact, and the court cannot say that a majority of the electors have consented to the change. To this it is replied, that the original petition signed by three-fifths of the legal electors shows the consent to a change, and this satisfies the constitutional provision; that if this is not so, both elections (in neither of which did Burlingame receive a single vote) establish the consent, not merely of a *majority*, but of *all the electors*, to a change. It is said that the vote signifies two things, first a willingness, a desire to change from Burlingame, and second, a preference for the place voted for; that in this way the unanimous wish was for a *change from Burlingame*, and the only matter of difference was as to the place to which the change should be made. The question is asked, might not the legislature submit to the electors the simple question, Are you in favor of a change of the county-seat? and if a majority answered in the affirmative, itself select the new county-seat. The constitutional provision is not the grant of a power, but a restriction upon a power already vested in the legislature. It does not require a vote, nor an election. It does not declare how the consent shall be evidenced. It does not necessitate any selection of the new county-seat by the electors. It simply forbids a change without their consent; and whenever that

1. At second election, vote is restricted to two places.

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consent is secured, all other matters are within the legislative control. On the other hand it is said, that the vote is to be taken as a single act; that there is no direct decision upon the simple question of making a change; that the consent implied by a vote for another place is purely conditional, that is, that the voter consents to the removal from Burlingame, provided, and only provided, it is changed to the place he has voted for. So, that while 1181 electors have signified their consent to a change from Burlingame to Lyndon, 1847 have not only failed to consent to such change, but have actually expressed their disapproval thereof. So also, the question is not to be taken as a consent to the change, but simply as an expression of a desire to ascertain the sentiment of the county. For, where the question of a change in the county-seat has not been presented for some time, and changes have taken place in the population, even a resident of the old county-seat, and one desiring it to there remain, might well seek an expression of the sentiment of the people, to determine not merely as to the expediency of erecting new county buildings, but also as to his own investments and business operations. At any rate, it is said the simple question of consent to a change has never been submitted to the electors; that the change has never been approved by a majority of the electors, and that it is unjust to infer consent from an act or a vote which not only does not necessarily mean consent, but is even consistent with an entire disapproval of the proposed change. It cannot be doubted that there is great force in the arguments presented on either side, and that it is difficult to determine to which the decision must go. A majority of the court are of opinion that the weight of the argument is in favor of sustaining the election—that thus effect is given to the statute, and at the same time the constitutional restriction is respected. Full power is with the legislature in respect to the change of the county-seat, except as thus restricted. If in any way a majority of the electors express their consent to a change, then the selection of a new county-seat, or the manner of its selection, is within the power of the legislature.

2. Consent of electors to a change.

Mode of selection.

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Given, the consent to a change, and the legislature may name the new county-seat, or it may remit the choice to the electors and provide the proceedings by which that choice shall be made. When the entire body of the electors upon the question of relocating the county-seat name as their choice for such county-seat other places than the prior county-seat, is it not an expression of their *desire for* as well as *consent to* a change? They divide upon the choice of a new, but agree in a desire to abandon the old. They prefer that it should be located elsewhere than it now is. They consent that it be changed. The law seems to have been framed upon the theory that one question at least shall be determined by each election. If on the first election no place receives a majority of all the votes, the law respecting the constitutional restriction declares that while

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consent.

no new county-seat has been selected, yet as a majority have named some place other than the old county-seat, that majority have expressed their consent to a change. For, if that majority were unwilling to change, the naming by them of the old county-seat would have been a clear expression of that unwillingness. If they had so voted, that election would have been a finality, and the county-seat remained undisturbed. If a vote for the old county-seat expresses an unwillingness to change, does not a contrary vote express a contrary wish? So the legislature seems to have thought, and provided that, if no place receives a majority, or in other words that a majority prefer some place other than the existing county-seat, but disagree as to the place to be selected, then a second election shall be had; and, to compel a final determination without repeated elections, it has limited the choice to the two places receiving the highest votes at the first election. By this construction the law is sustained in its application to the facts of this case, and apparently to all cases that may arise under it, while full force is given to the constitutional restriction as a protection to the rights of the existing county-seat. No county-seat can be changed unless at one or the other election a majority of the electors express by their votes their consent to a change.

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All other questions presented in this case necessary for its decision have we believe been decided in recent cases, and need not be noticed here.

The judgment of the district court will be affirmed.

The same judgment will be entered in the other seven cases brought by the same plaintiff in error, the same questions being involved in them.

VALENTINE, J., concurring.

THE PAOLA & FALL RIVER RAILWAY CO. V. COMM'RS OF ANDERSON COUNTY.

1. COUNTIES—*Powers, Where Vested.* The powers of a county are vested in a board of commissioners as a corporate entity, and not in the commissioners separately and as individual officers. [Same as to school board: *Aikman v. School Board*, 27-129; *Mincer v. School District*, 27-253.]
2. ——— *Sessions of County Board.* The county board, before it can act, must be convened in legal session, either regular, adjourned, or special; and a casual meeting of a majority of the commissioners does not create a legal session. [Same as to school board: *Aikman v. School Board*, 27-129; *Mincer v. School District*, 27-253.]
3. ——— *Special Sessions.* A special session may be convened upon the call of the chairman at the request of two members; but personal notice of such call must be served, if practicable, upon every member of the board. [Same as to school board: *Aikman v. School Board*, 27-129; *Mincer v. School District*, 27-253.]
4. COUNTY BONDS; *Subscription to Stock of Railroad Corporations—When may be Canceled.* Where the record shows that in September 1871 a vote was had by which the county board was authorized to subscribe to the capital stock of a railway corporation, and that in September 1873 two members of the board met without any request or call for a special session, and without any notice to the third member who was present in the county and could have been served with notice, and not at a regular or adjourned session, and where notice of such session was intentionally and fraudulently withheld by said railroad corporation from said third member, and that at such session the two commissioners present passed a resolution directing a subscription to the capital stock of said company, and such subscription was accordingly made, *held*, that

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such subscription was not a legal and binding contract upon the county, and that it could maintain an action to have it set aside and canceled, and all bonds delivered in pursuance thereof delivered up and canceled. [Comm'rs Anderson Co. v. Rly. Co., 20-534.]

Error from Anderson District Court.

THE Board of County Commissioners of the county of Anderson brought its action to cancel a subscription of \$160,000 purporting to have been made by said county to the stock of the Paola & Fall River Railway Company, and for the return and cancellation of \$160,000 of county bonds issued and deposited with the state treasurer to pay such subscription. The Railway Company demurred to the petition, and the district court, at the March Term 1875, overruled the demurrer. The essential facts stated in the petition, and upon which the questions here are decided, are copied in the opinion, *infra*. The Railway Company appeals, and brings the case here on error.

W. A. Johnson, for plaintiff in error:

1. The petition of the plaintiff below (defendant in error) shows that on the 14th of September 1871, at an election held in Anderson county a majority of all persons voting at said election voted in favor of a proposition then submitted by the county board relative to subscribing stock in and issuing the bonds of said county to the Paola & Fall River Railway Company. The plaintiff below admits that said election and all things anterior thereto were in conformity with the requirements of the statute to confer the authority on the county board to subscribe for stock in and issue the bonds of said county to said railway company. The petition further alleges that on the 4th of September 1873, the chairman of the county board and another member of the board met and held what they designated to be a special session of the board. The proceedings of said board, and their subscription to the capital stock of said railway company, and a copy of the proposition submitted to the electors, and the ballot used at the election on the 14th of September 1871, are set out in the record in exhibits to the plaintiff's petition, and the plaintiff is estopped

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from denying them. The county board having acquired jurisdiction by the election, every presumption is in favor of the regularity of its proceedings, and they cannot be inquired into collaterally. 3 Iowa, 114; 15 Iowa, 216.

2. The powers of a county as a body politic and corporate must be exercised by a board of county commissioners. (Gen. Stat. 263, § 43.) The county board are required to meet in regular session at stated times, and in special session on the call of the chairman, at the request of two members of the board, as often as the interests of the county may demand. (Laws of 1873, p. 157.) The petition of the plaintiff below shows that the chairman of the board and one other member of the board were present, and held what they determined to be a special session of the board. Two members of the board met and passed on the object of the meeting and its purpose, and by their determination declared it to be a special session. When commissioners meet at the county clerk's office, and by their consideration determine that the interest of the county requires that they should hold a special session of the board, and so enter their determination on the records of said board, and proceed to the business of said county, there can scarcely be any question as to the legality of their proceedings; and if all the commissioners could so hold a special session, a majority of them could legally meet and transact the business of the county. Gen. Stat. 259, § 20; id., p. 999, § 1, clause 3d. And so held by this court in *Scott v. Paulen*, 15 Kas. 162. And see *Blackman v. Town of Dunkirk*, 19 Wis. 198; *Com. v. Leckey*, 6 Serg. & Rawle, 166; *Cooper v. Ramesby*, 8 Watts; *Curtis v. Butler*, 24 How. (U. S.) 485.

In asking the court to cancel the subscription for stock and the cancellation of the bonds issued in payment thereof, the county board seeks the cancellation of its own official acts, an affirmation of its bad faith.

Abram. Bergen, for defendant in error:

The only authority given by the county board for the subscription for stock and issuing of bonds to plaintiff in error.

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was at a meeting of two of the commissioners, at what they termed a "special session" of said board. The allegations of the petition as to the manner of calling and holding this pretended session, admitted by the demurrer to be true, show that the two commissioners could not at such pretended meeting legally bind the county, as it might be affected by adverse claims, or in matters of contract. As to the meetings of corporate bodies, the rule is, if the meeting be special, that notice is necessary, and must be personally served, if practicable, upon every member entitled to be present, so that each one may be afforded an opportunity to participate and vote. Dillon on Munic. Corp., §§ 200, 201, 223, 224; Angell and Ames on Corp., §§ 488, 492; Wil. on Munic. Corp., § 58; 22 N. Y. 128, 134; 7 Cowen, 526; 21 Wend. 178; 2 Gill, (Md.) 254; 7 Conn. 214; 40 Cal. 77.

Plaintiff in error takes some pains to establish the proposition, that two of the commissioners can act. This is not controverted, as applied to the mode of proceeding after the meeting is duly convened. But it does not apply to the mode of convening the meeting. The majority may act only when the meeting is at a time designated by law, or if the meeting be special, when all the members are present, or all have been duly notified. (Dillon, §§ 202, 226.) In this state, the only statutory rule applicable to this case is found in Gen. Stat., p. 256, § 18, that the board may meet in special session on the call of the chairman, at the request of two members of the board. Under the rules of law, and in reason, the call should reach all the members. The member of the board absent from this special session, and not notified, resided with his family in the county, and was then in the county. In *Scott v. Paulen*, 15 Kas. 162, this court says, "The request may be verbal, the call verbal, the notice to the members verbal, provided all the members receive the notice in time to attend, and a quorum is actually present." In the case of *Blackman v. Town of Dunkirk*, 19 Wis. 198, cited by plaintiff in error, we do not discover anything tending to negative the necessity of notice to all the members.

Plaintiff in error seems to attach great weight to the records of the commissioners. We submit that this has no bearing upon the case as it now stands. We do not admit that the county is estopped by every entry on the record of the commissioners, from contesting the binding force of such entry, if made by the order of but one or two members of the board, at the request and with the knowledge and connivance of those claiming adversely, especially if the record itself shows these facts. The petition contains allegations showing that the action was not the action of "the board," but only of two individuals who happened to be members, assuming to act as a board, but not in such manner as to bind the county. By its demurrer, the railway company admits the truth of the allegations, and hence admits that the subscription and bonds are void.

The opinion of the court was delivered by

BREWER, J.: This was an action by the defendant in error to cancel a subscription for stock, and for the return and cancellation of the bonds of the county issued in payment of the stock. A demurrer to the petition was overruled by the district court, and this ruling is the matter here presented for review. We shall content ourselves with the examination of a single question, for upon that we think the ruling must be sustained. The subscription was ordered at a special session of the county board, and it is insisted that such session was not legally called, nor validly held. The facts respecting it are, as stated in the petition, and for the purposes of the demurrer admitted to be true, as follows:

"And said plaintiffs aver, that two members of said board did not request that such special session of said board should be held, nor that the same should be called by the chairman of said board; that no call for such special session was ever made by the chairman of said board; that all the members of said board were not present at such so-called special session; that B. M. Lingo, at that time an acting and legally-elected and qualified member of said board, was absent from said so-called special session, and no notice of such special session, or of any

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call therefor, was given to or served upon the said B. M. Lingo, or at his residence, although, as said Railway Company and its agents then and there well knew, the said B. M. Lingo was then in said county, and resided therein with his family, and had no knowledge or notice of such intended special session, or of any call therefor; but that knowledge and notice of such intended special session was intentionally and fraudulently concealed and kept from the said B. M. Lingo by the said Railway Company and its agents; and said session was not a regular session of said board, nor was it an adjourned session from any regular session thereof, nor from any duly-called special session of said board."

Was such session a legal one, and the acts of the two commissioners thereat binding on the county? and if not, is it estopped from asserting its illegality in this action? The statute providing for sessions of the county board is found in § 13, p. 256 of the Gen. Stat. That section, after providing for the meeting of the board in regular session, adds, "and in special session on the call of the chairman, at the request of two members of the board, as often as the interests of the county may demand." This is the only statutory provision on the subject. It does not specify whether the call shall be verbal, or in writing, how long prior to the meeting it shall be made, nor require a record to be preserved of it. And the same is true as to the request. But still it requires a "call;" and a call of a meeting, in the legal sense of the term, is a summons to the parties entitled to meet, directing them to meet. It involves something more than a mere purpose in the mind of the caller, or an expression of that purpose unheard, unseen, and unknown. It implies a communication of that purpose to the parties to be affected by it. How it shall be communicated, is sometimes prescribed by statute, or by by-law. It is sometimes provided that it shall be by publication in the newspaper, sometimes by printed notice served personally or at the residence, and sometimes by mere oral personal notice. But in some way or other notice must be given; and if there be no regulation as to the manner of notice, it must be personal, at least where personal notice is practicable. This

is no new question. It has arisen in respect to the sessions of common councils of cities, boards of directors or trustees of private corporations, the town meetings of New England, the meetings of members of corporations, boards of electors, etc. And there is but one uniform rule running through the authorities. In the case of *Rex v. Mayor, &c., of Shrewsbury*, Rep. Temp. Hard. 151, it was said by the court, that "When the acts are to be done by a select number, notice must be given of the time of meeting, * * * and in such case the acts of a majority would bind the whole body; or if all were present through accident, without notice, their acts would be good; but the acts of a majority, present by accident, would not be binding." It was a saying of LORD KENYON'S, that "special notice must be given to every member who has a right to vote." Ch. J. TILGHMAN, in the case of the *Baltimore Turnpike*, 5 Binney, 481, said, "that when several persons are authorized to do an act of a public nature which requires deliberation, they all should be convened, because the advice and opinions of all may be useful, though all do not unite in opinion." In *Wilcox on Munic. Corp.*, § 58, we find it laid down, that "all corporate affairs must be transacted at an assembly convened upon due notice at a proper time and place, consisting of a majority of the persons of each class to which the prescription or charter has confided the power." And SELDEN, J., in *People v. Bachelor*, 22 N. Y. 128, uses this language: "It is not only a plain dictate of reason, but a general rule of law, that no power or function intrusted to a body consisting of a number of persons can be legally exercised without notice to all the members composing such body." DILLON in his work on *Munic. Corp.*, § 224, lays down the law thus: "If the meeting be a *special* one, the general rule is, unless modified by the charter or statute, that *notice* is necessary, and must be personally served if practicable upon *every member* entitled to be present, so that each one may be afforded an opportunity to participate and vote." See also further, *King v. Theodorick*, 8 East, 548; *King v. Gaborian*, 11 East, 77; *Ex parte Rogers*, 7 Cowen, 526, and note; *Downing v. Rugar*, 21 Wend. 178;

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Stow v. Wise, 7 Conn. 214; *Harding v. Handewater*, 40 Cal. 77; *Wiggin v. Freewill Baptist*, 8 Met. (Mass.) 301. Nor is this merely an arbitrary rule, but one founded upon the clearest dictates of reason. Wherever a matter calls for the exercise of deliberation and judgment, it is right that all parties and interests to be affected by the result should have the benefit of the counsel and judgment of all the persons to whom has been intrusted the decision. It may be that all will not concur in the conclusion; but the information and counsel of each may well affect and modify the final judgment of the body. Were the rule otherwise, it might often happen that the very one whose judgment should and would carry the most weight, either by reason of his greater knowledge and experience concerning the special matter, by his riper wisdom and better judgment, or by his greater familiarity with the wishes and necessities of those specially to be affected, or from any other reason, and who was both able and willing to attend, is through lack of notice an absentee. All the benefit, in short, which can flow from the mutual consultation, the experience and knowledge, the wisdom and judgment of each and all the members, is endangered by any other rule. Again, any other rule would be fraught with danger to the rights of even a majority, as, when legally convened the ordinary rule in the absence of special restrictions being that a quorum can act and a majority of the quorum bind the body, it would, but for this rule, often be in the power of an unscrupulous minority to bind both the body and the corporation for which it acts to measures which neither approve of. Thus, were the body composed of twelve members, a quorum of seven could act, and a majority of that quorum, four, could bind the body. An unscrupulous minority of four by withholding notice to five, might thus bind both the body and the corporation. Reason therefore and authority unite in saying that notice to all the members to whom notice is practicable, is essential to a legal special session.

But we are referred by counsel to that clause in the act concerning the construction of statutes, (Gen. Stat., p. 999,) which

reads, "Words giving a joint authority to three or more public officers or other persons, shall be construed as giving authority to a majority of them, unless it be otherwise expressed in the act giving the authority." We do not see that this affects the question. Whenever there is a legal session, unquestionably a majority of the commissioners can act and bind the county. But this casts no light upon the question as to the manner of convening a legal session. It must be remembered that the powers of the county are not vested in three or more commissioners as such, but in a single board. (Gen. Stat., p. 254, §3.) Two commissioners casually meeting have no power to act for the county. There must be a session of the "board." This single entity, the "board," alone can by its action bind the county. And it exists only when legally convened. Its regular sessions are fixed by law, and of them all the members must take notice. Its special sessions exist only upon call of the chairman, and that as we have seen implies notice. But again we are referred to the case of *Scott v. Paulen*, 15 Kas. 162, in which this court sustained the action of a county board at a session held to be a special session at which only two commissioners were present, and for which no request, no call, and no notice were shown. It will be noticed from the opinion in that case that the court reluctantly sustained the action, and considered itself as there going to the extreme limit. But two very important differences exist between that and this case. Here it *affirmatively appears* that no request, no call was made, no notice given, and that designedly the parties interested in and desiring the action of the board withheld notice from one member. There it was simply a presumption from the silence of the record. But chiefly, there the action of the board created no liability, was in nothing adverse to the interests of the county, and was accepted by the people as legal. All that was done was to order a county-seat election. The proper petition was presented. If in unquestioned session, the board would have had no discretion, but would have been bound to order an election. By a majority, in apparent session, the election

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was ordered. The people accepted this action as valid, and generally participated in the election. Under such circumstances, when the only parties interested in and to be affected by the action, accepted it as valid, and when by it no interest or claim opposed to the county was created, it seemed just and legal to sustain the action. But in this case by the action a great liability is attempted to be cast upon the county, adverse interests created, and the people of the county have not since that accepted the action as valid, and thus in a certain sense estopped themselves from questioning its validity. True, the people had prior thereto by a vote given authority to the board to subscribe, but this as heretofore decided simply gave the authority to the board to be exercised at its discretion. *L. G. Rld. & Trust Co. v. Comm'rs Davis County*, 6 Kas. 256. And this discretion was the discretion of all the members; that is, the information, experience and judgment of all were to be exercised, and after consultation the judgment of the majority to control. Again, this action of the commissioners was taken in September 1878, and the vote was in September 1871. After remaining so long in abeyance it would seem that the authority should not be exercised without a full consultation of all the officers intrusted with the exercise of the authority. It may also be remarked, that this controversy arises between the county and the railroad company, the original parties to the transaction; that the latter is of course chargeable with notice of what actually took place therein, and was guilty as alleged of a fraudulent withholding of notice from one of the members. It cannot therefore, as against the county, invoke the aid of any principle of estoppel.

The ruling of the district court must be affirmed.

All the Justices concurring.

Tucker v. Allen.

E. M. TUCKER V. STEPHEN H. ALLEN.

1. **DEED; CONVEYANCE; When Executed in Blank, as to Grantee.** Where a deed was executed in blank as to the grantee, with the understanding that the deed should afterward be filled up and delivered to some person as grantee whom a certain railroad company should designate, and afterward, and in the absence of the grantor, the deed was so filled up and delivered to a grantee who had full knowledge of the facts—*assumed*, by the supreme court, but without deciding the question, that such deed, when so filled up and delivered, was void. [*Ayres v. Probasco*, 14-176; *Chapman v. Veach*, 32-167.]
2. **VOID DEED Becomes Valid by Ratification.** A deed void when delivered may be ratified and confirmed by the grantor, after he has full knowledge of all the facts, by any words and acts of his which show a clear intention on his part that the deed shall be considered as having been properly executed and delivered and as conveying the title to the property. [*Knaggs v. Mastin*, 9-532; *Ayres v. Probasco*, 14-177; *Wilkins v. Tourtellott*, 28-827.]
3. ——— Under the facts of this case, *held*, that such a deed so executed and delivered was afterward ratified.
4. **CONDITIONS; PUBLIC POLICY; Stipulation Not to Build Depot.** One of the conditions of a deed was, that no railroad depot should be built at a certain place within one year. No depot was built at such place within that time, and all the other conditions of the deed were strictly fulfilled, and everything connected with the deed was fully executed, and there was nothing to show that any injury or inconvenience ever resulted to any person or to society because no depot had been built at the place designated: *Held*, that neither the grantor in said deed, nor any person (with notice) claiming under him, can avoid said deed, merely because of a supposed illegality in inserting in said deed said conditions not to build said depot. [*St. J. & D. Rld. Co. v. Ryan*, 11-602; *Brake v. Ballou*, 19-397.]
5. **DESCRIPTION OF PROPERTY; Certainty; Terms of Deed.** Where property is conveyed by deed, a description of the property which can be made certain within the terms of the deed, and which is afterward made certain according to the terms of the deed, and to the satisfaction of all parties interested, and which then rests wholly in record evidence, is sufficient. [*Bemis v. Becker*, 1-226; *Steele v. McDowell*, 2-374; *Kuykendall v. Clinton*, 3-85; *Edwards v. Fry*, 9-417; *Ephraim v. Garlick*, 10-230; *Am. Cent. Insurance Co. v. McLanathan*, 11-533; *Jay v. Granby Co.*, 15-171; *Earnshaw v. Crout*, 23-560; *Wilkins v. Tourtellott*, 28-825.]

Error from Linn District Court.

EJECTMENT, brought by *Allen* as plaintiff, to recover possession of Lot 5 in Block 129, city of Pleasanton. Both

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parties claimed title in fee. The facts are fully set out in the opinion. The district court, at the May Term 1874, found in favor of *Allen*, and gave judgment in his favor, and *Tucker*, defendant, appeals, and brings the case here on error.

Thacher & Stephens, for plaintiff in error.

Stephen H. Allen, defendant in error, for himself.

The opinion of the court was delivered by

VALENTINE, J.: This was an action in the nature of an action of ejectment, brought by Stephen H. Allen, defendant in error, (plaintiff below,) against E. M. Tucker. The action was tried by the court below without a jury, on the following agreed statement of facts, to-wit:

1st. The land in dispute has a common title in Morgan Fickes, under whom both parties claim.

2d. The title of plaintiff Allen is a quitclaim deed from Fickes and wife, dated September 21st 1870, a copy of which is herewith presented, together with the register of deed's certificate of record, marked "A," and made a part of these facts.

3d. It is further admitted, that one William Cameron and Octave Chanute duly platted into blocks, lots, streets and alleys, as part of the original town-site of Pleasanton, the lands in the said quitclaim deed mentioned, and filed the same in the office of the register of deeds, September 2d 1869, and that the lot in the petition described is an odd-numbered lot in said plat of said town-site, so filed and recorded. Afterward, October 4th 1871, the plaintiff signed said plat and recognized it.

4th. The title of defendant Tucker is under a deed from Fickes and wife to Octave Chanute, dated June 7th 1869, which conveyance, together with the register of deeds' certificate of record, is herewith presented, marked "B," and made part of these facts. And it is agreed and admitted that all the conditions and limitations in said deed were fulfilled within the time therein provided; that said deed was delivered by said Fickes before the insertion of the name of the grantees therein mentioned, and no grantee was mentioned therein at the time of the delivery. The deed was handed

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by Fickes to C. C. Smith, resident engineer of the company, with verbal directions to the company to insert in the blank whosoever name the railroad company mentioned in the deed should desire, and the president of the company told Mr. Chanute that for his extra services in behalf of the company it desired him to take the lands, and his name was thereupon inserted in the deed by himself, with the full assent of the railroad company.

5th. The other half of the lands in the conveyances to said Chanute and said plaintiff mentioned were conveyed by warranty deed, July 24th and August 14th 1869, by Fickes and wife to William Cameron, which was duly recorded in said July and August in the office of the register of deeds in said county.

6th. Said Chanute, prior to the commencement of this action, conveyed by warranty deed to the defendant herein the lot in the petition mentioned, who took possession thereunder, and still holds possession thereof.

7th. The consideration for the deed from Fickes to Chanute is therein recited.

8th. The lands and lots mentioned in the quitclaim deed of Fickes to plaintiff at the time of conveyance were worth about ten thousand dollars.

9th. Fickes, shortly after the execution and delivery of the deed "B," knew that it was filled with Mr. Chanute's name, and also knew that the town-site of Pleasanton was being platted, surveyed and laid out by all the parties in interest, including Mr. Chanute, and made no objection thereto, and assented to such survey and platting.

10th. Lots 15 and 17 in block 121, mentioned in the exception to the quitclaim deed from Fickes to plaintiff, were bought by Fickes after such platting and laying out of said town-site, and are in the lands mentioned in said deed from Fickes to Chanute, and were bought by said Fickes in the fall of 1869, of one H. C. Swift, who was the surveyor in laying out said town-site, said Swift being the agent of one or more lot-owners in Pleasanton.

11th. When Fickes gave the quitclaim deed to plaintiff, he (Fickes) stated to him that he made no claim to any of said lands in the deed mentioned, except a one undivided-half of two strips of land, one fifty feet wide on the west side, and one of one hundred feet wide on the east side of the right of way of the Missouri River, Fort Scott & Gulf Railroad Company through said lands, which said strips were not laid out into

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lots, or included in any blocks, and were designated on said plat of said town-site as "railroad depot grounds." Plaintiff said to Fickes, "I want the deed to cover all the lands, so that I can use it against other interests besides those strips which I think you have." Fickes said, "I don't care about Chanute being bothered, as he hasn't used me just right." This reference to Mr. Chanute by Fickes was in answer to something Mr. Allen said to Fickes touching Chanute's interest in the lands. Fickes also stated to plaintiff that he would n't ever thought of conveying any interest in those strips if it had n't been for the difference between himself and Mr. Chanute.

12th. The Missouri River, Fort Scott and Gulf Railroad Company is a corporation duly incorporated and existing under the general incorporation law of 1865, (being chapter 44 of the laws of that year;) and during the years 1869 and 1870 Mr. Chanute was the chief engineer of said company. The consideration in said quitclaim deed "A" is correctly recited.

18th. Fickes, after he learned that Mr. Chanute was grantee in the deed, stated to Mr. Chanute that he had sold the other half of the land to Mr. Cameron, who would be a good man to push the town.

DEED MARKED "A."

THIS INDENTURE, made this 21st day of September 1870, between Morgan Fickes and Minerva Fickes his wife, of the county of Linn, and State of Kansas, of the first part, and Stephen H. Allen of the same place, of the second part, witnesseth: That the said parties of the first part, in consideration of the sum of three hundred dollars to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath bargained, sold, remised, released and quitclaimed, and by these presents do bargain, sell, release, remise and quitclaim unto the said party of the second part, and to his heirs and assigns forever, all our and each of our right, title and interest, estate, claim and demand, both at law and equity, and as well in possession as in expectancy, of, in and to the following-described premises or pieces and parcel or parcels of land, to-wit: The N.W. $\frac{1}{4}$ of the S.W. $\frac{1}{4}$, and the S. $\frac{1}{4}$ of the N.W. $\frac{1}{4}$ of section 31, in township 21, range 25, lying and being in the town of Pleasanton, county of Linn, and state of Kansas, and all lots, blocks, streets and alleys, strips and pieces of land therein contained, saving and excepting any part of the same heretofore deeded by the said parties of the first

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part to William Cameron; and lots number 15, 16, 17 and 18, in block 121; and lots numbered 6 and 84, in block 122; and lots numbered 1, 2, and 8, in block 189—together with all and singular the hereditaments and appurtenances thereunto belonging.

In witness whereof we have hereunto set our hands and seals the day and year first above written.

MORGAN FICKES. [SEAL.]

MINERVA FICKES. [SEAL.]

[Said deed was duly stamped and acknowledged, and was duly recorded on the 21st of September 1870.]

DEED MARKED "B."

Know all men by these presents, that Morgan Fickes and Minerva Fickes his wife, parties of the first part, do by these presents, for and in consideration of the sum of one dollar in hand paid, and the further considerations hereinafter specified, grant, bargain, sell and convey unto *Octave Chanute*, of Jackson county, Missouri, under the several limitations and conditions and restrictions hereinafter provided, the one-half of (as is hereinafter designated) the N.W. $\frac{1}{4}$ of the S.W. $\frac{1}{4}$, and sixty acres off the east end of the S. $\frac{1}{2}$ of the N.W. $\frac{1}{4}$ of section 31, of township 21, of range 25, in Linn county, state of Kansas, together with the appurtenances thereunto belonging; and we the said parties of the first part, warrant that we are seized of a good and indefeasible fee-simple title to the real estate hereby conveyed. The parties of the first part agree, and it is one of the conditions of this deed, to cause, on or before the completion of the depot hereinafter named, to have the land hereinbefore described surveyed, laid out and platted in village or town lots, with streets and alleys, by a competent surveyor, and that said lots shall be by said surveyor numbered, and the lots being designated on the plat of said survey by odd numbers, shall vest in the grantee an indefeasible fee-simple title, and the lots being designated on said plat by even numbers, the title to remain in the grantors. Now the conditions, limitations, and provisions, and the only uses and purposes for which the real estate aforesaid is conveyed, are as follows, to-wit: Whereas, the parties of the first part desire to secure the location and construction of a good and substantial freight and passenger depot on the line of the Missouri River, Fort Scott & Gulf railroad in the vicinity of the Round Mound which is situated in the west line of section 31, in town 21, range 25 in said Linn county: Now, in order to secure this object, it is

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herein agreed and provided, on the part of said grantors, constituting the parties of the first part, that for and in consideration that the said grantee, his, her, or their heirs, executors, administrators or assigns, shall cause said Missouri River, Fort Scott & Gulf Railroad Company to locate and construct a good and substantial passenger and freight depot within one mile of said Round Mound, within six months after the commencement of the running of the cars to or near said Round Mound, and that at the expiration of one year from the commencement of the running of the cars to said Round Mound neither said railroad company nor any other person or persons for or in behalf of said railroad company shall not have located or constructed a station or depot within four miles of said Round Mound, except the one herein provided for, then the title in fee simple to said real estate shall vest in said grantee, his, her, or their heirs or assigns. But if at the expiration of six months after the commencement of the running of the cars to said Round Mound, or as far south on the line of said road as said Round Mound, said railroad company shall not have located and constructed a good and substantial freight and passenger depot within one mile of said Round Mound, or if within one year after the commencement of the running of the cars to said point, or as far south as the said Round Mound, said railroad company or any other party or parties shall have located and constructed a station or depot other than the one provided for herein upon the line of said railroad within the space of four miles from said Round Mound, then the title to said real estate shall revert to the said Morgan Fickes and Minerva Fickes, their heirs or assigns.

In witness whereof, we have hereunto set our hands and seals the 7th day of June, 1869.

MORGAN FICKES. [SEAL.]
MINERVA FICKES. [SEAL.]

[Said deed was duly acknowledged by the grantors and duly certified on said 7th of June 1869, and was duly recorded in the registry of deeds of Linn county, August 10th 1869.]

Upon this agreed statement of facts the court below rendered judgment in favor of the plaintiff below and against the defendant below. Was this judgment correct? This is the only question in the case; but involved in this question are several others which we shall notice as we proceed. We shall decide however only such of these questions as are necessary to be decided in order to dispose of the case.

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In the first place then, we shall assume, but without deciding the question, that the deed executed by Fickes and wife in blank as to the grantee, was void when so executed, and was still void after Chanute filled up the blank by inserting his own name therein. (*Ayres v. Probasco*, 14 Kas. 176, and cases there cited.)

1. Deed in blank.

The next question, and one of the two main questions in the case is, whether the deed was made valid by any of the subsequent transactions. The other main question is, whether the deed is void as being in contravention of public policy. In discussing the first of these two questions we shall assume that the deed is not void because of any supposed antagonism to public policy. We have heretofore had occasion to examine similar questions in the cases of *Knaggs v. Mastin*, 9 Kas. 532, and *Ayres v. Probasco*, 14 Kas. 177, 196, 197. But those two cases differ from this in essential particulars. In the *Knaggs* case the deed was held to be good upon the ground of an equitable estoppel and of a subsequent ratification. But in this case we hardly suppose that an equitable estoppel can be interposed to aid the defective execution of the deed; for Chanute was fully aware of its defective execution when he inserted his own name therein as grantee. (See *Ayres v. Probasco*, supra.) The record does not show whether the defendant Tucker was aware of said defective execution or not, but as his counsel do not seem to claim that he stands in any better situation than his grantor (Chanute) did, we have concluded to treat the question now under consideration just as though it had arisen between the original parties to said deed. In the *Ayres* case the mortgage was held bad because there was no ground upon which an equitable estoppel could be founded, and there was nothing showing a subsequent ratification of the mortgage by Mrs. Ayres, in whom the title was; and as the mortgaged property was a homestead, the mortgage was wholly void without her consent. In the present case there is very much tending to show that Fickes, the grantor, in whom the title was, did by his subsequent acts and words ratify and confirm the deed after it was filled up, so as to make

2. Ratifying void deed. Cases, and authorities.

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it a deed to Chanute; and there is no pretense that the property attempted to be conveyed was at any time a homestead. The only question then for us now to consider is, whether the subsequent acts and words of Fickes did ratify, confirm, and make valid said deed. We think they did. Of course the regular way to execute a deed would be to complete the body of the same first, and then to affix the signature of the grantor; but this manner of executing a deed is not absolutely necessary. If the deed is complete when it is delivered, that is all that is necessary. It makes no difference in what order, or when, or where, or by whom the different parts of the deed are drawn up; or whether they are drawn up in the presence or absence of the grantor; or whether they are written or printed, or partly one and partly the other; or whether the grantor makes his signature before or after they are drawn up, or at some intermediate point of time, provided however, that before the deed is delivered it is made complete and perfect, and that the grantor has *actual knowledge* of its contents, and that with such knowledge he authorizes its delivery. Now the present deed comes very nearly within the foregoing description of a good deed. All that it lacks is, that it was not formally delivered by Fickes to Chanute after its final completion by inserting Chanute's name therein, for Chanute already had the possession of the deed. If after Chanute inserted his name in the deed he had handed it to Fickes, and Fickes had returned it to Chanute with the intention that it should be his deed, it would undoubtedly have become a good and valid deed by virtue of such act. (*Speake v. U. S.*, 9 Cranch, 28; *Malarin v. U. S.*, 1 Wallace, 282, 288.) But an actual or formal delivery of a deed never was necessary. A deed may be good by constructive delivery as well as by actual delivery. Any words or acts showing an intention on the part of the grantor that the deed shall be considered as completely executed, and the title conveyed, is sufficient. (4 U. S. Dig., First Series, 481, paragraph 306, et seq., and cases there cited.) And where a deed has been delivered to the grantee before it is finally completed, and the grantee completes the same, as in this case, we

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think the grantor may with a full knowledge of all the facts ratify and confirm the deed and make it valid by any words or acts which show a clear intention on his part that the deed shall be considered as having been properly executed and delivered, and as conveying the title to the property. (*Davin v. Himer*, 29 Iowa, 297.) Where a grantee obtained a deed without authority, it was held that the grantor might make the deed and the delivery thereof good by ratification, without any subsequent delivery thereof. (*Parker v. Hill*, 8 Metc. (Mass.) 447, 450.) It has also been held that a void deed already delivered may be ratified by words or acts without a reexecution or redelivery of the deed. (*Garrett v. Gouter*, 42 Penn St. 143; *Warden v. Eichbaum*, 3 Grant's Cases, (Penn.) 42; *Jones v. Evans*, 7 Dana, (Ky.) 96, 98.) Also held, that a bond or deed may be materially altered after its delivery, with the consent of all the parties, and still be valid. (*Speake v. U. S.*, supra; *Bassett v. Bassett*, 55 Me. 125, 127.) And other sealed instruments affecting real estate, void when delivered, have been held to be made valid by ratification without a second execution or delivery. (*Breithaupt v. Thurmond*, 2 Rich. (S. C.) 216; *Powell v. Gossom*, 8 B. Mon. 179; *Hall v. Vanness*, 49 Penn. St. 457.) In the present case, Fickes knew that the deed was filled up with the name of Chanute as grantee; he knew that Chanute took possession of the land under the deed, and laid it out into town lots, streets, alleys, etc.; he knew that Chanute claimed the property under the deed, and yet he made no objection to all this, but on the contrary he recognized Chanute's right to the property at various times, and bought two of the lots that went to Chanute under the deed. Fickes sold his remaining half of the property to Cameron, and then told Chanute that Cameron "would be a good man to push the town." And when Fickes executed the quitclaim deed to the plaintiff, Allen, he told Allen that he did not claim any of the land claimed by Chanute except the undivided-half of certain strips not laid out into town lots, streets, or alleys, and that he would not claim even this except for a difference between him-

2. Deed held
valid.

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self and Chanute. Was not this a good and sufficient ratification of the deed, known by Fickes to have been completed, and known by him to have been in Chanute's possession? Does not this show beyond all question, that Fickes intended that the deed should be a good and valid deed conveying the property to Chanute? And if so, was there any necessity to go through with the useless form of Chanute handing the deed to Fickes, and Fickes returning it to Chanute so as to constitute a formal delivery? We think the deed was ratified, and so made valid so far as this question is concerned.

Is the deed void because in contravention of public policy? We think not. It is a deed conveying an estate upon condition, but whether upon condition precedent, or condition sub-

4. Public policy;
conditions of
deed.

sequent, or partly one and partly the other, it is difficult to determine. As Chanute was to take immediate possession of the property, and survey it into town lots, streets, alleys, etc.; and as the title to the property was to "revest" in Fickes for any conditions broken, it would seem that all the conditions were intended to be conditions subsequent, and not precedent. But there is other language in the deed that would seem to indicate a contrary intention, and that all the conditions were intended to be fulfilled before any estate should vest in Chanute. Probably however the fairest interpretation of the deed would be, that no estate was to vest in Chanute until the land should be surveyed, platted, etc., and the desired depot built, and then that the estate should vest in him subject to be defeated or forfeited upon condition that the prescribed depot should be built within the prescribed time and limit. This would make the surveying and the platting of the town-site, and the building of the designated depot, conditions precedent, and the refraining from building the other depot a condition subsequent. And surely, this last condition should be considered a condition subsequent; for under the terms of the deed it could not possibly have been fulfilled under one year from the time when the cars commenced to run to that place, while all the other conditions might have been fulfilled

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before the cars commenced to run at all, and must have been fulfilled within six months thereafter. Now it can hardly be possible that the parties intended that Chanute should lay out said town-site, should know which were his town lots, and be in possession of them, and then hold them six months or a year before any title to them should vest in him. This is not the way people do business in this western country. Probably the parties expected to sell nearly all said town lots before the end of the year. Indeed, Fickes bought two of Chanute's lots within less than a year, and even within less than six months after said deed was executed. (In connection with this subject, see *Southard v. Central Rld. Co.*, 2 Dutch. N. J. 13; *Nicol v. N. Y. & Erie Rld. Co.*, 12 N. Y. 121, 131.) The deed in one place reads as though it was intended that the survey, platting, etc., should "vest in the grantee an indefeasible fee-simple title" to the odd-numbered lots. Now if the condition not to build said depot was a condition subsequent, then under no circumstances could the deed be held void on account thereof, because, first, the condition was fulfilled; second, if it had been broken, Allen could not claim a forfeiture on account thereof, but only Fickes, or his heirs; (2 Washb. Real Prop. 451; 1 Hilliard Real Prop. 430;) and third, if the condition were really illegal, immoral, or against public policy, then the effect would be to leave the estate already vested in Chanute absolute and not conditional; (2 Washb. Real Prop. 447; 1 Hilliard Real Prop. 510.) But for the purposes of the case we shall suppose that all the conditions were conditions precedent; and then, would the deed be void? We think not. We suppose it is not claimed that the agreement to lay out the land into a town-site, was illegal. Neither do we suppose that it is claimed that the agreement to build the depot, was illegal. (*Workman v. Campbell*, 46 Mo. 305.) It is the agreement *that a depot should not be built*, which we suppose the defendant in error claims was illegal. Now a contract that a depot should not be built for all time, would surely be illegal. (*St. Jo. & D. C. Rld. Co. v. Ryan*, 11 Kas. 602.) A contract that a depot

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should not be built at or near some particular *town* or *city* for the space of one year, would probably also be illegal. The courts could see from the facts of such a case that such a contract would be against public policy; and they could therefore determine, as a matter of law, from such facts that such a contract would be illegal and void. But how can any court, without knowing the facts, determine as a matter of law that a contract not to build a depot at a particular place (not a town or city) for the space of one year only, would be against public policy, and therefore illegal and void? There are whole counties in this state without any population. There are many places where a depot will probably not be needed for the next century. And is it possible, that a contract, not to build a depot at any one of such places, for the space of one year only, would necessarily, and as a matter of law, be *illegal* and void? It is not enough for the present case that the contract, or rather the condition of the deed, should be merely indifferent or valueless. It must be absolutely *illegal* in order to be available to the plaintiff below. Whether there was any population at or near said "Round Mound," or not, the record does not disclose. Or, whether any depot might ever be needed there, the record does not show. And courts cannot take judicial notice, without any facts being brought to their knowledge, where depots might be needed, and where they would not be needed. When this deed was executed, there was a railroad in prospect, and a town in prospect; and that is about all there is to show that there was any necessity for any depot anywhere within that whole country. But for the purposes of this case we will suppose that the courts can determine as a matter of law, and without reference to the facts, that the condition in the present deed that no depot should be built at a particular place within one year, was illegal; and upon such supposition, would the deed be void? We still think not. Every condition of the deed was scrupulously fulfilled, within the very terms of the deed, long before the plaintiff, Allen, claims to have obtained any interest in the property. At

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the time that Allen procured his quitclaim deed from Fickes, nothing pertaining to the original transactions between Fickes and Chanute, or contemplated in the deed from Fickes to Chanute, remained executory. Everything had previously been executed and fulfilled, and executed and fulfilled without the commission of any illegal, immoral, or injurious act. It is not pretended that the failure to build said proscribed depot injured or produced any inconvenience to any person or society. And Chanute and his grantees have long been in the possession of the property, holding the same under said deed. The question then to be now considered is, not whether an illegal executory contract shall be enforced, but it is whether vested rights held under an illegal executed contract shall be disturbed. Or, to state the question more accurately, it is, whether vested rights, held under a contract partially illegal in its origin, but now wholly executed, and executed without the commission of any wrongful act, can now be disturbed because of such original illegality, by an assignee of one of the parties to the contract, where both parties to the contract were equally in the wrong? The assignee in this case is not an innocent purchaser. He obtained said quitclaim deed knowing all the facts, and of course he can have no greater or better rights than Fickes had. If Fickes could not avoid the deed to Chanute for illegality, then of course Allen cannot. And we do not think that Fickes could. It is a general rule of law that a man will not be allowed to set up his own illegal acts for the purpose of avoiding his own deed. And with regard to executed illegal contracts, where the parties thereto are in equal wrong, it is a general rule that the law will not aid either of them, but will leave each and all of them where it finds them. *In pari delicto portior est conditio defendentis*; and *In pari delicto portior est conditio possidentis*. (2 Pars. Contr. 747, note *w*, and cases therein cited.) This rule of law has been applied to cases very similar to the one at bar. (*Worcester v. Eaton*, 11 Mass. 368, 375, et seq.; *Swain v. Russell*, 10 Ind. 488.) And we think it ought to be applied to this case.

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If the contract not to build said depot was illegal, then clearly Fickes was *in pari delicto* with Chanute; and he would not be allowed to set up his own wrong for the purpose of defeating his own deed. And this is especially so where he has received the full consideration for his contract, and where it has probably proved immensely valuable to him, and where he has not offered to return any portion of the same.

It is also claimed that the description of the land in the deed was indefinite and uncertain. Now the description was such s. Description of land; certainty. that it could easily be made certain by a fulfillment of the terms and conditions of the deed itself. And the description was made certain, exactly in accordance with the deed, and to the full satisfaction of all the parties interested. The land was surveyed. It was laid out into lots, streets, alleys, etc. The lots were numbered. And a plat thereof was made, and filed in the office of the register of deeds September 2d 1869, according to law. (Gen. Stat. 618.) And by these transactions the description of the property conveyed was made as absolutely certain as it could be. And the whole description of the property now rests in record evidence. We think such a description is good. In connection with this question we would refer to *Armstrong v. Mudd*, 10 B. Mon. 144; *Grover v. Drummond*, 25 Me. 185.

The judgment of the court below will be reversed, and cause remanded with the order that judgment be rendered on the agreed statement of facts in favor of the defendant below, and against the plaintiff below.

All the Justices concurring.

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her, because, first, the only hand he had in the whole matter was to indorse this note before maturity to Hollis Day, which act the statute nowhere forbids him to do, but which the law expressly gave him the right to do, and which the defendant in error by valid contract in writing had specifically stipulated he might do; and second, the plaintiff in error was not, nor can he be held responsible for the judgment of the court.

This usurious interest, then, having been voluntarily paid by defendant in error to Hollis Day, could not be recovered back from him, nor could it have been recovered back from plaintiff in error if paid by her to him: 9 Iowa, 382; 12 Iowa, 801; 1 McLean, 514; 11 Ohio, 419; 12 Ohio, 548; 7 Metc. 18; 8 Kas. 481.

Sluss & Dyer, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This action was brought in the court below by Hannah M. Walker, as plaintiff. The material facts upon which said Walker's cause of action is founded, as appears from her petition, are substantially as follows: On November 4th 1872, H. C. Day (plaintiff in error here) loaned her the sum of \$1,000 for the term of one year, at the usurious rate of interest of 54 per cent. per annum, and to evidence said loan, she and W. N. Walker, her husband, executed and delivered to him their promissory note for the sum of \$1,540, bearing date on said day, payable to Day's order, in one year thereafter, with interest at 12 per cent. per annum after maturity, the sum of \$540 thereof representing the usurious interest reserved for the use of said \$1,000. Said note was secured by a mortgage on certain real estate in Sedgwick county, executed by defendant in error and her said husband. Long before the maturity of said note, plaintiff in error by indorsement and for a valuable consideration transferred said note to one Hollis Day, who had no knowledge or notice of said usurious contract, and who by

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said transfer became the owner of said note and mortgage. On December 13th 1873, said Hollis Day obtained judgment against defendant in error in the district court of Sedgwick county for the amount of said principal and interest mentioned in said note, and for the sale of said mortgaged real estate to pay the same; and on March 9th 1874, he was about to cause said real estate to be sold to satisfy said sum under a legal process issued upon said judgment, and then defendant in error was compelled to and did pay to said Hollis Day said sum, \$1,604.14, of which \$447.50 was usurious interest reserved for said loan, and by reason of the premises said H. C. Day became liable to pay defendant in error said \$447.50, with interest from March 9th 1874, which he has refused to pay, although requested. To this petition plaintiff in error demurred. The district court overruled the demurrer, and Day excepted. After the overruling of said demurrer Day filed his answer. He admitted the execution and delivery of the note and mortgage, as alleged, and also the assignment thereof to Hollis Day, and then as a defense alleged that on October 22d 1873 one Geo. H. Sweet commenced an action as plaintiff against said Hollis Day and said Hannah M. Walker, as defendants; that due service was obtained on both of said defendants; that that action was brought to foreclose a lien on said mortgaged estate; that the petition of said Sweet alleged that Hollis Day had or claimed some interest in said real estate; that said Day appeared and answered, and filed his cross-petition therein against his codefendant (Walker,) setting up the note and mortgage in question and demanding judgment against her for the full amount of said note, for the foreclosure of his lien, and the sale of the property to pay said judgment, and that the said Walker neglected and refused to answer said petition and said cross-petition, but suffered judgment to be rendered against her by default, in favor of Sweet, and also in favor of said Hollis Day for the full amount specified in said note, with interest, etc., and that afterward she fully paid off, satisfied and discharged said judgment. To this answer the defendant in error demurred, as not stating facts sufficient to constitute a

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defense. This demurrer was sustained by the court, and plaintiff in error excepted.

We are inclined to think that the court below erred. We think that the petition *does not* state facts sufficient to constitute a cause of action; that the answer *does* state facts sufficient to constitute a good defense to the plaintiff's supposed cause of action; that the demurrer to the petition should be sustained; that the demurrer to the answer should have been carried back to the petition, and sustained as against it, and not as against the answer. We have no statute in this state making it illegal to contract for usurious interest, or to pay or receive the same. Section 1 of the interest law, as amended, provides that, in the absence of contract, interest at the rate of seven per cent. per annum may be received. (Laws of 1871, p. 250.) Section 2, as amended, provides that the parties may contract for any rate of interest, "*Provided*, that no person shall recover in any court more than twelve per cent. interest per annum." (Laws of 1872, p. 284.) Section 3, as amended, provides that, "All payments of money or property made by way of usurious interest, or of inducement to contract for more than twelve per cent. per annum, whether made in advance or not, shall be deemed and taken to be payments made on account of the principal and twelve per cent. interest per annum, and the courts shall render judgment for no greater sum than the balance found due after deducting the payments of money or property made as aforesaid." (Laws of 1872, p. 284.) Section 4 of the interest law of 1868 has been repealed; (Laws of 1872, p. 284, § 3.) Section 5 provides that judgment shall draw interest at the rate of seven per cent. per annum, except as otherwise provided; (Gen. Stat. 526.) Section 6 provides that judgments upon contracts shall draw interest at the rate expressed in the contract, not to exceed twelve per cent. per annum; (Gen. Stat. 526.) This is the substance of the interest laws.

Now, upon what principle can this action be maintained? Not under the statute, for there is no statute authorizing such an action. Not upon any contract of the defendant below

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for he has violated no contract, and has paid to the plaintiff every cent that he ever agreed to pay her. Not upon any tort, for it is not shown that the plaintiff ever committed any tort. Not upon any fraud or overreaching, for it is not claimed that the plaintiff was ever in any manner deceived or defrauded. Not for money paid, for it cannot be claimed that the plaintiff ever paid any money to or for the use of the defendant. Not for money had and received, for it cannot be claimed that the defendant ever received from the plaintiff or from any other person any money. The defendant paid to the plaintiff \$1,000. He was entitled according to law to receive back at the end of one year \$1,120. He has received nothing from the plaintiff. He however transferred the note "for a valuable consideration" to one Hollis Day. But what he received from Hollis Day, we do not know. Whether it was money or property, or whether it was worth one dollar, or one thousand dollars, or some other sum, more or less, we have not been informed. Suppose the defendant exchanged the note for a horse worth \$300: would it be right for the plaintiff to recover from the defendant \$447.50, when the defendant did nothing more than what the plaintiff had authorized him by the note to do? The note was negotiable, and payable to the order of the payee, and the transfer thereof was just what the plaintiff authorized the defendant to do by the note itself. The most plausible grounds upon which the plaintiff below may claim to recover in this action are probably as follows: Sec. 8 of the interest laws provides, that "all payments of money or property made by way of usurious interest, or of inducement to contract for more than twelve per cent. per annum, shall be deemed and taken to be payments made on account of the principal and twelve per cent. interest per annum." The consideration of the note in this case was \$1,000 in cash, \$120 legal interest for one year, and \$420 usurious interest. This usurious interest may under said § 3 be considered as a payment upon the principal, and should have been indorsed on the note, leaving as due on the note only \$1,120. This amount was all that the defendant

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should have assigned to Hollis Day. The amount however of \$420 was not indorsed on said note. The note was sold and assigned to Hollis Day as though nothing had been paid thereon, and as though the note was properly for \$1,540. Hollis Day was an innocent and *bona fide* purchaser of the note. The plaintiff was therefore compelled to pay him the full amount of the note, and therefore the plaintiff may now recover the amount of the usurious interest from the defendant. This argument however fails in the following particulars: 1st.—The statute provides for only actual payments of money or property being considered as payments on the principal, and there was no actual payment in this case by the plaintiff to the defendant of any money or property. 2d.—There is no claim that the defendant ever received from any source any payment of money or property more than he was entitled to receive, or more than he could have collected from the plaintiff on the note. 3d.—There was no understanding or agreement by the parties that said \$420 usurious interest should be considered as a payment on account of the principal, but on the contrary both parties understood and agreed that it should be paid in addition to the principal and legal interest, to whoever might be the holder of the note.

There was no failure of consideration. The consideration that the plaintiff received was eminently valuable, and was all that she ever expected to receive. It was all that the parties stipulated for, and all that they ever had in contemplation. There was no deception or fraud, no mistake or misapprehension. Both parties knew exactly what they were doing, and what they were getting, and no disappointment subsequently ensued. And the whole transaction was purely voluntary on the part of the plaintiff. If, instead of giving her note for \$1,540 for the one thousand dollars in cash, she had given money or property worth \$1,540, we still apprehend she would have no action to recover the surplus back. Now, we understand that actions to recover money back because of failure of consideration, can be maintained only when there has been

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some mistake or misapprehension with reference to the consideration, and not where the parties had full knowledge of all the circumstances at the time of making the contract, at the time the consideration passed, and at the time of paying the money. But we do not wish to assert principles beyond the necessities of this case.

The judgment of the court below will be reversed, and cause remanded for further proceedings in accordance with this opinion.

All the Justices concurring.

THE L. L. & G. RAILROAD CO. V. W. H. H. MARIS.

1. COMMON CARRIER; *Extent of Liability, After Transit.* The extraordinary liability of a railroad company as carrier of goods extends, not merely to the termination of the actual transit of the goods to the place of destination, but also until the consignee has a reasonable time thereafter to inspect the goods and remove them in the usual hours of business, and in the ordinary course of business. [*Kallman v. U. S. Exp. Co.*, 3-205.]
2. REASONABLE TIME—*What is it; Residence of Consignee.* This reasonable time is not a time varying with the distance, convenience, or necessities of the consignee, but is such time as would enable a person living in the vicinity of the place of delivery, in the usual course of business, and within the ordinary hours of business, to inspect the goods and take them away.
3. ——— Where goods are permitted by the consignee to remain eight days in the depot of the carrier, at the place of delivery, that is more than a reasonable time; and if the goods are then lost or destroyed without any negligence on the part of the carrier, it is not responsible.
4. WAREHOUSEMEN; *Liability; Negligence.* After the expiration of such reasonable time the carrier is responsible not as carrier, but only as warehouseman, and for ordinary negligence.
5. CONTRACT—*Changes Rule.* Where the carrier and shipper by special contract stipulate for notice, without any limitations or conditions, the reasonable time for removal commences from the time of the notice, and not from that of the arrival of goods.

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6. ——— *Notice; Terms, and Construction of.* Where after a stipulation for notice, without any agreement as to the form or conditions thereof, the carrier gives notice, with a condition written thereunder that the liability of the carrier terminates upon the arrival of the goods, and the consignee receives such notices without objection, and continues his shipments over the road, *held*, that this was equivalent to a construction by the parties, and binding upon both, that the agreement for notice was simply for the accommodation of the consignee, and without extending the extraordinary liability of the carrier.

Error from Montgomery District Court.

THE opinion contains a full statement of the facts and questions in this case. *Maris*, as plaintiff, recovered judgment at the April Term 1874 of the district court against the *Railroad Company*, for \$208.25, and costs, and the *Railroad Company* brings the case here on error.

S. O. Thacher, for plaintiff in error.

L. F. Michenor, and *J. D. McCue*, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This was an action brought by defendant in error to recover for goods destroyed by fire in a depot belonging to the plaintiff in error, and the question is, whether the company at the time of the fire occupied toward the goods the position of carrier, or that of warehouseman. The case was tried upon an agreed statement of facts. It is not contended that the fire was caused by the negligence of the company, or that if its liability as carrier had terminated it was responsible for the loss. The material facts are these: *Maris* was a merchant at Winfield, a place about ninety miles west of Independence, a point on the company's road. Goods were shipped to him over the company's road, to be delivered to him at Independence. The goods in question reached Independence on the 4th and 7th days of January 1872, and were placed in the depot building, and there remained eight

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facts.

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days, (until the 15th of January,) and were then consumed by fire. Immediately after the arrival of each consignment of goods at Independence, notice thereof was forwarded by mail to Maris at Winfield, but did not reach him until the 20th of January, and after the fire. A tri-weekly mail ran between the two places. Ordinarily, only two days were occupied in transmitting the mail. During that month the epizooty was prevailing among the horses in that section of the country, and owing to that or some other cause over which neither party had any control, the notice did not reach Maris until the 20th. He called every day at the post office in Winfield for his mail. The only means of conveying goods from Independence to Winfield was by wagon, and under favorable circumstances the trip from Winfield to Independence took from three to five days, and the round trip six to ten days. By special agreement between the parties, notice was to be given Maris by mail of the arrival of the goods at Independence. The form of the notice given, (and Maris had prior to the 1st of January 1872 received similar notices of the arrival of other goods,) was as follows:

FREIGHT OFFICE, L. L. & G. R. R. LINE,
INDEPENDENCE, ——— 187—.

M———:

There this day arrived at our depot at——, consigned to you, the following articles:

No.		Articles.		No.		Articles.
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EXHIBIT A.

Weight, ———

Charges, \$ ———

which are ready for delivery to you on payment of freight and charges.

N. B.—No goods delivered until all the charges thereon are paid. Storage will be charged in all cases where goods are not removed within the prescribed time.

The contract of this company as common carriers ends upon the arrival of goods at our depots, and the company will not be responsible for damage from ordinary leakage, breakage, or insufficient coöperation; and no claims for damages will be

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allowed after the goods leave the depot, unless by consent of the agent.

Goods will be delivered only to the owner, or his written order. A receipt for the goods will, in all cases, be required, and no claim will be entertained for goods lost after such receipt has been taken. _____, Agent.

Upon these facts some questions of importance are presented. It is insisted on behalf of the company, in the first place, "that a common carrier is relieved of its extraordinary liability as an insurer whenever it has carried the goods in-
1. Common carrier: liability, extent. trusted to it safely, and deposited them in a safe warehouse." This question as to the period at which the carrier's extraordinary liability terminates, comes to us borne upon two opposing lines of decision. At the head of one line stands the case of the *Norway Plains Company v. B. & M. Rld. Co.*, 1 Gray, 263, in which the great jurist of Massachusetts, C. J. SHAW, holds that this liability of the carrier terminates when the goods are unloaded at their place of destination, and are ready for removal by the consignee; that if the latter be not present to receive them, and they are kept by the company in its depot or warehouse, its liability is that of a warehouseman. In other words, this liability continues only during the actual transit, and that when this is ended, if the consignee does not immediately receive them the company, as carrier, delivers them to the company as warehouseman, and thereafter the company is liable only for loss resulting from actual negligence. At the head of the other line is the case of *Moses v. B. & M. Rly. Co.*, 32 New Hamp. 528, in which the court decides that the carrier's liability continues after the termination of the actual transit, and until the consignee has a reasonable time to remove the goods; that, as the carrier's liability commences, not with the actual transit of the goods, but from the time of receipt from the consignor, so it continues until actual delivery to the consignee, or, what is equivalent to a delivery, until the consignee has had reasonable time after their arrival to inspect and take them away in the common course of business. The

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mere fact that either before or after the actual transit they are placed by the company in its depot or warehouse does not change the character of its liability. The following cases support the Massachusetts doctrine: *McCarty v. N. Y. & Erie Rld. Co.*, 30 Penn. St. 253; *Francis v. Dubuque & S. C. Rld. Co.*, 25 Iowa, 60; *Bauserman v. T. W. & W. Rly. Co.*, 25 Ind. 484; *C. & C. Air Line Rld. Co. v. McCool*, 26 Ind. 140; *C. & A. Rld. Co. v. Scott*, 42 Ill. 133. The other doctrine is adopted in the following cases: *Fenner v. B. & St. L. Rld. Co.*, 44 N. Y. 505; *Zum v. New Jersey St. Co.*, 49 N. Y., 442; *Wood v. Crocker*, 18 Wis. 845; *Derosia v. St. P. & W. Rld. Co.*, 18 Minn. 133; *Morris & Essex Rld. Co. v. Ayres*, 5 Dutch. 393; *Blumenthall v. Brainard*, 38 Vt. 413; *McMillan v. M. S. & N. J. Rld. Co.*, 16 Mich. 79; *Jeffersonville Rld. Co. v. Cleveland*, 2 Bush. 468; *Hilliard v. Wilmington & C. Rld. Co.*, 6 Jones, (Law) 343. The question is a new one in this state, and one of no small importance both to carriers and shippers. Notwithstanding there is a technical precision in the Massachusetts doctrine which makes it both capable of exact statement and easy of application, we think the other doctrine more just and reasonable in its application to the ordinary transactions of business, protecting both the shipper and the carrier. It extends a little the duration of the carrier's obligation, but only so far as seems necessary to protect the shipper. The goods remain in the custody of the carrier, and subject to his control. The exact moment of arrival can seldom be known to the consignee, even if he have notice of the shipment. It is unreasonable to compel him to remain at the depot of the carrier, waiting the arrival of the goods, or assume all the risks of the uncertainties in the delay of transportation and time of arrival. We therefore hold that the carrier's liability continues until the consignee has had a reasonable time to call for, examine, and remove the goods.

What is a reasonable time? This is not a time varying with the distance, convenience or necessities of the consignee, but it is such time as will enable one living in the vicinity of the place of delivery, in the ordinary

2. What is reasonable time.

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course of business, and in the usual hours of business, to inspect and remove the goods. It is well said by the court in the case from 18 Minn. 138, that, "What would be under the circumstances of the case, such reasonable time for the removal of the goods, is not to be measured by any peculiar circumstances in the condition or situation of the consignee, or plaintiff, which render it necessary for his convenience or accommodation that he should have longer time or better opportunity than if he resided in the vicinity of the depot, and was prepared with means and facilities of removing them; but what is meant by reasonable time is, such as would give a person residing in the vicinity of the place of delivery, informed of the usual course of business on the part of the company, a suitable opportunity, within the usual business hours, after the goods are ready for delivery, to come to the place of delivery, inspect the goods, and take them away." Tried by this rule, it is plain that the goods had remained in the depot at Independence more than a reasonable time for their inspection and removal. They should have been removed on the day of their arrival, or at the furthest, during the business hours of the succeeding day.

It is insisted however, that notice was required of their arrival, and that no notice was received until after the destruction. Whether, independent of the special contract, any notice was requisite, may be doubted. The consignee did not live at or near the place of delivery, and the authorities are conflicting upon the question whether notice is requisite even when the consignee lives at the place of delivery. See upon the question of notice *McDonald v. W. Rld. Co.*, 84 N. Y. 497; *Fenner v. Buffalo & St. L. Rld. Co.*, 44 N. Y. 505; *Price v. Powell*, 8 N. Y. 822; *C. & A. Rld. Co. v. Scott*, 42 Ill. 133; *De-rosia v. St. P. & W. Rld. Co.*, 18 Minn. 138; *McMillan v. M. S. & N. J. Rld. Co.*, 16 Mich. 79; *Hilliard v. W. & C. Rld. Co.*, 6 Jones, (Law) 848. But whether notice independent of any special contract would have been requisite, need not be determined, for here the parties had stipulated for notice. And the question is, what effect did this notice have upon the company's

s. Notice to
consignee;
contract.

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liability? On the one hand it is claimed that the reasonable time in which to remove the goods dates from the receipt of the notice, instead of the arrival of the goods; on the other, that the notice was purely a favor to the consignee, and that specifying the time at which the carrier's liability was to cease, it cannot be construed as enlarging that time. The question is one of difficulty. In those states where notice of the arrival of the goods is required to terminate the carrier's liability, it is held that the reasonable time for removal dates from the giving of the notice. This seems necessary to make the notice of any value, for if the reasonable time commences with the arrival of the goods it might often expire before the receipt of notice. It would almost invariably so expire if the consignee lived elsewhere than at the place of delivery. Hence, the notice would be meaningless, as affecting the rights and liabilities of either party. On the other hand, the form of notice used by the company, and of which Maris had information by the receipt of such notices, attempts to limit the effect thereof, and plainly states that the company's liability as carrier is to terminate upon the arrival of the goods. Hence, Maris had knowledge that while the company had agreed to give and would give notice of the arrival, it did so only as a favor to him, and without extending the duration of its extraordinary liability. If Maris was unwilling to continue the shipment of goods under such conditions he was at liberty to stop. Continuing, he accepts the conditions. To this it is replied that, contracting for notice without any stipulations as to the forms and conditions of notice, carries with it all the rights which flow from the mere fact of notice, and that the company cannot thereafter limit those rights by attaching conditions to that notice. This would doubtless be a satisfactory reply if this were the first consignment and the first notice. But having received notices with similar conditions, and making no objection thereto, or seeking a new arrangement, it seems to us that he cannot insist upon rights other than those given by the form of notice actually used. It must be borne in mind that this is not an attempt by the company to restrict

a. Construction
of notice;
form, terms.

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its liability, but an attempt by special contract to enlarge it; and before the company could be bound by such special contract it should be made clear that it had assented to it in full as claimed. It is not pretended that the company had ever given any notice otherwise than with the conditions attached to this; nor is it claimed the company would not be liable for any injuries resulting from its own negligence; so that its interpretation of its contract for notice, an interpretation accepted by Maris without objection, was that of an agreement to give information of the arrival of the goods without in the meantime assuming any additional liability. We are aware that the agreed statement shows that the first notice was only received Dec. 28d 1871, and that owing to the sickness of one party employed, as well as the prevalence of the epizooty, Maris failed to get a team to Independence before the destruction of all the goods of the various consignments by fire on January 15th 1872. But we fail to see anything which shows that Maris was unable to communicate by mail with the company, or to go himself, or send some one else to Independence to make a new arrangement, or stop the shipment, or receive and store the goods. Under these facts, though with some doubts, we are constrained to hold that the company's liability as carrier had terminated before the fire, and that therefore it was not responsible for the destruction of the goods.

The case having been tried upon an agreed statement of facts, the judgment will be reversed, and the case remanded with instructions to enter judgment in favor of the plaintiff in error, defendant below.

All the Justices concurring.

LEWIS ORNN, *et al.*, v. MERCHANTS NATIONAL BANK.

1. SERVICE OF SUMMONS; *Jurisdiction; Findings; Presumption.* Where the court below finds that a sufficient service of summons was had upon the defendant, and renders a judgment against him, and there is nothing in the record brought to the supreme court which shows that no such service was in fact had, or that the defendant did not make a voluntary appearance in the case, and it does not appear that the whole of the record has been brought to the supreme court, *held*, that although it may not appear affirmatively from the record brought to the supreme court, except as above stated, that any such service or appearance was in fact made, still it will not be presumed from such a record, for the purpose of reversing the judgment of the court below, that the judgment was rendered without a sufficient service of summons or appearance.
2. NATIONAL BANKING LAW; *Mortgage to National Bank.* The defendant owed a large sum of money to a National Bank. To partially secure the payment thereof he gave a mortgage to the bank on some property owned by him in Chicago, Illinois. There was a prior lien of \$2,000 on the Chicago property, which the defendant agreed to pay. Five hundred dollars of the same became due, and the bank, in order to save and protect its own lien on said Chicago property, at the request of the defendant, paid said sum of \$500, and then took the note and mortgage now sued on for that amount on property situated in Crawford county, Kansas: *Held*, That the taking of the last-mentioned mortgage is not a violation of the National Banking Law, and that the mortgage is valid.

Error from Crawford District Court.

FORECLOSURE of mortgage, brought by the *Merchants National Bank of Fort Scott*, as plaintiff, against *Lewis Ornn* and his wife. The mortgage was executed by said defendants to secure a note given by said *Lewis Ornn* alone. The note and mortgage were executed and dated July 19th 1873. The *Mo. River, Fort Scott & Gulf Railroad Co.* was joined as a codefendant, as having some interest in or claim to the mortgaged premises. Trial by the court, without a jury, at the October Term 1874. The journal entry of the trial, showing the findings of fact and conclusions of law, is as follows:

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(Title.) "This cause this day came on by consent. The plaintiff appeared by Playter & Purcell, its attorneys; the Mo. River, Ft. Scott & Gulf Railroad Co. by C. W. Blair, and the defendant Abbie E. Ornn by her counsel McComas & McKeighan. The defendant Lewis Ornn not appearing, but being in default. Whereupon the court finds as to Lewis Ornn, that he is indebted to plaintiff in the sum of \$558.55 on his note as set forth in plaintiff's petition, and that said indebtedness was secured by a mortgage signed by said Lewis Ornn and Abbie E. Ornn his wife on the property described in plaintiff's petition; and that the sum of \$50 is due thereon as attorney's fee for foreclosure of said mortgage.

"And as to defendant the Mo. River, Fort Scott & Gulf Railroad Co. the court finds, that the legal title to the lands described in said mortgage is in the said defendant the Mo. River, Fort Scott & Gulf Railroad Co., and that there is due said company as purchase-money on said land the sum of \$36.30 with seven per cent. interest from July 16th 1874, which is a first lien on said land.

"And upon the issues submitted between the plaintiff and the defendant Abbie E. Ornn, the court, after hearing the evidence and argument of counsel, and being fully satisfied in the premises, upon request doth make the following special findings of fact:

"1st. That at the time of the execution of the note and mortgage stated in this case, the defendant Lewis Ornn owed the plaintiff about \$4,000; that \$2,500 of this sum was secured by a mortgage upon his mill at Cherokee, Crawford county, and the remaining \$1,500 was secured by a deed conveying to the plaintiff certain property in the city of Chicago, Illinois, both of which last-mentioned securities were taken to secure indebtedness existing against Ornn prior to their being taken by plaintiff.

"2d. That this Chicago property was originally owned by one Walker, who sold it to one Watson, who sold it to defendant Lewis Ornn. The property was valued at about \$4,000, and Watson executed to Walker a deed of trust for \$2,000 of the purchase-money. This deed of trust was an existing lien on the property at the time it was conveyed by Watson to Lewis Ornn, and at the time he conveyed it to plaintiff, and which said existing lien Ornn agreed to pay off when due, and protect the second lien held by plaintiff of \$1,500.

"3d. That after the Chicago property was conveyed to the plaintiff, \$500 of the indebtedness upon said deed of trust be-

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came due and payable, and the plaintiff, upon the request of Lewis Ornn, and in order to protect its lien of \$1,500 from being lost, paid it; and the note and mortgage in suit here were given for that \$500, but were given before said payment was made; and that the plaintiff, after taking this note and mortgage, sent drafts to Chicago to make payment of said \$500.

"4th. That the property described in the mortgage in suit here, at the time of the making of the note and mortgage, was the homestead of the defendants Lewis Ornn and his wife Abbie E. Ornn.

"5th. That the plaintiff is a National Bank.

"And as a conclusion of law, the court finds that this mortgage is valid under the National Banking Law."

Judgment was given foreclosing said mortgage, and for a sale of the mortgaged premises, the court ordering and directing that from the proceeds of sale there be paid, first, the costs of suit and sale; second, the amount due to the railroad company; and third, the amount due to the plaintiff. From this judgment *Ornn* and wife appeal, and bring the case here on error.

McComas & McKeighan, for plaintiffs in error, contended that there was no service on Lewis Ornn, and no appearance by him, and that therefore the judgment as to him was *coram non judice*, and void. Also, that the mortgage was given for debt concurrently contracted, and therefore void, as being prohibited by the act of congress.

The opinion of the court was delivered by

VALENTINE, J.: We would infer from the brief of counsel for plaintiffs in error that they probably do not think that there is very much in this case. They refer us to the record three times, but in no case do they give us the page. (Rule 2, 13 Kas. 5.) They refer us to the United States Statutes at Large; but they neither give us the volume or the page. They also refer us to "*Kansas Valley Bank v. Rowell*, 2 Dillon, page —." This we have found, though the page is not given.

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Their first claim is, that the court below erred in rendering a judgment against Lewis Ornn, because (as they claim) he was not served with summons, and made no appearance in the case. The record however shows otherwise. A part of one of the journal entries reads as follows: "Now at this day this cause coming on to be heard upon the amended petition and proofs of plaintiff, and it appearing that service of summons has been lawfully made upon each of the defendants herein, and the parties being represented by counsel," etc. And a part of another journal entry reads as follows: "The defendant Lewis Ornn not appearing, *but being in default,*" etc. Now these are findings by the court below of service of summons, and will be considered as true unless contradicted by some other portion of the record. But no other portion of the record, as brought to this court, does contradict them. We do not know that we have the whole of the record. Indeed, the presumption is pretty strong from what we have, and from the certificates of the clerk, that we have not got the whole of it. The transcript filed with the petition in error contained only the pleadings and such of the proceedings as were had by and before the court below at its September term in 1874. Afterward, and at the instance of the plaintiff in error, a copy of a summons with the indorsements thereon, and a copy of the proof of a publication service were filed in this court. But there is still nothing to show that there was not some other summons in this case, some other publication service, or some appearance by the defendant Lewis Ornn at some previous term of the court. There is nothing in fact which shows how much of the record has not been brought to this court. There is nothing which shows upon what evidence the court below made said findings. Indeed, none of the evidence upon any subject seems to have been preserved, and consequently none of it has been brought to this court. We must therefore take the findings of the court below that there was service, and sufficient service, as true. But even if the court below had made no findings upon the subject, still it would be presumed until the contrary were

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shown, that the judgment was rendered upon sufficient service. And the contrary could not well be shown by the record without the introduction of the whole of the record. A want of service on the defendant, or of appearance on his part, cannot be presumed merely because of the absence from the record of proof of the same, unless the whole of the record is introduced.

The plaintiffs in error also claim that the mortgage now sued on is void. They claim that it is void for the reason that it is a mortgage upon real estate given to secure a debt concurrently created. The facts affecting this question are substantially as follows: The bank is a National Bank. Lewis Ornn owed it a large sum of money. To partially secure the payment thereof he gave a mortgage to the bank on some property owned by him in Chicago, Illinois. There was a prior lien of \$2,000 on said Chicago property which Lewis Ornn agreed to pay. Five hundred dollars of the same afterward became due, and the bank, in order to save and protect its own lien on said Chicago property, and at the request of said Lewis Ornn, paid said sum of \$500, and then took the note and mortgage now sued on for that amount on property situated in Crawford county, Kansas. We think the mortgage is valid. The taking of the mortgage under such circumstances was not a violation of the National Banking Law. We think the bank had a right to get all the security it could for money which it necessarily had to pay out. And therefore we do not think that the mortgage is void.

The judgment of the court below is affirmed.

All the Justices concurring.

ELI HOLDEN v. GEORGE M. CLARK, *et al*

1. **MORTGAGE; Stipulations and Conditions; Default; Election of Mortgage; When Debt Becomes Due.** This action is on certain negotiable promissory notes and a mortgage. The notes by their terms are to become due at different times. The defendants set up usury, and a want of consideration. The mortgage contains a covenant that the defendants shall pay all taxes "that may be levied or assessed on said premises at the time the same shall become due and payable by the laws of this state; and they will insure or cause to be insured the buildings on said premises in a responsible insurance company to be named by the grantees;" and in case of failure to pay said notes when they become due, or said taxes, or to insure said building, "in manner aforesaid, then and at the time of such nonpayment or failure, or either of them, the whole sum hereby secured shall, if the grantees so elect, become due and payable." The notes and mortgage were dated July 14th 1873. At that time taxes were due on the land which were afterward paid by the grantee out of the money for which the notes and mortgage were given. No holder of the notes and mortgage ever named an insurance company in which to have said building insured, and the same was never insured. On August 8th 1873 the first holder of said notes and mortgage transferred the same to one H. M. Holden, and he transferred the same before maturity to the plaintiff Eli Holden. On November 1st 1873, other taxes became due on the mortgaged premises, which taxes have never been paid. On January 14th 1874, the first note became due, which note has never been paid. On February 13th 1874, the plaintiff, Eli Holden, elected that the whole debt secured by the mortgage should become due, and gave notice accordingly. Afterward he commenced this action: *Held*, That the plaintiff must be considered as an innocent and *bona fide* purchaser of said notes and mortgage, and that he holds the same freed from all equities existing between the original payor and payee, and mortgagors and mortgagees. [*Day v. Walker*, ante, 326; *Rahm v. Bridge Co.*, post, 530; *Gross v. Funk*, 20-656.]
2. **REPLY; Sufficiency; Waiver.** Where an action is tried in the court below as though all parties considered that the reply was sufficient to put in issue certain allegations of the answer, the case will be considered in the same way in the supreme court. [See *Bent v. Philbrick*, ante, 190, and cases cited there.]

Error from Linn District Court.

ACTION by *Holden* as plaintiff, to foreclose a mortgage given by *Clark* and wife to Dean S. Kelley, to secure a note executed by *Clark* alone. The note was for \$600, due in five years, with

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interest-notes payable every six months. The action was commenced February 14th 1874. The defense was, an alleged partial failure of consideration, and usury. The real question was, whether *Holden* took the note and mortgage as an innocent purchaser for value before due. The material facts, and the stipulations and conditions of the mortgage are set forth in the opinion, *infra*. Trial at the October Term 1874 of the district court. Among the instructions given to the jury were the following:

"By the election of said plaintiff Eli Holden, the entire claim became due before he acquired an interest in said notes and mortgage; and if there was a failure of consideration for said notes and mortgage, he cannot recover. But whether there was a failure of consideration, is a question of fact to be determined by the jury.

"The notes and mortgage sued upon are subject to the same defense in the hands of the plaintiff that they would be if owned and in the hands of Dean S. Kelley, the payee in the notes and grantee in the mortgage."

The jury returned a verdict in favor of *Holden*, plaintiff, for \$513.33. *Holden* moved for a new trial on the ground that the court erred in its instructions to the jury, and that the verdict was too small. Motion overruled, and judgment on the verdict. *Holden* now brings the case here for review.

Dean S. Kelley, for plaintiff:

The clause or stipulation in the mortgage, that reads, "then and at the time of such nonpayment or failure, or either of them," the grantee may elect, shows that it was the intention of the contract that the grantee might if he chose wait until several defaults occur, and then after the last exercise his option. This clause was undoubtedly inserted in view of the common-law rule, that where a party has a right upon default of the other party to choose between different courses or remedies stipulated in the contract he must exercise his option at the time of the default. (5 Wis. 206.) The plain intent of this contract is to vary that rule, and allow the party to exercise his option at any time after default.

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But, to charge plaintiff with equities between Kelley and Clark, the notes must have been dishonored in the hands of H. M. Holden. Though plaintiff had actual knowledge of the dealings between Kelley and Clark, yet he would be protected, having received the paper from an innocent holder. (Edwards on Bills, 312.) The law will certainly not place him in a worse position when at best he only has constructive knowledge of them.

Again: We claim in order to charge the plaintiff with equities the notes must have been dishonored at the time he received them. (Edwards on Bills, 57.) This was evidently also the view of this court in *National Bank v. Peck*, 8 Kas. 660, upon which the ruling in this case, in the court below, was based. If not dishonored at the time of the transfer, he took them as an innocent holder. The notes were afterward dishonored in his hands. Can a note which becomes dishonored in the hands of an innocent holder be chargeable with prior equities? But it is said the notes and mortgage are one contract, and the several indorsees are required to take notice of the provisions of the mortgage, and are consequently chargeable with knowledge of transactions between the maker and payee. That they are one contract for the purposes of construction, we admit; and that the indorsees of the note are chargeable with knowledge of the terms of the mortgage, is probably the law; but would they be chargeable with the fact that Clark had failed to perform his contract? This must be the case in order to charge the indorsee with equities. The fact certainly does not appear on the face of the contract. Is the indorser required to look beyond it? We think not. (1 Black, 386; 1 Wall. 83.) It certainly would be a strange rule of law that would presume a man had not performed his contract, and upon the strength thereof require the indorsee of his commercial paper to ascertain at his peril that he had done so before his paper could be deemed clothed with the attributes ordinarily possessed by paper of that character. The defendant should at least have been required to prove that he never had paid his debts, before asking the court to reverse a rule of law so ancient and honor-

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able to human nature as that which presumes until the contrary appears that all men perform their legal obligations. The rule above contended for would have made these notes equally dishonored in the hands of H. M. Holden, if it would not in fact render it impossible to purchase commercial paper secured by mortgage in any manner so as to become an innocent holder. But suppose plaintiff and H. M. Holden did know at the time they respectively received the notes that Clark had not paid the taxes and insurance: how does it affect the negotiability of the paper? The principle which charges an indorsee with prior equities on account of knowing certain facts is this, that the facts known are of a character to excite suspicion and put the party upon inquiry. (Edwards on Bills, 317.) What possible connection is there between the non-payment of taxes or insurance, and the consideration of the notes? Would the knowledge of these facts be any augury of the rates of interest charged, or excite any suspicion as to whether it was legal or illegal? Might they not exist the same had the loan been at seven instead of seventeen per cent? The payment of taxes and insurance were acts to be performed after the execution of the papers, and could have no possible connection with the consideration for which they were given. Suppose a negotiable corporation bond, payable in ten years, may by its terms be elected due if the obligor fail to pay certain prior bonds which are past due, or fail to pay insurance on a portion of its property: will the fact that the purchaser of the bond knew that the prior debt or insurance had not been paid excite any suspicion as to the legality or illegality of the original transaction? If so, and the purchaser by reason thereof is chargeable with equities, then it is in the power of the maker of negotiable paper of this character to render it *non-negotiable by his own wrong*, by simply refusing to perform his contract.

The notes then were not dishonored and not subject to prior equities when plaintiff received them. The first note was actually dishonored by non-payment on the 14th of January 1874, and yet the remaining ten notes were not. They were all ne-

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gotiable notes, and not due on the 12th of February 1874. On the 13th of February plaintiff elects to have them due by reason of the failure to pay the first—and the district court held that in doing so he actually made them all due at the time of their inception, and thus dishonored the first note a second time! It was an honorable note on the 14th of January; dishonored by nonpayment on the 15th, and again dishonored *ab initio* on the 18th of February by a mere stroke of an ordinary quill! If the law-merchant is to be determined by such “now you see it, and now you don’t see it” legerdemain, the sooner it is determined the better for the commercial interest of the state.

The theory of the law is, that the indorsee must have either actual or constructive notice of equities in order to be charged with them. If he receive the paper after maturity, the presumption is conclusive that he had such notice. If he receive it before maturity, the contrary presumption prevails, unless he had actual knowledge, or such as would put him upon inquiry. By what principle of law then, can a party be said to be an innocent holder to-day, and not so to-morrow, when there is no change in the contract, and no new developments as to facts known? Clearly, nothing but this: The contract provides as a penalty for a breach that the holder may elect to have the whole debt due. The defendant suffers the breach, and the plaintiff exercises his right of election. Suppose it would take it back to a date prior to the transfer by Kelley: does it raise any presumption that the plaintiff had any knowledge as to the consideration? It is simply the stipulated consequence of a breach of the contract, and the defendant can take no advantage of it. Again: Suppose for the sake of argument we concede that the effect of the election was to take it back to the time of the breach: does it follow that the breach occurred at the inception of the notes, or even while they were in the hands of Kelley, or H. M. Holden? The contract reads, “And the grantors covenant and agree that they will pay all taxes, etc., at the time they shall become due by the laws of the state.” This clearly contemplates only taxes subsequently to be levied, otherwise it would be a

Brief of Defendants.

covenant to pay a tax when due by the laws of the state, when in fact by the laws of the state it was already over two years past due. No one would seriously contend that the debt could be elected due for the nonpayment of that tax. But suppose it could: the defendant would be allowed a reasonable time to pay it, and it is certainly in the power of the grantee to enlarge that reasonable time as much as he likes, it being entirely at his option. The defendant cannot take advantage of his own wrong, and say, "I ought to have paid that tax in twenty-four hours, and as I did not, my default occurred then, and you shall suffer by it to my advantage." If Kelley saw fit to extend the time or not to claim a default while he held the note, he had a perfect right to do so; and if he did, then there was no default. H. M. Holden had the same right; and unless he insisted upon its payment, there was no default. The plaintiff had the same right, and consequently there was no default as to taxes and insurance until the election was made by Eli Holden. No one can with a shadow of reason contend that either of the holders had not the right to let the tax run as long as he choose, and then, if he saw fit, pay it and charge it up as a part of the debt; and with no more reason can it be claimed that there would be a breach until declared so by the grantee.

The same reasoning applies to the insurance, but with much greater force—as by the terms of the contract it is at the option of the grantee to take the insurance or not. If he deems the security ample, he may go without it. If otherwise, he may name a company and require insurance. No insurance company was ever named by the grantee in this case.

W. R. Biddle, for defendants:

1. Could the defense of usury and want of consideration be made by the defendant against this plaintiff? The answer alleges that Kelley, the payee in the notes and mortgagee in the mortgage, was the agent of the plaintiff and H. M. Hol-

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den, and as such agent was authorized to make this loan to the defendants for the benefit of the plaintiff. The reply does not deny this agency and authority, by affidavit of the plaintiff, his agent or attorney; and the agency of Kelley, and his authority to make this loan, was admitted by the pleadings. (Code, § 108.)

2. The notes and mortgage were due before they were assigned to plaintiff, and the same defenses could be made against them in his hands that could have been made had the suit been brought by Kelley. The notes and mortgage are one contract, and the provisions thereof inure to the benefit of the defendant as well as to the plaintiff. (8 Kas. 456, 660.) The plaintiff elects that by reason of nonpayment of the interest-note that became due Jan. 14th 1874, and the nonpayment of the taxes that were due and payable upon the mortgaged premises at the time the mortgage was given, and the nonpayment of the taxes dues Nov. 1st 1873, and the failure of said defendants to insure the building situated upon the mortgaged premises for the benefit of the mortgagee or his assigns, that the whole sum secured by the mortgage should become due and payable. Now the mortgage provides that *at the time* of such nonpayments, or failures, or any of them, if the grantee so elect, the whole amount secured by the mortgage should become due. The petition alleges that such failures and nonpayments were made, and the answer admits them; and the *time* of the nonpayment of the taxes already due on the land when the mortgage was given, and the failure to insure the building on the mortgaged premises, was before Holden became the holder of the notes and mortgage, so that they were all due before that time.

But it may be said, the plaintiff must *elect* that the notes and mortgage become due by reason of such nonpayment or failure, and that the date of the election is the date or time when the notes and mortgage become due. This might be true if it were not for the plain statements in the mortgage to the contrary. The election simply refers back to the times of nonpayment, or failure, or both. So that, even though the

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plaintiff afterward purchased the notes and mortgage, the defense of usury, fraud and want of consideration could be made.

3. The instructions given by the court are in accordance with the cases reported in 8 Kas. 456, 660.

The opinion of the court was delivered by

VALENTINE, J.: The facts presented by the record are as follows: The petition is for the foreclosure of mortgage given by the defendants to one Dean S. Kelley to secure a promissory note for \$600 payable five years after date, and also ten semi-annual interest-notes for \$86 each. The notes and mortgage were executed July 14th 1878. The mortgage is in the ordinary form except that it contains a covenant as follows:

"And the said grantors hereby covenant and agree that they will pay all taxes and assessments of every nature *that may be levied or assessed on said premises at the time the same shall become due and payable by the laws of this state*; that they will insure or cause to be insured the building on said premises in a responsible insurance company, *to be named by the grantee*, in the sum of three hundred dollars, and assign the policy or cause the same to be made payable in case of loss to the grantee, his heirs or assigns, as his interests may appear, and continue such insurance until said indebtedness shall be paid in full. But in case of the nonpayment of said sum of money, either principal or interest or any part thereof, at the time or times above limited for the payment thereof, or in case of the nonpayment of any taxes *that may be levied or assessed upon said premises, at the time the same shall become due and payable as aforesaid*, or in case of the failure of the grantee to insure and keep said property insured and the policy assigned or made payable to the grantee *in manner aforesaid*, then, and at the time of such nonpayment, or failure, or *either of them*, the whole sum hereby secured shall, *if the grantee so elect*, become due and payable, anything in said note to the contrary notwithstanding, and this deed shall then be and at that time become absolute, and notice of such election may be given to the grantor *at any time thereafter*. * * * And it is further covenanted and agreed, that in case of failure of the grantor to pay taxes or cause said property to be insured as above provided, the

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grantee, his heirs or assigns, may, if he elect so to do, pay said taxes, or cause said property to be insured as aforesaid, and the amount of money so paid for taxes or insurance shall become an indebtedness against said grantor and draw interest at the rate of twelve per cent. per annum from the time of such payment."

Kelley transferred said notes and mortgage to one H. M. Holden August 8th 1878, and said Holden transferred the same to the plaintiff afterward and before maturity of said notes or either of them. Defendants did not pay the first interest-note which fell due on January 14th 1874; did not pay taxes for 1873, due November 1st 1873; did not insure property; and did not pay certain back taxes which were due on a portion of said property at the time the mortgage was given; and by reason thereof, and after the maturity of the first interest-note, viz., on February 18th 1874, plaintiff elected to have the whole debt become due, and on that day gave notice thereof to defendants. The answer admits these facts, and sets up that Kelley acted as the agent of H. M. Holden and the plaintiff in making the loan to defendants, and claims a failure of consideration. The testimony shows (and there is no dispute on the point,) that Kelley paid a judgment of foreclosure against Clark upon the premises herein, amounting to \$314.36; also, taxes on same land, \$114.17; also, for abstract, \$5, and for patent, etc., \$2.50—making a total of \$436.03, which is all the consideration Clark ever received for the notes; that \$150 commission was reserved by Kelley, and that he still has about \$14 in his hands belonging to Clark. Defendant admits in open court that there is no evidence that Kelley acted as agent for plaintiff, or H. M. Holden, and hence the only question for this court is, whether the plaintiff obtained the notes and mortgage before or after maturity, and consequently, whether the notes are subject to or freed from equities between Clark and Kelley.

Though the defendant admits that the plaintiff received the notes as above stated and in fact *long prior to the maturity of either of the notes*, yet he claims, and the court below so in-

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structed the jury, that, "by the election of the plaintiff, Eli Holden, the entire claim became due before he acquired an interest in said notes and mortgage," and therefore that the notes are subject to equities between Clark and Kelly. Other instructions given by the court were in substance to the same effect, all hinging upon the theory that, by reason of the failure of the defendants *to pay the portion of the taxes unpaid at the time the notes and mortgage were executed*, and by reason of their failure to insure the property under the above covenant, the notes became due at the time they were executed. As above stated, the election of the plaintiff was made and notice thereof given to the defendants on the 13th of February 1874, one month after the maturity of the first note. The reason assigned for the above ruling is, that the covenant reads that, in case of default, "then and at that time" the entire debt shall, at the election of the grantee, become due; and as plaintiff elects to have the whole debt due, it relates back to "that time," viz., the *time of the default*, which (it is said) was that of the date of the papers. The language however of the contract is, that "then and at the time of such nonpayment, or failure, or *either of them*," the whole of the debt shall become due "*if the grantee so elect*"—showing clearly that it was the intention of the parties, not that the whole of the debt or any part thereof not yet due should become due upon the happening of any default or failure—not that the grantee would be required to make his election at the happening of the first or any intermediate default, or not at all, but that the grantee might wait until several defaults had occurred, and then, after the last default, exercise his option by electing that the debt should become due, and the debt would then become due, not because of such default merely, but because of the election by the holder thereof that it should become due. The grantee might waive all the defaults except the last one, and then upon that default, and because thereof, elect to make the whole of the debt become due. And then, by no rule of construction could the time for the debt to become due be made to relate back to the time of any

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default which occurred previous to the last one. No election had been made by any holder of the notes or mortgage when either H. M. Holden or the plaintiff Eli Holden purchased the same, and none of the notes had yet become due by their terms. Hence both the Holdens were innocent purchasers and holders of the notes and mortgage. Up to February 13th 1874, when Eli Holden elected that the whole of the debt should be due, he was unquestionably an innocent holder of the notes. Now how can it be said because of such election that he never was an innocent purchaser? Up to January 14th 1874 none of the notes had become due. Then how can it be said that because of said election none of the notes were ever otherwise than due? Evidently all of the notes but the first note became due at the time that Eli Holden elected that they should become due, that is, on said February 13th, and not one of them became due prior to said January 14th. On said January 14th the first note became due, and it had never before that time been due. Then how can it be said after February 13th that it had never been otherwise than due? Can a note become due a second time? Can a note that was always due become due again? Can a note be due and not due at the same time? H. M. Holden purchased said notes on August 8th 1873, and the first default, as we think, was not made sooner than November 1st, 1873. The maker of the notes was to pay the taxes on the property (in the language of the contract) "that *may be* levied or assessed on said premises at the time the same *shall* become due and payable by the laws of this state;" and "that *may be* levied or assessed on said premises at the time the same *shall* become due and payable as aforesaid;" and he was not required to pay taxes "that" *had been previously* "levied or assessed on said premises," nor was he required to pay such taxes or any taxes "at the time the same" *had* "become due and payable," or that were *then* "due and payable." Besides, the taxes that were then due and payable were paid out of the money for which the notes were given long before the notes were transferred to H. M. Holden. But is it possible to con-

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strue this contract so that Kelley might have elected to consider all of the notes due the very minute they were given? Such certainly could not have been the intention of the parties. The defendants certainly did not want to put it in the power of the holder of the notes to sue on them as soon as they were made when it was stipulated in the principal note and mortgage that the loan should be for five years. The insurance was to be (in the language of the contract) "in a responsible insurance company to be named by the grantee;" and the grantee never named any insurance company; so the defendants of course were never in default in this respect. The first default was therefore after H. M. Holden purchased the notes; and therefore, if we should carry the time back when said notes became due to the first default it would still leave H. M. Holden an innocent purchaser and holder of the notes; and if he was an innocent purchaser and holder, then of course the plaintiff must recover. Upon this whole subject we would refer to the able and elaborate brief of counsel for plaintiff in error.

Counsel for defendants in error raises the question that the plaintiff's reply was not verified by an affidavit, and therefore that it did not put in issue some of the allegations of the defendants' answer. The case was tried however in the court below, in the same manner as though it was considered by all the parties that the reply was sufficient, and therefore this court will now treat the case in the same way. (*Bent v. Philbrick*, ante, 190; *Wright v. Bacheller*, ante, 259, and cases there cited.)

The judgment of the court below will be reversed, and cause remanded for a new trial.

All the Justices concurring.

GEORGE JANSEN V. THE CITY OF ATCHISON, AND A. G. OTIE.

1. **CITIES; POWERS AND DUTIES, Respecting Bridges, Streets and Sidewalks; Liability for Negligence.** Cities, having the powers ordinarily conferred upon them respecting bridges, streets and sidewalks within their limits, owe to the public the duty of keeping them in a safe condition for use in the usual mode by travelers, and are liable in a civil action for special injuries resulting from neglect to perform this duty. [The previous rulings of this court in sundry cases, in respect to this question, noticed and affirmed.] [*City of Leavenworth v. Casey*, McC.-124; *City of Topeka v. Trulle*, 5-311; *City of Atchison v. King*, 9-550; *City of Ottawa v. Washabaugh*, 11-124; *City of Wyandotte v. White*, 13-191; *Smith v. City of Leavenworth*, 15-81; *Gibson v. City of Wyandotte*, 20-156; *City of Fort Scott v. Brothers*, 20-455; *City of Atchison v. Jansen*, 21-560; *City of Wyandotte v. Gibson*, 25-236; *City of Parsons v. Lindsay*, 26-426; *City of Salina v. Trospen*, 27-545; *Corlett v. City of Leavenworth*, 27-673; *Maulby v. City of Leavenworth*, 28-745; *City of Osborne v. Hamilton*, 29-1; *City of Sedan v. Church*, 29-190; *City of Emporia v. Miller*, 30-494; *City of Wellington v. Gregson*, 31-99; *Gould v. City of Topeka*, 32-485; *City of Emporia v. Schmidling*, 33-485. Contra, as to county, *Comm'rs Marion Co. v. Riggs*, 24-255; and townships, *Eickenberry v. Township of Bazaar*, 22-556.]
2. **STARE DECISIS; Settled Rules Should Not be Overturned.** It is seldom that a rule of law, generally recognized by the decisions of other states, generally approved by jurists, hitherto followed by this court, and apparently salutary in its operation, ought to be abandoned merely because the reasons given for its original adoption are not altogether satisfactory, and that, logically, the courts should have reached an opposite conclusion.
3. **DEMURRER TO EVIDENCE; Province of Court, and Jury; Practice.** Where the court sustains a demurrer to the evidence, this ruling will be reversed when it appears that the petition states facts sufficient to constitute a cause of action, and there is testimony tending fairly to establish every essential fact thereof; and this, notwithstanding a preponderance of the evidence appears to be with the ruling of the court. [*Watterson v. Rogers*, 21-529.]
4. **LIABILITY OF CITY; Notice of Defect in Sidewalk; Diligence.** To make a city liable for injuries resulting from a defect in a sidewalk, it must appear, either that the city had notice of the defect, or that it was a patent defect and had continued so long that notice might reasonably be inferred, or that the defect was one which with reasonable and proper care should have been ascertained and remedied. [*Riggs v. City of Florence*, 27-194; *City of Salina v. Trospen*, 27-545; *City of Emporia v. Smidling*, 33-485.]
5. **LOT-OWNER, Non-liability for Injury.** Where injury has resulted from a defect in the sidewalk by the city negligently permitted to continue, and for which the city is compelled to pay, there is no recourse over in favor

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of the city against the owner of the lot in front of which the defect existed, and no liability on the part of such owner to the party injured, arising from the mere fact of ownership.

6. ——— *In Case of Negligence.* Before the lot-owner can be held responsible, there must appear some negligence on his part, or he must have trespassed upon the sidewalk by obstruction upon the surface, or excavation beneath, and such negligence, obstruction or excavation caused the injury.
7. ——— *Area, under Sidewalk; Presumptions.* Where there is an area or open space in front of a building, and beneath the sidewalk, and a wall extending along in front of said area, upon which the sidewalk in part rests, it may be presumed, in the absence of testimony, that this area was for the benefit of the building, and for the purposes of air, light, approach, or storing, and that the same was constructed by the owner, or at his instance; but where it appears from the testimony that this area was not, and could not (without a change in the walls or approaches) be used for any purpose connected with the building, then this presumption ceases, and it must be shown that the work was done by the owner, or at his instance, before he can be held responsible for injuries received by falling through the walk into the area.
8. ——— *Negligence of City.* Where neither statute nor ordinance attempts to cast upon the lot-owner the duty of making or repairing sidewalks, and the only provisions thereon authorize the city to make or repair sidewalks, and collect the cost thereof from the lot-owner, held, that permitting a defect to remain in the sidewalk may be negligence on the part of the city, but is not on the part of the owner.

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ACTION by *Jansen*, to recover damages for personal injuries. His petition alleged that in August 1873 while lawfully, and without any negligence on his part, walking along and over the sidewalk on Commercial street in the city of Atchison, said walk broke through, and precipitated plaintiff into an area under the walk, causing great and permanent injury to his person, etc. Other statements of his petition, the defenses set up by the defendants, and the material facts, sufficiently appear in the opinion, *infra*. Trial at the June Term 1874 of the district court. When the plaintiff rested, the defendants, the *City of Atchison*, and *A. G. Otis*, filed separate demurrers to the evidence. These demurrers were sustained by the court, the jury discharged, and judgment entered in favor of the defendants for costs. *Jansen* brings the case here on error.

Albert H. Horton, and H. C. Solomon, for plaintiff:

1. The city is liable not only for accidents occasioned by negligently constructing defective sidewalks on its streets, or by causing such defects in them after they are made, but also for negligently permitting such defects to continue. Laws of 1872, p. 208, §§ 54, 55; Laws of 1873, pp. 128 to 132, §§ 1, 2, 3, 4, 9; 9 Kas. 550; 11 Kas. 124, 127; 2 Dillon on Munic. Corp. 908 to 928, §§ 787 to 796; 40 Mo. 569; 45 Mo. 449; 35 Ill. 58; 30 Conn. 118; 4 Black, 418; 5 Kas. 311; 37 N. Y. 568; 22 Penn. St. 55, 384; 67 Penn. St. 355; 68 Penn. St. 404.

2. The owner of the house and premises, whose duty it was to keep a passage-way or sidewalk in repair, and who allowed it to become and remain in a dangerous condition, is also liable to a person who receives an injury from said neglect. 37 N. Y. 568; 23 Wend. 445; 2 Black, 418.

If defendant Otis, without special authority, made or continued a covered excavation on Commercial street, or on the sidewalk thereof, for a private purpose, he is responsible for all injuries resulting from the way being thereby less safe. 18 N. Y. 79; Dillon Munic. Corp. 925.

D. Martin, for the city of Atchison:

1. We contend, that the control and care which a city of the second class in this state exercises over the streets and sidewalks of the city, are by virtue of a power of a governmental character, and that it is not liable to the private action of an individual for neglecting to exercise such power, or for its imperfect execution, and therefore that the city cannot be liable in this action. We are aware that in one case this court has seemingly overlooked, and in another apparently discountenanced, this doctrine. In *Topeka v. Tuttle*, 5 Kas. 311, which was a case of neglect to repair a street, it would seem that the general question of municipal liability or immunity in such cases was not argued by counsel. It was contended that the petition was insufficient, but the court say, "Why it is not sufficient we are not informed." It is then intimated that the

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court think the petition sufficient. On the motion for rehearing, 5 Kas. 425, the argument seems to be wholly upon other questions. The case of *Atchison v. King*, 9 Kas. 550, was submitted on brief; and although the point was raised by the city, still there was but little argument further than a mere statement of the proposition and a citation of authorities. The court decides that the instruction asked by the city which raised the question, lacked one essential element, saying "if the city carelessly and negligently permitted the defect to exist, no matter how caused, after notice thereof to the city, or for so long a time that notice was presumable, then it became liable." The court does not discuss the point, nor refer to any authorities on either side. Now, inasmuch as no rule of property is involved, but only the construction of powers granted by statute, and liabilities incurred by reason thereof, we think the doctrine of *stare decisis* should not in this case outweigh reason, and that this court ought to examine the question fully on principle, and decide it in accordance with sound reason. (1 Kent's Com. 477.) We do not wish to be understood as undervaluing precedent. We claim indeed to stand on this question *super antiquas vias*. For the doctrine of common-law municipal responsibility to private individuals for damages caused by defective highways, we consider a modern heresy, now bolstered up it is true by a respectable array of authorities, but none the less a heresy on that account. From the time that the Romans are said to have established the four great highways through the length and breadth of Britannia, down to the present, we know of no British authority from which the doctrine of such responsibility can be legitimately drawn. And we might search in vain for such a doctrine in that system of jurisprudence which once ruled the civilized world, and the principles of which are even now so prevalent in Europe, some of them even being engrafted upon the common law. Yet the civil law was very careful of the persons and possessions of individuals, and even more rigorous than the common law for acts of negligence. The inhabitant of a house was responsible for all damages caused by throwing anything out of

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it by which one was injured, even though by a stranger in the absence of the proprietor; and was finable for hanging anything from the house into the street whereby one might be injured; yet the public could not be required to respond in damages to individuals on account of defective streets. (Domat's Civ. Law, part 1, book 2, title 8, §1.) These principles obtained also in France. Persons placing obstruction in streets or highways, or committing other trespasses therein, were subject to fine, and also liable to indemnify any person injured thereby; but it does not seem that the public ever assumed the burden of making pecuniary satisfaction for injuries to individuals. In England the public roads and streets were called in the old books *via regia*, and they are still designated as the king's highways. The reparation of these was one of the *trinoda necessitas* to which every man's estate was subject, the duty being placed side by side with the building of castles, and the repelling of invasions. (1 Bl. Com. 357, 262; 2 Bl. Com. 102.) The reparation of the king's highways was a public duty devolving upon the subject, just as the contribution to the erection of fortresses and serving in the king's armies in time of war were public duties. The subject was punishable for failure to perform these duties when legally called upon. In order to apportion the burden of repairing the highways it was found convenient to require the inhabitants of each parish to repair the highways within its limits, and the parish was indictable for failure to do so. The inhabitants were amenable to the king, just as they would be for failure to contribute to the erection of fortresses, or to take up arms against the hostile invader. But as the king could not be called to account by a subject for a failure to protect him against an invader, so neither the king nor the parish was liable to an individual for the non-repair of highways. The want of power in the courts to enforce any decree against the king, is not the only reason for his immunity from legal process. A remedy presupposes a wrong; but "the king can do no wrong." The Americanization of this axiom is this: Acts of the government are but emanations of the public will; and as this is the highest hu-

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man authority recognized by republics, such acts are, according to the theory of our government, right, and must be so accepted by all people within its jurisdiction. In the performance of governmental duties, therefore, the sovereign power is not amenable to individuals.

Our road laws generally pursue the analogies furnished by the mother country. In this state, highways are laid out by legislative authority, and the sovereign power of eminent domain is freely exercised. The whole state, not excepting cities of the second class, is laid off into road districts, each having an overseer whose duties are prescribed by the laws of the state. Ample powers are conferred upon these overseers; and able-bodied male persons are required to work on the roads and streets, or pay a commutation fee, and a county tax may also be levied for road purposes. (Gen. Stat. 902, 906.) Our statute is very similar to 13 George III, c. 78. But we have no statute fixing a liability upon counties, townships or road districts, in favor of private individuals for injuries caused by defective highways, and we think it well settled that there is no common-law liability. 2 Term R. 667; 9 Mass. 247; 4 Cush. 810; 2 N. H. 392; 17 How. 161, 167; 17 Ill. 143; 3 Harrison, 108; 2 Vroom, 507; Cooley on Const. Lim. 247; Dillon on Munic. Corp., §§ 762, 785.

We think there is no foundation in reason for the distinction asserted in some late cases between cities clothed with authority to repair highways on the one hand, and counties and townships possessing like authority on the other, holding the former liable to such actions while the latter are not. It is somewhat surprising that a doctrine, asserted for the first time to be "common law" only thirty years ago, upon reasons which have been and must continue to be distinctly repudiated by our most enlightened jurists, should still be accepted as the undoubted law of the land. The courts of New York are responsible for the heresy. It is on their authority that all other similar decisions are based, whether in the federal or the state courts. And these New York authorities were so ably reviewed, and the fallacy of the doctrine and the inconsistency of the cases so thor-

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oughly exposed in the brief of Hon. J. P. Whittemore in the case of *Detroit v. Blakeby*, 21 Mich. 87-100, that we desire to refer to that brief as a part of our brief in this case, making some additional observations. The first distinct enunciation of the *rationale* of the doctrine was made by Selden, J., in the case of *Weet v. Brockport*, 16 N. Y. 161. Referring to municipal charters, (page 171,) he says:

"But it is well known that such charters are never imposed upon municipal bodies, except at their urgent request. While they may be governmental measures in theory, they are in fact regarded as privileges of great value, and the franchises they confer are usually sought for with much earnestness before granted. The surrender by the government to the municipality of a portion of its sovereign power, if accepted by the latter, may with propriety be considered as affording ample consideration for an implied undertaking on the part of the corporation to perform with fidelity the duties which the charter imposes." * * * "It follows from the preceding reasoning that if we regard the injury to the plaintiff as the result of mere neglect to keep the highways of the village in repair, the defendants would be responsible in this action for such neglect upon the ground that their acceptance of the franchise granted by their charter raised an implied undertaking or contract on their part to perform that duty, which, upon the principles referred to, inures to the benefit of every individual interested in such performance."

The decision of the case was placed on other grounds; and yet these *dicta* of Justice Selden form the basis for all subsequent decisions holding municipal corporations liable in such cases for mere non-feasance. Mr. Justice Cooley quotes them as authority in his dissenting opinion in *Detroit v. Blakeby*, and lays them down as law in his valuable work on Constitutional Limitations, 247, 248; and their doctrine has even been countenanced by the supreme court of the United States. (1 Black, 39, 50.) Let us examine this reasoning. It is asserted that "such charters are never imposed upon municipal bodies except at their urgent request." We do not know whether this general statement of fact was true or untrue in New York when Justice Selden wrote his opinion. Its truth or falsity is not apparent from the report of the case, and we presume

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it was not in the record. Neither do we think it such a matter of public history as the courts will take judicial notice of without proof. Justice Selden then says, that while municipal charters "may be governmental measures in theory, they are, in fact, regarded as privileges of great value, and the franchises they confer are usually sought for with much earnestness before they are granted." The foregoing remarks apply also to this assertion. But granting it to be true, we submit whether it is not an immaterial statement of fact. Are petitioners to the legislature affected differently from other citizens by the enactment of a statute embodying the recommendations set forth in their petition? Is even a member of the legislature who introduces a bill and secures its enactment, peculiarly bound by its provisions? We think these questions must be answered in the negative. These assertions of Justice Selden are made, apparently, as an inducement to the following legal propositions, viz.:

"The surrender by the government to the municipality of a portion of its sovereign power, if accepted by the latter may with propriety be considered as affording ample consideration for an implied undertaking on the part of the corporation to perform with fidelity the duties which the charter imposes." And the defendants, the trustees of the village of Brockport, would be responsible for neglect to keep the streets in repair "upon the ground that their acceptance of the franchise granted by their charter raised an implied undertaking or contract on their part to perform that duty, which inures to the benefit of every individual interested in such performance."

Now, granting for the sake of deference to the learned and able judge who wrote the opinion, that this language had some meaning in the state of New York when written, let us see if it has any force in Kansas. Is "the surrender by the government to the municipality of a portion of its sovereign power" a possibility in Kansas? We think not. (Const., Art. 12, §§ 1, 5.) The legislative power over cities is as plenary as it is over counties, townships and school districts. Each of these organizations is invested with certain powers

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which may be modified or entirely taken away at the will of the legislature, which surrenders nothing. The next step toward liability, according to Judge Selden's opinion, is, acceptance of the charter by the municipality. This is another impossibility here; for acceptance implies and presupposes the power to reject. And we know that a city having a population exceeding two thousand has no more right to reject the act to incorporate cities of the second class, than a county, township or school district has to reject the several laws enacted for its government. The next proposition in the opinion is, that such surrender, if accepted, "may with propriety be considered as *affording ample compensation for an implied undertaking* on the part of the corporation, to perform with fidelity the duties which the charter imposes," and the conclusion is then drawn that such surrender and such acceptance by the trustees, *actually "raised an implied undertaking or contract* on their part to perform" the duty of repairing the streets, which contract "inures to the benefit of every individual interested" in its performance. The opinion represents the state as farming out its sovereign powers for a consideration. And what is the consideration? If it be the "surrender," then such "surrender" is both the consideration and subject-matter of the contract. The state not being originally liable to individuals on account of injuries from defective streets, it had no immunity to gain by a "surrender" of its powers to subordinate organizations. Immunity from being called to account by the citizen or subject for the mode of exercising governmental functions, is one of the essential attributes of sovereignty. Unincorporated communities are exempt from liability to individuals for neglect to repair highways. But it is one of the queer results of the strange reasoning of Justice Selden, that if sovereign powers be imparted to such communities by the state, then such communities become *ipso facto* liable to account to every person in the world for the mode of exercising those powers, and if authority to repair highways be conferred, then such com-

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munities are bound, as by a covenant obligation, to a perfect execution of such authority.

In our state, the conferring of corporate powers upon communities cannot be regarded in the light of a contract between the municipality and the state, because—1st, There is but one party—the state; the municipality being the mere creature of the legislative act, which at once creates it a legal entity, confers its powers upon it, and fixes its liabilities. 2d, There is no consideration moving from the community to the state, nor from the state to the community, except the general welfare, which we must presume to be the motive for all legislation. 3d, The community does not assent to the act of the legislature, for it has no power to dissent from it. 4th, There is no subject-matter of contract. The legislature cannot, under our constitution, barter away its powers; and the communities have nothing which they can confer upon the legislature or the state government, except by the united action of all the people in the forms prescribed by the constitution. Indeed, the distinction between public and private corporations, in respect to the nature of their charters, was recognized in the *Dartmouth College Case*, and it may be considered as a well-settled principle of American jurisprudence, that public municipal charters are not to be regarded as contracts. (Dillon on Munic. Corp., § 80.) If then, such a charter is not a contract between the municipality and the state, how can it either be a contract or raise a contract, express or implied, between the municipality and every person in the world who may happen to travel upon its streets? It will not be contended that there is any such express contract. How is an implied one “raised?” An implied contract, as well as an express one, must have competent parties, a consideration, assent of the parties, and a subject-matter. The illustrations given by Sir William Blackstone show that all these requisites are necessary. (2 Bl. Com. 443.) Now, as between the individual and the municipality, what is the consideration? how and when is the assent given? and what is the subject-matter of the contract? We cannot imagine. When it is admitted that a charter is not a contract

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between the municipality and the state, the theory of an implied contract with the individual falls to the ground. The only English authorities quoted as sustaining the doctrine of municipal liability to individuals in such cases are based wholly upon the idea of a contract between the municipality and the crown. *The Mayor of Lynn v. Turner*, Cowp. 86; *Henley v. The Mayor and Burgesses of Lyme Regis*, 5 Bing. 91; S. C., 3 Barn. & Adolph. 77, and 1 Bing. N. C. 222. The mode of constituting our municipal corporations, and their powers, privileges and relations to the government, when constituted, are so dissimilar from those of England existing by royal grant, that adjudged cases as to the liabilities of such corporations in England are not of much value as precedents here. (Dillon on Munic. Corp., chapter 3; 36 N. H. 284.) The case of *Lynn v. Turner*, supra, in the King's Bench, was upon the pleadings. The action against the corporation was for not repairing and cleansing a certain creek into which the tide of the sea was accustomed to flow and reflow, as from *time immemorial they had been used*, whereby the sea was prevented from flowing therein, so that said creek was rendered unnavigable, and the plaintiff was obliged to carry his corn round about. It was urged by Mr. Baldwin for the corporation, that the declaration showed the *locus in quo* to be a navigable river, and therefore in the nature of a highway, common to all, and that no private action would lie. But Lord Mansfield said, "*Ex facto oritur jus*. How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so; for there are many places into which the tide flows that are not navigable rivers; and the place in question may be a creek in their own private estate." Mr. Baldwin answered: "Then it was incumbent on the plaintiff to show a special reason or tenure why the corporation ought to repair, for they are not bound of common right"—citing authorities. Lord Mansfield did not dispute this proposition, but only rejoined: "It is here alleged that the corporation have from time immemorial been used to repair. It states, therefore, that they are bound by prescription, and it might be the very condition and terms of their creation

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or charter." The judgment was therefore affirmed. It will be observed that the court decided only two points: 1st, That it did not appear from the declaration that the creek was a navigable river or highway; that it might "be a creek in their own private estate." 2d, That an allegation of immemorial usage to repair, was equivalent to an averment that the corporation was bound by prescription to repair, which "might be the very condition and terms of their creation or charter."

In *Henley v. Lyme Regis*, supra, which was for damages to real estate on account of the non-repair of a certain pier and sea-wall, it appeared that the charter granted by Charles I not only pardoned, remised, and released to the mayor and burgesses, and their successors forever, 27 marks of the 32 marks anciently due, and gave them the proceeds of certain fines and amerciaments, but the king then granted "full power and authority and license from time to time, forever, to dig stones and rocks in any place whatsoever, within the borough and parish of the town aforesaid, out of the sea and on the sea shore, in the borough and parish aforesaid, adjoining to the said borough or town, for the reparation and amendment of the port and building aforesaid, called the pier, quay or cob, and other necessary reparations and common works of the same town and borough," and the king therein willed that the mayor and burgesses and their successors should at their own costs and charges thenceforth forever repair, support and maintain the same as often as it should be necessary. And the mayor and burgesses having accepted this charter, it was held that they were legally bound to make such repairs, and that an action might be maintained for a direct and particular damage sustained by an individual in consequence of neglect to make the necessary repairs. We can see no difficulty in calling this transaction a contract or covenant between the crown and the mayor and burgesses. The transaction was of the same nature as that between George III and the Trustees of Dartmouth College. There were competent parties, a consideration, a subject-matter, and assent of the parties. These con-

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stitute a contract. The only real point of difficulty in the case was, whether the contract so inured to the benefit of *individuals* that they might maintain their actions for special damages sustained by them.

We think it quite plain that Judge Selden's theory of municipal liability, in this country is not sustained by these cases, nor by reason. Judge Dillon very justly characterizes it as "purely ideal." (Dillon on Munic. Corp., § 765.) And thereupon Judge Dillon advocates a theory of his own which is certainly very indefinite and unsatisfactory, if not also "purely ideal." He says:

"This liability on the part of municipal corporations springs, as we think, from the particular *nature of the duty* enjoined, which must relate to the local or special interests of the municipality, and be imperative and not discretionary or judicial, and from the *means given* for its performance, which must be ample, or such as were considered to be so by the legislature."

What are the local or special interests referred to? Are not all the interests named in and regulated by the act incorporating cities of the second class, of some local and special importance to such cities? Let us refer to some of them: Such cities are "authorized and empowered to enact ordinances:" 1st, For opening and improving streets, avenues, and alleys, making sidewalks, and building bridges, culverts and sewers. (Laws 1878, p. 128.) These have a local and a general importance. Every person in the world is free to use the improvements, although persons living in the vicinity are chiefly benefited by them. 2d, For imposing a license tax on auctioneers, etc. (Laws 1872, p. 206, § 47.) This is more especially a "local and special" interest. 3d, For restraining and prohibiting riots, assaults, disturbances, indecent shows, and the discharge of firearms, etc. (Laws 1872, p. 207, § 50.) This is partly of local and partly of general interest. 4th, For regulating and prohibiting the running at large of cattle, hogs, etc. (Laws 1872, p. 207, § 51.) This might be termed a "local and special" interest. 5th, For procuring fire apparatus, organizing fire companies, etc. (Laws 1872, p. 208, § 58.) This might be

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termed a local interest. Other powers might be mentioned, but these are sufficient for illustration. Now which of these five classes of powers or duties are "imperative," and which "discretionary, or judicial?" They are each and all conferred apparently as *legislative powers*. They are nowhere referred to in the statute as *duties*. There is nothing to indicate that the first is more "imperative," or less "discretionary or judicial," than any of the other four. And it would seem that the power to repair sidewalks is not even therein expressly granted, but only impliedly conferred by the authority given to make sidewalks and to levy assessments for "making and repairing sidewalks." (Laws of 1878, p. 128.)

There is abundant authority for saying that in the absence of statute no action lies at the suit of an individual for the negligent or improper exercise of any of the four classes of powers last named. 8 Pet. 398, 409; Dillon on Munic. Corp., §755; 13 B. Mon. 559; 12 Ohio St. 375; 98 Mass. 221; 1 Allen, 172; 1 Sandf. 465; 11 N. Y. 396; 104 Mass. 87; 19 Ohio St. 19; 88 Wis. 314.

As to the power to make sidewalks, (one of the first class of powers,) this court has decided that its exercise is discretionary. 9 Kas. 155, 161; 11 Kas. 384, 392. By what process of reasoning is it determined, that while the language of the charter authorizing the city to make sidewalks and to levy assessments for making and repairing the same, confers a *discretionary power* to make, it imposes an *imperative duty* to repair? It certainly requires the exercise of judgment and discretion to determine when and how repairs should be made, or whether they should be made at all. This court has decided that after a city has constructed a sewer or drain for the purpose of carrying off surface-water, it may, in its discretion, wholly abandon or discontinue the same, and never make any further use of it. (9 Kas. 608.) Why may it not for a sufficient reason abandon a sidewalk? And who shall determine the sufficiency of the reason—the city council, or the courts? We are not aware that the courts have ever assumed jurisdiction of such affairs.

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We have now examined the question of liability as arising from "the particular nature of the duty enjoined." But Judge Dillon thinks there is another element essential to liability. The *means given* for the performance of the duty "must be ample, or such as were considered to be so by the legislature." We know of no instance wherein the legislature has stated that it considered the means given ample to the exercise of any power, or the performance of any duty. How shall the point be determined? Is it a legislative, or a judicial question? Shall it be settled by the legislature, the city council, or the courts? If by the courts, then is it a question of law for the court, or a question of fact for the jury? A city of the second class cannot, under the present law, keep any fund on hand, nor incur any general indebtedness, for repairing sidewalks. It may, after notice in some cases and without notice in others, cause sidewalks to be repaired, and levy assessments upon the abutting lots to pay for the same. (Laws of 1873, p. 130.) But suppose no contractor will make the repairs and wait for his pay until the assessment can be collected: must the city appropriate money from other funds, or borrow it for the purpose? And in case the city have no surplus funds, and no credit, what then? We are not aware that the defenses suggested by these questions have ever been made in any court, but we submit whether they would not be good upon the theory of amplitude of means being an element necessary to liability. Such defenses would certainly be very troublesome. On the whole, Judge Dillon's theory of municipal liability in such cases seems to be "purely ideal," if indeed it does not resolve itself into the theory of Justice Selden.

There is still another theory of municipal liability in such cases, the only remaining one that has come to our notice. It was advanced by Nelson, C. J., in *The Mayor, &c., of New York v. Furze*, 3 Hill, 612. The doctrine is laid down, that the legislative grant to a municipality of *power* to do an act is equivalent to the injunction of a *duty* to perform it, and is

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based upon the rule of construction, which sometimes gives to the word "may" the force and effect of "must." This doctrine has since been repeatedly disapproved in such cases in New York. (1 Denio, 600; 32 N. Y. 489, 499.) The word "may" is not used in the grant of power to cities of the second class; the words are "authorized and empowered." And we have before seen that the authority to repair sidewalks is only impliedly granted. But even if the power to repair had been conferred by the use of the word "may," we think it would not affect the matter, for we know of no instance in which the rule of construction in question has been applied to legislative grants of power to any of the subdivisions of the state. If the grant of *power* is equivalent to the injunction of a *duty*, and the injunction of a duty binds the municipality as by a *covenant* to perform that duty, and if every individual interested in the performance of the duty may maintain an action for the *breach* of the covenant, then we have indeed by judicial construction made a contract between the municipality and every person in the world, and this only by a grant of legislative power! We think the distinction between the mere grant of power and the injunction of a duty to perform, is well taken, and is in consonance with sound reason. *Cole v. Medina*, 27 Barb. 218; *Peck v. Batavia*, 32 Barb. 634, 644. Those were stronger cases against the municipality than is the case at bar, and yet it was held that there could be no recovery. Upon the theory advanced in *Mayor, &c., v. Furze*, the municipality would be liable for negligent or imperfect execution of any of the powers enumerated in the five classes heretofore referred to, saying nothing of others granted or to be granted. We have now examined all the theories within our knowledge upon which the doctrine of a common-law liability in such cases has been said to rest. We do not regard any of these theories to be the "perfection of reason," and we cannot therefore accept any of them as law.

An effort is made in this case to charge the city with liability because the mayor and council enacted certain ordinan-

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ces relating to the duties of the road overseer, the repairing of sidewalks, etc. We had supposed that if there was any liability on the part of the city it arose either upon the construction and interpretation of certain statutes of the state, or from some principle of the common law; but it is hard to treat with seriousness the notion that the rights or liabilities of the city are to be tried upon the basis of the general ordinances of the city. If the mayor and council can, by general legislation, charge the city with liabilities unknown to the common law or the statutes of the state, we see no good reason why they may not in like manner invest the city with rights before unknown. When legal processes shall bring about these results, we may expect such a revolution in the mechanical forces that a man may lift himself by his boot-straps. It is often difficult to find authorities directly in point on questions involving legal absurdities; but we think the following are sufficient in this instance: *Vandyke v. City of Cincinnati*, 1 Disney, 532; *Dillon on Munic. Corp.*, § 251.

2. If in certain cases an action may be maintained against a city of the second class for injuries caused by neglect to repair sidewalks, we submit that this is not one of such cases. We think it safe to say from the plaintiff's own evidence, that neither he nor the city authorities knew of any defect in this area covering, rendering the same either dangerous or unsafe. If he had supposed so, ordinary prudence would have required him to use the rear entrance mentioned in his testimony. Besides he testifies substantially that there was nothing upon its surface indicating that it was defective, and that he supposed it safe. And the witnesses are all agreed on this point. His talk with the street commissioner could not therefore, have charged the city with notice that it was dangerous and unsafe. The utmost that could have been conveyed by that conversation was, that the boards were rather old, though not rotten, and the sidewalk somewhat rough. Although the plaintiff had been an occupant of the premises for eighteen months, he did not know that any of the sills or joists were defective, and

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yet it was the breaking or displacement of one of them that caused the accident. He did not know what broke, but two other witnesses did know. And their testimony on that point is corroborated.

It is a well-established principle that cities are not liable for defective streets or sidewalks unless they have actual notice of the defect that caused the injury, or unless the defect is of such a nature or has existed for so long a time that notice on its part must be presumed. *Shear. & Redf. on Neg.* §§ 148, 407; *Dillon on Munic. Corp.*, § 790; 24 *Wis.* 549; 15 *Mich.* 307; 9 *N. Y.* 456; 86 *Barb.* 226; 5 *Duer*, 674. In the case at bar the defect was latent, and therefore actual notice must be brought home to the city, or it cannot in any event be made liable. The only circumstances even remotely tending to show notice to the city was the conversation between the plaintiff and the street commissioner. But as the plaintiff and all the other occupants of the house who were witnesses, testified that they considered the covering of the area *safe*, even up to the moment of the accident, we do not see how that conversation could have charged the city with notice that it was *dangerous*.

8. There is still another phase to this case. If the plaintiff is entitled to recover, should such recovery be against the city, or Mr. Otis, or both the city and Mr. Otis? The accident could not have occurred had not the basement-way been constructed under the street by Mr. Otis for his own benefit and the convenience of his tenants. It was his duty to see that the part of the street or sidewalk occupied by the basement-way or area was made and kept as safe as if such basement-way or area had not been built. This area and covering were constructed with reference to the building. The joists were supported in the masonry of the building and area. If either of the defendants is liable, we think it should be the landlord, for whose benefit the basement-way or area was made. *Dillon on Munic. Corp.*, § 794; 2 *Black*, 418, 424; 4 *Wall.* 657; 18 *N. Y.* 79, 84; 9 *Allen*, 17; 23 *Pick.* 24, 82; 10 *Gray*, 496.

Aaron S. Everest, for defendant Otis:

It is admitted that Otis was the owner of the lot in front of which the defective sidewalk was constructed. But the undisputed evidence is, that the premises were demised and leased to Mrs. T. R. Jansen, step-mother of the plaintiff, and had been so leased to and occupied by her since the 1st of October 1870; that by the terms of said lease said tenant was to keep said premises in good repair during said lease at her own expense; that the plaintiff had full knowledge of the terms of said lease, and executed the same on the part of Mrs. Jansen, as her agent; that she received said demised premises in good order and condition; that said premises at the time of the injury were in her possession, occupancy and under her control. The evidence of the plaintiff shows that the premises were occupied for hotel purposes by Mrs. Jansen, and that he was clerking for her, and engaged in his business as such clerk waiting on a guest at said hotel at the time of the alleged injury; that the sidewalk was apparently safe at the place of the alleged injury; that said plaintiff was familiar with said premises, and had been clerking there, and in the occupation thereof since February 1872, and was the general business manager of Mrs. Jansen, and that he considered the covering of the area wall safe to travel upon.

1. Was there any legal liability, or bounden duty on the part of Otis, by reason of being the owner of the premises to repair, and maintain the sidewalks in question? And if by any contingency it can possibly be held that such was his duty, was it such without his first being notified by the proper city authorities to make such repairs? We contend that there is no liability or duty imposed upon the lot-owner by the statute in such cases. Ordinance No. 69, in force at the time of injury, did not contemplate any notice to the lot-owner, or impose any duty upon him whatever in reference to the construction and repair of sidewalks, but clearly, in connection with the other ordinances, imposed such duties upon the city, which duties

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were also imposed on it by the general laws incorporating cities of the second class. The city was empowered to make and repair sidewalks, and impose taxes therefor upon the abutting lot-owner. It was not a matter of discretion with the city authorities to exercise or not to exercise the corporate duties imposed by law. The language of the act, though permissive in form, is in fact peremptory. Giving the city authority and power to act, was in effect requiring it to act. The power was given, not for the benefit of the city, but of the public; and the public interest, and individual rights, called for its exercise. 4 Wallace, 446; 61 Ill. 160; 42 Ill. 507; 17 Ill. 145; 25 Ill. 437; 16 N. Y. 159; 60 Barb. 378; 3 Hill, 612.

2. Is said Otis as landlord and owner of said premises liable to his said tenant, her guests or employes, for injuries occurring through the *latent* defect in the sidewalk abutting upon the same, when, as in the case here, there is no proof that he ever constructed said walk, or who constructed the same—whether said tenant, or said city, or said Otis? Certainly not. The city would not be liable in such a case. For in case of an open and apparent defect the city is not liable without actual notice, or without the defect has so long existed that notice is to be presumed; and no notice can be presumed of a latent defect. The city is not an insurer against accidents upon streets and sidewalks, nor is every defect therein, though it may cause injury, actionable. It is sufficient if the sidewalks in a city are in a reasonably safe condition for travel. Sher. & Red. Neg., §§ 398, 407; 39 Vt. 255; 35 N. H. 74; 33 Iowa, 397; Dillon on Munic. Corp., § 790; 4 Wallace, 195. See, as to latent defects, 2 Duvall, (Ky.) 576. Now if the city is not liable under the case stated, we certainly contend that the case is much stronger in favor of defendant Otis, for he is under no statutory obligations to the public to either construct or repair sidewalks, and certainly cannot be liable for a latent defect, such as the evidence shows caused the injury to plaintiff in the case at bar.

3. Was Otis in any way liable for said injury, when said premises were in the possession and under the *entire* control

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of said tenant, who received the same in good condition, and covenanted by the terms of the lease to keep the same in good condition and repair at the said tenant's expense? And is he liable to an employé of said tenant who used and occupied said premises, as the business manager of said tenant, having full knowledge of the terms and conditions of said lease? On this we say the law is well settled, that neither the tenant nor the plaintiff in her employ, could maintain an action against Otis, the landlord, for personal injuries sustained through the defective condition of the building or appurtenances thereto. 59 Barb. 497; 3 Oregon, 206; 17 Mo. 282; 109 Eng. Com. Law, 220. Otis certainly cannot be charged with negligence in failing to repair, when the defect was latent, unknown to the plaintiff, the occupier of the premises, and who certainly had better means of ascertaining and knowing its existence than Otis could possibly have.

4. Is Otis liable over to his codefendant, the city of Atchison? On this point we submit, that the settled rule of law is, that where the premises are leased out, as in this case, and not in the personal possession and occupation of the landlord, that such liability over does not and cannot exist against the landlord. *Lowell v. Spalding*, 4 Cushing, 277; 14 Gray, 249; 2 Sandf. 301; 12 Ohio St. 92; 9 Allen, 21.

The opinion of the court was delivered by

BREWER, J.: In September 1878, the plaintiff in error, George Jansen, commenced his action against the city of Atchison and A. G. Otis to recover damages in the sum of ten thousand dollars, by reason of personal injuries received by the plaintiff on August 10th 1878, through defects in a sidewalk of one of the public streets of the city of Atchison. Jansen alleged that said injuries were occasioned by defendants' negligently constructing a sidewalk on Commercial street, and by the said defendants negligently permitting the said defects in said sidewalk to continue; and also, from the defendants negligently permitting an old, defective and dangerous side-

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walk to remain and exist. The plaintiff also stated in his petition that the defendant Otis was the owner and possessor of the lot and premises on said Commercial street, in front of which the said defective sidewalk existed at the date of the injuries complained of. The city of Atchison filed its answer, admitting that such city was a city of the second class, and a body corporate and politic, as stated in the petition, but denying the other allegations, statements and averments contained in said petition; and said answer alleged that the damages sustained by the plaintiff were caused by the negligence of the plaintiff and others, for whose carelessness and negligence the city of Atchison was not liable. Otis filed an answer, admitting the ownership of the lot, and alleging that the said premises were at the date of the alleged injury, and for several years prior thereto had been, demised and leased to plaintiff's mother, who, in connection with the plaintiff, at the time of the accident and for a long time prior thereto had been in the occupancy and use thereof as tenants of said Otis, having the personal care, supervision, and entire control of said premises, the buildings thereon, and the appurtenances thereto; that under and by the terms of said lease, said tenants were to keep said premises in good repair at said tenants' expense, and that they received said premises in good repair; and further averring that he (Otis) had no knowledge or information that said sidewalk was unsafe or insecure, and that it was the duty of his codefendant, the city of Atchison, under its corporate powers, to maintain said sidewalks, and that there existed no liability on his part to said plaintiff, and no liability over to said city of Atchison; and that said accident was caused by want of care on the part of the plaintiff, and by negligence and failure of duty on the part of the said city of Atchison. To these answers replies were duly filed, and the case came on for trial. No question was raised as to the joinder of the parties defendant. Indeed, such joinder seems to have been desired by all, that the one action might dispose of all questions growing out of the injury. After the plaintiff had introduced his testimony

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each defendant filed a demurrer to the evidence, which was sustained by the court, and judgment rendered in their favor and against the plaintiff for costs.

It is manifest that to sustain this ruling it must appear, either that there was absolutely no liability on the part of the defendants for the injuries sustained by plaintiff—for of the fact of his sustaining injuries there is no question—or, that there was a total failure of proof as to some matter essential to such liability. For if the defendants might under any circumstances be liable for such injuries, and there was testimony tending fairly to establish each fact essential to fix a liability, the party was entitled to a finding as to those facts by the jury, and could not be deprived thereof by an order of the court. The case stands in a different attitude before us from that it would occupy if the jury had passed upon the testimony. Then every conflict in the evidence would be resolved in favor of the result below; now against it.

Counsel for the city has filed an elaborate brief in support of the rulings of the district court, in which he contends—first, that the control and care which a city of the second class in this state exercises over the streets and sidewalks of the city, are by virtue of a power of a governmental character, and that it is not liable to the private action of an individual for neglecting to exercise such power, or for its imperfect execution, and therefore that the city cannot be liable in this action; second, that the facts of this particular case do not warrant a recovery in favor of the plaintiff; and third, that if the plaintiff is entitled to recover, such recovery should not be against the city, but against the defendant Otis. The first proposition is one very sweeping in its reach, and if true gives to cities an immunity from responsibility which to most would seem not only novel, but dangerous. To the support of that proposition counsel devotes the major portion of his brief. He reviews the reasons given by courts and writers for imputing liability to cities in cases of this nature, and claims that none of these reasons are sound, and con-

1. Powers and duties of cities, respecting bridges, streets and sidewalks.

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cludes therefrom that a doctrine has become engrafted upon American law which has no foundation in correct legal principles, and should therefore be repudiated. He concedes that this court has hitherto seemed to follow the line of adverse decisions, but contends that as no rule of property is involved, but only the construction of powers and liabilities granted and fixed by statute, the doctrine of *stare decisis* should not outweigh reason, and that the question should be reëxamined and decided in accordance with correct principles. It may be well to see how far this question has been before this court, and the various rulings thereon. In the case of the *City of Topeka v. Tuttle*, 5 Kas. 311; the petition alleged that the city negligently left one of its streets out of repair, whereby the plaintiff suffered injury; and on an objection that the petition was insufficient, this court held that it was sufficient. True, no specific objection was pointed out, but the court decided that a petition stating such and such facts, and presenting the very question in issue here, was good. In the case of the *City of Atchison v. King*, 9 Kas. 550, the question was fairly presented, and the court held that a city was liable for injuries resulting from negligently-constructed sidewalks, and also from defects subsequently arising and negligently permitted to continue. The same doctrine was recognized in *City of Ottawa v. Washabaugh*, 11 Kas. 124. In the case of the *City of Wyandotte v. White*, 13 Kas. 191, a judgment against the city for injuries sustained through a defect in a bridge, a part of the public highway, negligently permitted to continue, was affirmed. In *Smith v. City of Leavenworth*, 15 Kas. 81, the city was held responsible for injuries resulting from negligence in leaving open and unprotected an area and cellar-way in the sidewalk. See also the case of the *City of Leavenworth v. Casey*, McCahon's Rep. 122, decided by the territorial supreme court, in which the city was held responsible for injuries resulting from a negligent construction of a sewer. And in these decisions the court was announcing no new doctrine, but following the almost uniform line of decisions elsewhere. In Dillon

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on Municipal Corporations, §789, the law is summed up in these words:

"It may be fairly deduced from the many cases upon the subject, referred to in the notes, that in the absence of an express statute imposing the duty and declaring the liability, municipal corporations proper, having the powers ordinarily conferred upon them respecting bridges, streets and sidewalks within their limits, owe to the public the duty to keep them in a safe condition for use in the usual mode by travelers, and are liable in a civil action for special injuries resulting from neglect to perform this duty."

Among the many cases supporting this proposition may be named, *Weightman v. City of Washington*, 1 Black, 39; *West v. Brockport*, 16 N. Y. 161; *Davenport v. Ruckman*, 37 N. Y. 568; *Norristown v. Moyer*, 67 Penn. St. 355; *R. & W. H. Township v. Moore*, 68 Penn. St. 404. There are many others, but it is unnecessary to burden the records with citations. The supreme court of Michigan by a divided court has ruled the other way.

Detroit v. Blakeby, 21 Mich. 84. We do not care to follow counsel in his discussion of the reasons given by the various courts in support of this doctrine. It may be that those reasons are not altogether satisfactory. Perhaps if it was a new question, we should be compelled to hold them insufficient. But we find a doctrine generally recognized in the courts of other states, generally approved by eminent jurists, hitherto followed by this court, and as it seems to us eminently wise and just; and we are unwilling to abandon it because the reasons given for it may not be wholly satisfactory. We concur in the views expressed by Mr. Justice Cooley in his dissenting opinion in *Detroit v. Blakeby*, from which we quote: "The decisions which are in point are numerous; they have been made in many different jurisdictions, and by many able jurists—and there has been a general concurrence in declaring the law to be in fact what we have already said in point of sound policy it ought to be. We are asked nevertheless to disregard these decisions, and to establish for this state a rule of law different from that which prevails elsewhere, and dif-

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Settled rules
should not be
overturned.

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ferent from that which, I think, has been understood and accepted as sound law in this state prior to the present litigation. The reason pressed upon us for such a decision is, not that the decisions referred to are vicious in their results, but that the reasons assigned for them are insufficient, so that, logically, the courts ought to have come to a different conclusion. I doubt if it is a sufficient reason for overturning an established doctrine in the law, when its results are not mischievous, that strict logical reasoning should have led the courts to a different conclusion in the beginning. If it is, we may be called upon to examine the foundation of many rules of the common law which have always passed unquestioned." We adhere then to the rulings heretofore made in this court, as to the liability of a city for injuries resulting from negligence in the care of its sidewalks and streets.

We pass then to the second proposition of the learned counsel for the city; and here he contends that the defect in the sidewalk was a latent defect, and that the city had no notice of its existence or of facts sufficient to put it upon inquiry. If this be true, doubtless the city is not responsible, and if the testimony leaves no

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tice of defects.

question as to its truth there was no error in sustaining the demurrer. This compels some notice of the testimony. The injury happened in this wise: Plaintiff stepped out of the door of a building upon the sidewalk, and as he stepped upon it, it gave way, and he fell through into an area beneath. There was testimony tending to show that this sidewalk was made of cottonwood, and had been built several years; that cottonwood in such a position is liable to decay in a less period than the time this walk had been there; that some of the joists underneath were decayed, and through their rotteness the walk gave way; that shortly before the injury an accident had happened on the walk in front of a near building, and that plaintiff had spoken to the street commissioner of the city about this walk, and requested him to repair it. It was by ordinance made the duty of the street

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commissioner "to thoroughly examine from time to time all walks, sidewalks, and to see that they are kept in good repair." Now it seems to us, that here was testimony which ought to have gone to the jury, and that the court erred in taking the question from them. We do not mean to intimate that a jury ought to find from this testimony that sufficient notice existed to charge negligence upon the city, but simply that here was a *question of fact* which it was for them, and not the court, to pass upon. And in order to guard against any misconception, we desire to emphasize the fact, that before the jury may find negligence they must be satisfied that the city had notice of the defect, or had knowledge of facts sufficient to put it upon inquiry long enough before the injury to have repaired the walk. Negligence implies some omission of duty. The city must have been in fault. And if it had no knowledge of any defect, or of any facts from which it might reasonably have presumed that there was a defect, it is not to blame, and cannot be said to have been guilty of negligence. On the other hand, though the rottenness of the stringers was not apparent, the circumstances might have been such that a man of ordinary prudence would have expected to find decay, and ought to have made examination. In *R. & W. H. Township v. Moore*, 68 Penn. St. 404, the defect was in a bridge whose timbers had decayed. The decay was not apparent to a mere outside inspection, but inasmuch as the timbers had stood for such a length of time under such surroundings as would ordinarily produce decay, the court properly held that a failure to make a critical examination was some evidence of negligence. See also, *Weisenberg v. City of Appleton*, 26 Wis. 56; *City of Ripon v. Rittle*, 30 Wis. 614; *Mersey Docks v. Gibbs*, 11 H. L. Cases, 687. In this last case the House of Lords held, "that having the means of knowledge, and negligently remaining ignorant, is equivalent in creating a liability to actual knowledge."

As to the third proposition of counsel, it seems to us that the city is liable, whether it have a cause of action over against

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its codefendant, or not. The fee of the street is not in the lot-owner, but in the county. *Comm'rs Franklin Co. v. Lathrop*, 9 Kas. 458; *A. & N. Rld. Co. v. Garside*, 10 Kas. 552.

s. Lot-owner; generally not liable. The control of the street is in the city. The lot-owner has no right to occupy the sidewalk with any improvement, nor to excavate beneath it for any area, or passage-way. (*Smith v. City of Leavenworth*, 15 Kas. 81.) If the city permits a lot-owner to occupy the sidewalk, or obstruct the free passage over it, or endanger its safety by excavations beneath it, it does not thereby relieve itself from responsibility. It is, as to third parties, the same as though it had done these things itself. In other words, it cannot transfer to private citizens that responsibility which, for wise purposes of public policy, the law casts upon it, in reference to the care and safety of its streets and walks. Was the demurrer of the defendant Otis properly sustained? We think it was. The only allegation in the petition pointing toward him was, that he was the owner of the lot and building in front of which the injury occurred. There was no allegation or intimation that the defect in the sidewalk resulted from any negligence or omission on his part. Negligence was charged upon the city, not upon him. So that, unless a lot-owner is responsible for all injuries resulting from a defective sidewalk in front of his lot, the petition stated no cause of action against him. Nor is there anything in the answer of the city of Atchison which discloses a cause of action against him. That simply admits that the city of Atchison is a city of the second class, denies all other allegations of the petition, and alleges that the injury complained of was caused by the negligence of plaintiff and others for whose negligence the city was not responsible. The answer of Otis does not make good the omissions of the other pleadings, nor state any facts tending to show a liability on his part. But passing beyond the pleadings, we do not think the testimony disclosed any liability on his part. It appears that the sidewalk, at the place of accident, was some twelve-and-a-half feet in width; that four or five feet from the building was an area wall. A part of the walk reaching from the curbstone

1. Area under sidewalk; presumption.

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to this wall rested on the ground. The balance on stringers let into the house on the one end, and resting at the other on the wall. This walk over the area was the part that broke. The area was partially filled with dirt, shavings, etc., and (according to the only testimony given thereon) was not and indeed could not be used for any purpose in connection with the building. It did not, according to the plaintiff himself, furnish air to the basement or cellar. Whether it furnished light or not, is not stated; and whether the front of the cellar or basement was walled or boarded up tight, does not appear. There is no testimony tending to show when this wall was built; by whom, or for what purpose. For aught that the testimony discloses, it may have been built there by the city to protect the dirt of the street from washing away, or as a support to the sidewalk, or for any other conceivable purpose. Now, ordinarily an area is supposed to be for the benefit of the adjoining building, for light, air, approach, or storing; and there may be a presumption that it was constructed by the owner, or at his instance, or for his benefit. But when, as in this case, the testimony shows that it was not for the benefit of the building, that it was not for air, approach, or storing, was not and could not be used for any purpose in connection with the building, it does away with any presumption that it was constructed by the owner, or that he is responsible for injuries resulting from it. He has not the fee of the street or sidewalk. He is not to be presumed to be trespassing upon the property of the public. The city has the possession and control of street and walk. Any work done above or below the surface, is presumptively done by it; and for any injury resulting from any obstruction or excavation, it is responsible; and it has a claim over against an individual only when it appears that such obstruction or excavation was made by the individual, or at his instance, or for his benefit. The liability of the individual is no greater because the injury took place on the sidewalk, than if it happened in the middle of the street, or from falling into a sewer rather than into an area. The only principle upon which the individual can be held responsible is, that the individual caused

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the injury—not that he owns a lot in front of which the injury was done. So far as the mere fact of a defect in the sidewalk is concerned, neither statute nor ordinance attempted to cast upon the lot-owner the duty of making or repairing sidewalks. An ordinance had been in force requiring lot-owners to keep the sidewalks in front of their lots in repair, but this had been repealed some two months prior to the injury. The only provisions in force authorized the city to make or repair, and to collect the cost thereof from the lots. There is, outside of positive law, no natural obligation on the part of a lot-owner to keep the street or sidewalk in front of his lot in good repair, and no liability for injuries resulting from a failure to do so. Hence, when a city has assumed the entire control of the matter, a failure to repair the sidewalk may be negligence on its part, but is not on the part of the lot-owner who has been ousted from all control. We think therefore, upon the testimony in this case, the demurrer of the defendant Otis was properly sustained. It is unnecessary to inquire what effect the fact that the step-mother of plaintiff, whose clerk and business manager he was, was the lessee of the building with a covenant in the lease to keep the premises in repair, would have upon the liability of Mr. Otis, if it appeared that he had constructed the area, or that it had been done at his instance or for his benefit.

The case therefore will be sent back with instructions to reverse the judgment in favor of the city, and grant a new trial; but the judgment in favor of defendant Otis will be affirmed. The costs in this court will be divided between the plaintiff in error and the city of Atchison.

All the Justices concurring.

A. G. HOBSON, *et al.*, v. OGDEN'S EXECUTORS.

1. **AMENDMENT, *At the Trial; Pleading.*** Where, when a case is called for trial, defendants object that the petition is insufficient in not containing a particular allegation, and thereupon the court permits an amendment to be made by inserting the allegation, and it is apparent the defendants were not surprised by this new allegation, and no application was made for a postponement, and the amendment does not work a radical change in the cause of action, *held*, that it does not appear that the discretion of the court was abused in granting the amendment. [*K. P. Rly. Co. v. Nichols, et al.*, 9-235; *Prather v. Sneed*, 12-447; *Baird v. Truitt*, 18-120; see cases cited in *K. P. Rly. Co. v. Kunkel*, 17-145.]
2. **ADMISSIONS IN PLEADINGS; *Evidence.*** Statements of a party made in pleadings in a court of record, signed by himself, are admissible in evidence against him in a trial other than that in which the pleadings are filed.
3. **FINDINGS OF FACT; *Conclusive; Evidence to Sustain.*** The finding of a court upon a question of fact is as conclusive in this court as the verdict of a jury; and where there is testimony clearly tending to establish the fact, and sustain the finding, although indirect and circumstantial, this court will not reverse the finding, even though the only direct testimony is against the finding. [*Bayer v. Cockrill*, 3-283; *Swartzell v. Rogers*, 3-374; *Waltire v. Carriger*, 5-872; *Chapman v. Casebolt*, 8-399; *Hyde v. Bledsoe*, 9-399; *Clark v. Hall*, 10-80; *McCoy v. Haslett*, 14-430; *K. P. Rly. Co. v. Kunkel*, 17-145; *Oliphant v. Comm'rs Atchison Co.*, 18-386; *Winstead v. Standeford*, 21-270; *Sexton v. Lamb*, 27-426; *Jones v. Inness*, 32-177; *Weir v. Ins. Co.*, 32-327; see cases cited in *K. P. Rly. v. Kunkel*, 17-169.]

Error from Dickinson District Court.

IN August 1860, W. J. Hobson gave to R. W. Ogden his due-bill for \$559.12, with A. G. Hobson, as surety. In 1867 Ogden recovered judgments against said Hobsons on said due-bill, and executions thereon were returned "no property found." All the parties resided in Kentucky, and said judgments were recovered in the circuit court of Warren county in that state. A. G. Hobson, who then held the "Receiver's Receipts" showing the entry by him of some 800 acres of land lying in Dickinson county, Kansas, on the 23d of March 1870 assigned said "receipts" to his son Joseph V. Hobson, who also resided in Kentucky. In 1872 Ogden commenced a suit against said A. G. Hobson and W. J. Hobson in the

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district court of Dickinson county, on his Kentucky judgments, and sued out an order of attachment, which was levied upon 160 acres of the lands so as aforesaid transferred or conveyed to *Joseph V. Hobson* by his father. Said action was prosecuted to final judgment by *Ogden*, who recovered judgment therein for \$953.70 and costs; and thereupon *Ogden* commenced this action against said *A. G.* and *Joseph V. Hobson* to set aside the assignment or conveyance of 23d March 1870, as to the 160 acres of land attached, and to subject said lands to the payment of his said judgment. The petition alleged that said conveyance was without consideration, and fraudulent as to *Ogden*. This action was tried at the March Term 1874. The district court found that said assignment or conveyance was without any consideration, and was made to defraud the creditors of said *A. G. Hobson*, and rendered a decree setting the said conveyance aside, and ordered and directed that unless the defendant *A. G. Hobson* pay to *Ogden* the amount of the judgment rendered in the former action, with interest and costs, within ten days, an order of sale be issued to the sheriff of Dickinson county commanding and requiring him to sell said attached lands, and out of the proceeds of such sale to pay the said judgment and costs. From this decree the *Hobsons* appeal and bring the case here on error. The errors and proceedings complained of are stated in the opinion. [After the action was tried in the court below, *Ogden* died, and his executors, *W. V.* and *H. V. Loving*, were substituted as plaintiffs, and the action here is against them as defendants in error.]

Case of Putnam, for plaintiffs in error:

1. After the trial commenced the plaintiff asked leave to amend his petition by inserting an averment that the debt was contracted prior to the conveyance. Objection was made on the ground that it changed the claim of the plaintiff. Objection overruled and excepted to. The plaintiff had not notified the defendants that they would be called on to rebut evidence of prior indebtedness, either to the plaintiff or other

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creditors. The amendment wholly changed the status of the case, and the court erred in allowing the amendment.

2. The evidence of the plaintiff below establishes the following facts only: That Atwood G. Hobson was the father of Joseph V. and W. J. Hobson; that they lived in Warren county, Kentucky; that the father was in debt, and unable to pay; that Joseph V. Hobson is a single man, about 23 to 25 years of age; that he has been government gauger in the provost marshal's office, and clerk in the post office; that he has been in the grocery and hardware business; is an active, sober, and industrious man, and has been for himself for the last eight or ten years; that he listed no property scarcely for taxation in Warren county, Kentucky; that if he had any property the witnesses did not know it, and they judge from the tax-list that he had none with which to purchase the land. This is the sum and substance of the evidence for Ogden, as contained in the depositions. The six certificates of land show that Atwood G. Hobson was the owner of them from October 1860 until March 23d 1870. He discloses in his answer in the action in the Warren county court that he was the owner of lands in other states, and as the court ruled him to disclose definitely where it was, there is no doubt he did so, or the plaintiff below would have shown his refusal. They were recorded on the 10th of November 1871, in Dickinson county, Kansas.

The evidence of the defendants below establishes these facts beyond question: first, that the trade for the land between Jos. V. Hobson and A. G. Hobson was made on the 9th of May 1869, and the price agreed on was \$4,000; second, the amount of land was 794.28 acres; third, the value of the land was not to exceed \$5 per acre, on the 9th of May 1869; fourth, that the agreement was, that Joseph V. Hobson should pay the \$4,000 consideration by taking up, paying and canceling the indebtedness of Atwood G. Hobson, his father, to that amount; fifth, that he did so, and a trifle over. There is no witness in this case who has testified that the sale was not made, that the price was not paid, that the contract was

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not carried out to the letter by Joseph V. Hobson. The evidence, wherever the question of consideration is referred to, shows a good consideration, to-wit, the payment of the debts of A. G. Hobson. 8 Kas. 180; 9 Kas. 399.

N. C. McFarland, for defendants in error:

1. The amendment did not substantially change the plaintiff's claim. The indebtedness to the plaintiff must have accrued before the commencement of the action in which judgment was rendered in the Dickinson county district court at the April Term 1872. The amendment only makes the petition more specific by stating the *time*. It is such an amendment as the court might well allow after the trial, by conforming the pleadings to the evidence. Nor could the defendants be taken by surprise, for the court will observe that the plaintiff's evidence was in depositions, and must have been on file. The court had power to allow the amendment, and if the defendants were prejudiced thereby they should have asked a continuance.

2. The question then before this court is, whether it will reverse the *finding of facts* of the court below. The rule established by this court as to the weight of evidence necessary to overthrow such finding has been so often stated that no reference thereto is necessary. The record in this case is perhaps more remarkable for what it *does not*, than for what it *does* contain. Neither Atwood G. Hobson, the father, nor Joseph V. Hobson, the son, appears as a witness; and these are the only two persons who know absolutely whether the sale was fraudulent, and without consideration. But they call W. E. Hobson a son of A. G. H., and brother of J. V. H., who pretends to "know" that the sale was made in good faith, and that there was consideration paid, etc., all of which he must have learned from somebody, or, as he says, "These payments have been submitted to me by the parties and the credits mentioned by A. G. Hobson." He was not present when J. V. H. made any payments to his father's creditors. But he once carried a part payment to Dr. V., and does not personally know of any of the

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payments. Then another son and brother (Jonathan) tells what he has *heard* about the sale, and how the money was paid, etc.; and by these two witnesses it is mainly expected to be shown that this was a sale in good faith. The two Hobsons implicated state to two other Hobsons how matters stood, and then put them on the stand to tell what they (defendants) had told them. This gets the testimony in the depositions (not in court,) and avoids perjury. But it is all incompetent, as hearsay, and was objected to. The knowledge of the facts in respect to the payment for this land was in possession of defendants, and them only, and they ought to have produced the evidence by themselves, giving the facts. (23 Howard, 477.) When there are such suspicious circumstances as are shown conclusively in this case, the burden of proof is shifted, or at least it becomes necessary for the parties charged with the fraud to make satisfactory explanations. And this even when it is conceded that the consideration was ample, and paid. (6 Wallace, 299-315; 2 J. J. Marsh, 218.) What are the suspicious circumstances really not denied? A. G. Hobson, the father, was in failing circumstances and by repute insolvent for a number of years prior to the conveyance; he sold the land in controversy to his son, and so far as can be ascertained it was all the property he owned at the time. Various witnesses state the age of the son in 1878, when depositions were taken, at from 21 to 25 years, (and he was probably about 21 years old when the agreement to sell was made in 1869.) J. V. Hobson had not listed any property prior to this sale for taxation that could have included assets to pay for this land. The claim set up by the testimony of the brothers, that in 1861, (when about 12 years old,) Joseph V. H. was clerk in office of provost marshal, and made money—that in 1866, (when about 16 or 17 years of age,) he was a partner in grocery business, and a merchant, and that when he was 21 years old he had saved money enough to pay off \$4,000 of his father's debts—is utterly absurd. But I claim that if he paid the money, (which is to me incredible,) he cannot be protected. If he had information sufficient to put him upon inquiry as to his

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father's insolvency, it is sufficient. (*Pitney v. Leonard*, 1 Paige Ch. 461.) Living with his father, the knowledge of his insolvency will be inferred. (*Dunlap v. Hayes*, 4 Heisk. (Tenn.) 476.) He is not a purchaser in good faith, who knows and assents to the design to defraud creditors, or who might have known by the exercise of ordinary diligence. (*Garaby v. Bayley*, 25 Tex. 294.)

There is no *competent evidence* in the record which shows the son ever paid anything on the pretended purchase. While these defendants have acted unwisely in attempting to perpetrate this fraud, yet it must be admitted they have acted wisely by not attempting to swear it through themselves.

The opinion of the court was delivered by

BREWER, J.: This was an action to set aside a conveyance of a tract of land, and to subject the land to the payment of the debts of the vendor. Three questions are presented. It is insisted that the court erred in permitting an amendment of the petition after the commencement of the trial. As the petition stood it alleged the conveyance in 1870, the recovery of a judgment against the vendor in 1872, and that the conveyance was fraudulent and with intent to hinder, delay and defraud the plaintiff. It did not allege when the plaintiff's claim accrued against the vendor, or even that it accrued before the conveyance. The court permitted an amendment to show that it accrued before 1868. This amendment was made before any testimony was received—was made upon the objection of defendants' counsel that the petition did not state a cause of action without such an allegation. No suggestion of surprise, or application for postponement, was made. Indeed, it is not possible that the party was surprised, for the petition in the action in which judgment was rendered, in the same court, alleged as its cause of action an indebtedness created in 1867. Therefore the claim of error is rested upon the simple proposition, that the court ought not at that time to have permitted such an amendment. We do not think the court abused its discretion in permitting the amendment; though we think as

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a general rule, and this does not seem an exception, that such amendments should be made upon terms. We cannot see that the defendants were materially injured by the amendment.

A second error is alleged in admitting a transcript of certain records of the circuit court of Warren county, Kentucky, the county in which all the parties resided. The principal part of this transcript consisted of verified answers of one of the defendants, the vendor of the land in controversy, filed in certain suits in that court, and were offered for the purpose of showing his financial condition which was stated by him in those answers. Of course, as admissions of one of the defendants, they were good against him. The remainder of the transcript, being an order of the court, and an opinion by its judge that a further disclosure was necessary, seem immaterial except perhaps as explaining the filing of an additional answer. We cannot see how either party was benefited or prejudiced by this portion of the transcript. If error to admit it, it was, because it was immaterial.

The principal error however alleged is, that the finding of the court is against the evidence. The court found that the conveyance was without consideration, and adjudged it void as against the plaintiff's claim. The vendor and purchaser were respectively father and son. All the parties, as we have seen, resided in Warren county, Kentucky. The father was and for several years had been embarrassed, and unable to pay his debts. The conveyance was of nearly 800 acres of land in Kansas, including the 160 acres in controversy. The contract therefor, as defendants claimed, was made May 9th 1869, and the conveyance, which was by assignment and transfer upon the land-office receiver's certificate, and not by separate deed, March 23d 1870. The consideration as testified to, for none is stated in the conveyance, was \$4,000, and was paid by the son in paying certain debts of the father. The son was an unmarried man, of from 23 to 27 years of age, and at the time of this controversy was clerk in the post-office at Bowling Green. Prior to that he had been clerk in the provost marshal's office, whisky ganger, and for about a year

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carried on a grocery store in company with his brother. Prior to the conveyance he had never been assessed a dollar, and subsequently only to the extent of a mule valued at \$75, and a horse valued at \$100. Neither vendor nor purchaser testified in the case, but two sons of the vendor (brothers of purchaser) testified to the terms of the contract, and to the performance by the purchaser, giving names and amount of the father's creditors whose debts were thus paid by the son. They also testified to the son's having money at different times, and they with other witnesses testified to the young man's industry, frugality, and correct habits. It does not appear that the purchaser ever came to Kansas to examine the lands before or after his purchase. Subsequently to the conveyance, the father came here, paid the taxes, filed the conveyance for record, made many inquiries concerning the land, and some statements concerning his intentions in reference to it, which appear to have been differently understood by those who heard them. This gives an outline of the testimony, and only an outline, for it comprises nearly two hundred pages of the record. The minor features of the case, the details of the testimony, it would be useless to attempt narrating. We have examined the entire testimony with care, and cannot say that the court erred in its conclusions. The silence of the parties to the transaction; the fact that the two principal witnesses for the defendants must necessarily have obtained much of their knowledge second hand; the conduct of the parties after the purchase in reference to the land; the successful and continued escape of the purchaser from the assessor; his employment, and apparent means of accumulation, during the years prior to the conveyance; the financial condition and embarrassment of the vendor, all tend strongly to support the conclusion of the court, that the conveyance was without consideration. At any rate, we do not see testimony in the record sufficient to justify us in reversing the judgment, and it will be affirmed.

All the Justices concurring.

PERRY PHILLIPS V. VICK REITZ.

1. **FRAUDULENT SALES; Good Faith.** To support a sale of personal property, where there is no change of possession, as against a creditor or subsequent purchaser, proof of good faith is as essential as proof of a sufficient consideration. [*K. P. Rly. Co. v. Couse*, 17-571.]
2. ——— **Possession of Vendor.** A continuance of possession by the vendor is evidence of a want of good faith, as well as of a want of sufficient consideration. It does not raise a presumption of law that the sale is fraudulent and void, but simply one of fact, which may be overcome by other testimony. Like the possession of recently-stolen property, it casts upon the party the duty of explaining the possession, and may, if unexplained, become conclusive evidence against the sale. [*K. P. Rly. Co. v. Couse*, 17-571.]
3. ——— **Intent of Vendor; Knowledge of Vendee.** Knowledge of facts sufficient to excite the suspicions of a prudent man, and put him upon inquiry, is, as a general proposition, equivalent to knowledge of the ultimate fact. [*McDonald v. Gaunt*, 30-693.]
4. ——— **If a party knows of the fraudulent intent of a vendor, and buys with that knowledge, he is not a bona fide purchaser, for he is knowingly helping the vendor to accomplish the fraud and do the wrong.** [*Crapster v. Williams*, 21-109.]

Error from Johnson District Court.

REFLEVIN, brought by *Perry Phillips*, for the undivided one-half interest in nine head of horses, one phaeton, two buggies, harnesses, etc. *Phillips* claimed to be the owner, and entitled to the possession of the property, and alleged that it had been wrongfully taken and was wrongfully retained by *Vick Reitz*. *Reitz* answered, that the property in question was the property of one I. N. Phillips, and not the property of plaintiff; that defendant was sheriff of Johnson county, and as such sheriff he had received and held a writ of execution to him duly issued and delivered, upon a judgment duly recovered in the Johnson county district court, by B. A. Feineman & Co. as plaintiffs against said I. N. Phillips as defendant, for \$160.35 and costs, April 15th 1874; that by virtue of said writ of execution he (*Reitz*) as sheriff had levied upon said property as

Statement of the Case.

the property of said I. N. Phillips; that he found said property in the possession and under the control of said I. N. Phillips, and that he (the sheriff) had taken the same, and now held and retained the possession thereof as such sheriff, and by virtue of said writ of execution. Trial at the August Term 1874. The evidence showed that I. N. Phillips and one Thomas Muir had been partners, carrying on the livery business in the city of Olathe for a long time; that the horses, carriages, etc., levied on by sheriff *Reitz* had been owned by said Phillips & Muir, and used in their said business; that said I. N. Phillips, in March 1874, was largely indebted, and suits were pending against him; that his homestead, and all his real property except the undivided half of the livery-stable lot was mortgaged; that *Perry Phillips*, the plaintiff, was his brother; that *Perry* resided on a farm ten miles distant from Olathe; that on the 4th of April 1874 said I. N. Phillips and one McKeever went to the residence of the plaintiff, and there said I. N. Phillips sold his interest in the livery stable and stock to the plaintiff for \$1,200, for which sum the plaintiff executed his promissory note, which was immediately indorsed to said McKeever as collateral security for the payment of the purchase-money of a farm sold by said McKeever to said I. N. Phillips, upon which farm McKeever held a mortgage given to secure said purchase-money; that the livery stock and property was all at Olathe at the time, and the plaintiff did not go to see or take possession of it; that I. N. Phillips and Muir continued the livery business as partners, but one witness for plaintiff had testified that plaintiff had employed him (the witness) to take charge of the stock and attend to the plaintiff's interests in the livery business. It also appeared that *Feineman & Co.* had recovered a judgment against I. N. Phillips, April 15th 1874, and an execution thereon had been issued, as alleged in *Reitz's* answer; that *Reitz* had levied said execution upon the property in controversy on the 20th of April; that thereupon I. N. P. dispatched a messenger for the plaintiff, who immediately came to Olathe, and then (after said levy) said I. N. P. went

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with the plaintiff to the livery stable, and undertook to make formal delivery of the property to the plaintiff, but they were notified by Muir that the sheriff had levied upon the property and had left it in his (Muir's) care, and that no delivery or change of possession could be made; that after said levy Muir and I. N. Phillips had a settlement between themselves, which included partnership accounts in the livery business down to the day of the settlement. It also appeared that *Perry Phillips* had obtained possession of the property, at the commencement of the action, and that at the time of the trial a part of the stock, and two of the carriages were in the possession of I. N. Phillips. The material part of the instructions is copied into the opinion, *infra*. The jury found for the defendant, and assessed the value of the property at \$732.50. New trial refused, and judgment on the verdict in favor of defendant *Reitz* for a return of the property, etc. *Phillips* brings the case here on error.

John T. Burris, and John T. Little, for plaintiff:

1. The plaintiff contends that the evidence in this case proves clearly that there was an actual *bona fide* sale of the property in controversy, and that there was no fraud nor collusion on the part of plaintiff. He was a farmer, living some ten miles distant from his brother, and plaintiff knew nothing about his brother's condition. He bought the property in good faith, and gave his note therefor, which passed into innocent hands.

2. The jury were misled by the instructions given by the court in reference to a change of the possession. It was error to instruct the jury that if they found from the evidence that plaintiff had purchased the property for a fair price, and paid his money therefor, yet, if there was no change of possession at the time of the levy that this was evidence of fraud: 15 Cal. 508; 14 Cal. 384; 4 Kent's Com. 500. The evidence shows that long before the levy was made, plaintiff had taken possession and had employed hands to take charge of the stable and property. No removal of the property was necessary. It was

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such property as was not to be removed—a livery stable and stock. A delivery of the possession without a change of possession is sufficient: 5 Cal. 326; 14 Cal. 384; 19 Cal. 398; 25 Cal. 545. See also, 26 Cal. 816; 28 Cal. 13.

3. The court also erred in giving the instruction, that notwithstanding the vendee paid full value for the property, yet, if the circumstances which ought to have excited the suspicions of a prudent man, existed, (although the vendee knew nothing of the circumstances,) he is not a *bona fide* purchaser, and not entitled to protection as such.

The opinion of the court was delivered by

BREWER, J.: This was an action of replevin, and the question was as to the validity of a sale claimed to have been made by one L. N. Phillips to plaintiff. Defendant was sheriff of Johnson county, and under an execution against L. N. Phillips levied on the property. The property consisted of livery stock in the city of Olathe. Plaintiff was a farmer living some miles off in the country. The sale was made at the farm of plaintiff. He was not from the time of the sale to the time of the levy in Olathe, and L. N. Phillips remained in the actual charge, though, as was claimed, as the agent of plaintiff. The errors alleged are in the giving of instructions. The two propositions to which specific objections are made are—

1st, "The unexplained possession by the vendor, after the sale, is conclusive evidence of fraud."

2d, "The actual participation by the vendee in the vendor's fraudulent intent, is not necessary to avoid the sale. It is enough if he knew of such intent, or of facts sufficient to excite the suspicions of a prudent man, and put him on inquiry."

That good faith is as essential to support a sale like the one before us, as a sufficient consideration, will not be questioned. *Twyne's Case*, 8 Coke, 80; 1 Smith's Leading Cases, 42; *Baldwin v. Peet*, 22 Texas, 780; *Chandler v. Van Roeder*, 24 How. (U. S.) 224; *Pullevin v. Newberry's Adm'r*, 41 Ala. 168. And that a continuance of possession is evidence of a want of good

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faith, as well as a want of sufficient consideration, is settled by the statute. Gen. Stat., p. 504, § 8. That possession may be retained, and still there be a valid sale, is also clear, and so in unmistakable language the court instructed the jury. And this instruction, as to the effect of an unexplained possession, must be considered in reference to and as qualified by the other instructions. There has been a vast amount of controversy as to the effect of a retained possession upon an alleged sale, when challenged by a creditor, or subsequent purchaser. It is all based upon the idea that possession follows title, and that where there is a transfer of title there should be a change of possession. In some courts it has been held, that a failure to change possession is so inconsistent with a transfer of title that it creates a presumption of law against the alleged sale. This presumption of law, no evidence of the good faith of the parties, and of the payment of full consideration, can overthrow. In others, such failure to change possession is merely evidence against a sale, which may be explained. The presumption is one of fact, and like all presumptions of fact open to explanation by other testimony. It is like the presumption of guilt which flows from the possession of recently-stolen property. It casts upon the possessor the duty of explanation. (See for a full discussion of this question and the authorities thereon, *Twyne's Case*, and notes thereon, in 1 Smith's Leading Cases, Hare & Wallace's notes, pp. 47, and following.) Our statute has accepted the latter construction; and provides in the section cited, that "Every sale * * * unaccompanied by an actual and continued change of possession, shall be deemed to be void, * * * until it is shown that such sale was made in good faith, and upon sufficient consideration." In other words, proof of actual good faith, and payment of sufficient consideration, does away with the presumption which flows from a retained possession—shows that such possession does not imply a retained title, or secret trust—in short, explains the possession. Until it is so explained, it is evidence against the sale; and unless so explained, it is conclusive evidence. To that extent, and only to that extent, do we understand the instructions

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of the court, taken as a whole, to have gone; and in that is no error. (See upon this, *Ayres v. Moore*, 2 Stewart (Ala.) 836; *Peck v. Laud*, 2 Kelly (Georgia) 1; *Flemming v. Townsend*, 6 Georgia, 104; *Beers v. Dawson*, 8 Georgia, 557; *Robinson's Ex'rs v. Robards*, 15 Mo. 459.)

As to the second objection, the court distinctly charges that the vendee must be a party to the fraud to avoid the sale, and then, in another instruction, apparently in explanation of what was necessary to make him a party to the fraud, charged that it was enough if he knew of the vendor's fraudulent intent, or of facts sufficient to put him upon inquiry. Is this error? We think not. Knowledge of facts sufficient to excite the suspicions of a prudent man, and put him upon inquiry, is, as a general proposition, equivalent to knowledge of the ultimate fact. *Garaby & Bayley*, 25 Texas, (Suppt.) 294; *Pitney v. Leonard*, 1 Paige Ch. 461. And if the vendee knew of the fraudulent intent of the vendor, and bought with that knowledge, he can scarcely claim to be a *bona fide* purchaser, for he was knowingly helping the vendor to accomplish the fraud and do the wrong.

There appearing no error in these rulings, the judgment must be affirmed.

All the Justices concurring.

26—28 Kas.

JOHN LANE V. WILLIAM SCOVILLE, *et al.*

1. IMPANNELED JURY; *Disqualification of Juror; Laches of Party; Waiver.*
Where, at the time of impanneled a jury, a party knows of the disqualifications of a juror, and fails to challenge him on account thereof, he will not be permitted thereafter to raise the objection.
2. ——— Where a juror is called, and upon his *voir dire* testifies that he has no knowledge of the case, a party is ordinarily justified in resting on such testimony.
3. ——— Where there is no reason to suspect the juror who has thus testified, a party is, though there has been a previous trial, under no obligations to examine the record of such trial to ascertain whether the juror did not serve upon such trial; nor is he ordinarily chargeable with gross negligence or laches in forgetting the fact of such service.

Error from Atchison District Court.

ACTION by *Scoville*, and two others, partners as *Scoville & Smith*, on a due-bill for \$200 executed to them by *Lane* April 3d 1873, on which a payment of \$100 was indorsed as having been made on the 16th of said April. *Lane* answered, and alleged that the due-bill was procured by fraud, and was without consideration. Trial at the November Term 1874, C. W. J., judge *pro tem.*, presiding. Verdict in favor of defendant. On plaintiff's motion the verdict was set aside and a new trial granted. From this order *Lane* appeals, and brings the case here on error.

W. W. Guthrie, and *Horton & Waggener*, for plaintiff in error.

Wm. R. Smith, for defendants in error.

The opinion of the court was delivered by

BREWER, J.: *Lane*, who was defendant below, seeks in this case to review an order of the district court granting a new trial. The facts are these: Defendants in error brought their action against *Lane* before a justice of the peace. A jury

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trial was had. Verdict and judgment were the for plaintiffs. Lane appealed. In the district court another jury trial was had, and the verdict was in favor of Lane. The district court sustained a motion for a new trial, and this is the ruling now presented for review. The district court overruled all the grounds for a new trial except one, misconduct of the jury. Upon this it granted a new trial. The misconduct was this: The foreman of the jury in the justice's court was a juror in the trial in the district court. He was called as a talesman, and on his *voir dire* testified that he knew nothing of the case, etc., and was not challenged. The plaintiffs and their attorney had forgotten that he had served on the trial in the justice's court, though they were present at that trial, and did not become aware of the fact until after the jury had been impaneled and the trial commenced. Before this juror was called one had been challenged because he had served on the trial below, and the transcript of the proceedings in the justice's court was passed to and examined by the plaintiff's counsel at that time. Upon this transcript appeared the name of the juror, for whose misconduct the new trial was granted, as foreman of the jury. The counsel doubtless overlooked this, and rested with the testimony of the juror on his *voir dire*.

Ought the ruling of the district court granting a new trial to be reversed? That the juror was incompetent, and that his service on the former jury was cause for principal challenge, is settled by the statute. Gen. Stat. p. 680, Code, § 270. On the other hand, it is clear that if the plaintiffs knew of his disqualification, and failed to challenge, they waived all objection: 2 Gra. & Wat. on New Trials, 467; *Fox v. Hazleton*, 10 Pick. 275; *Barlow v. The State*, 2 Blackford, 114; *Glover v. Woolsey*, Dudley, (Geo.) 85; *Jeffries v. Randall*, 14 Mass. 206; *Booby v. The State*, 4 Yerger, 111. But the point here is, that the plaintiffs were ignorant of the disqualification, having forgotten that the juror had served on the prior trial, then some ten months past, and that they resorted to the ordinary means of ascertaining his disqualification by ex-

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amining him on his *voir dire*. In *Barlow v. The State*, supra, some of the grand jury who found the indictment were called and served as petit jurors. It was held that the objection was not good, on a motion for a new trial, although the defendant had forgotten the fact which disqualified when the jury was impaneled. The court says: "Here the defendant had once known that these men were on the grand jury. The statement of his not recollecting it, is insufficient. An affidavit to that effect could never be disproved." See also, *State v. O'Drescoll*, 2 Bay (S. C.) 153. In the case cited above from Dudley's Reports, the juror was security on the appeal bond, and though the party swore he was ignorant of the fact, it was held to be gross negligence not to be aware of it, and the objection to the juror was too late. In *Jeffries v. Randall*, supra, no inquiry was made of the juror on his *voir dire*, and the party was held to have waived any objection to him. In *Rollins v. Ames*, 2 New Hamp. 349, it appeared on the motion for a new trial that one counsel was at the time of impaneling the jury unapprised of the disqualification, but it did not appear whether the party or his other counsel were also ignorant, and the motion was overruled. In the case in 4 Yerger, 111, the affidavit of the juror, that he believed the party was not aware of his disqualification, was held insufficient to show the party's ignorance. On the other hand, *Williams v. McGrade*, 18 Minn. 82, where there were two trials, and a juror called and served on the second who had also served on the first trial, although the clerk's minutes showed the fact, yet, as nearly three years had elapsed between the two trials, and the juror on his *voir dire* disclaimed all knowledge of the case, the objection was held good on a motion for a new trial. In *Rice v. The State*, 16 Ind. 298, a grand juror was called as a petit juror. On his *voir dire* he swore that he had formed no opinion, etc. A motion for a new trial was sustained, and the court say: "Here the accused undertook to test the juror's freedom from bias, and being answered by the juror that he had formed no opinion on the case, he was not required to go

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further and ascertain whether he had been on the grand jury, or whether he was under any other disqualification." See also *Herndon v. Bradshaw*, 4 Bibb, (Ky.) 45.

There is, it will be noticed, not entire harmony between the authorities. It seems to us that these propositions, which find support in the latter authorities, are just and reasonable: Where a juror is called, and upon his *voir dire* testifies that he has no knowledge of the case, a party is ordinarily justified in resting on such testimony. Where there is no reason to suspect the juror who has thus testified, a party is, though there has been a former trial, under no obligations to examine the record of such trial to ascertain whether the juror did not serve upon such trial, nor is he ordinarily chargeable with gross negligence or laches in forgetting the fact of such service. Tried by these rules, the decision of the district court is correct, and must be sustained. We are aware, as counsel suggest, that, as the first jury found in favor of plaintiffs, suspicion might be aroused as to the actual forgetfulness of plaintiffs and their counsel; but the district court was satisfied of the truthfulness of their statements, and we have no right to question it. It seems from the affidavits that defendant's counsel was equally forgetful. We notice also that plaintiff's counsel had just examined the justice's transcript in reference to another juror. All that can be inferred from this is, that as to that juror the counsel had some suspicion, either from what the juror said or otherwise, that he had served upon the prior trial; not that he was bound to have the same suspicion, or make the same examination, as to each succeeding juror. The ruling of the district court was in favor of a new trial, and that, as often decided, is entitled to more consideration in this court than one refusing a new trial.

The order of the district court will be affirmed.

All the Justices concurring.

SCHOOL DISTRICT No. 10 v. W. H. COLLINS.

SCHOOL-DISTRICT ORDERS; *Irregular Payment, held Good.* On March 11 1874, a school-district order was drawn in favor of W. upon the treasurer of the district for \$126, in payment of W.'s wages as teacher, and payable out of the teachers' fund belonging to the district. Prior to this time, but after the indebtedness to W. had nearly all accrued, he drew several orders upon the treasurer of the district as treasurer, for portions of this indebtedness, which orders were accepted and paid. These orders were to pay certain sums of money, and each contained the clause, "and this shall be your receipt to me for the same as teacher of school in said district." Upon the receipt of the school-district order, W. presented it to the treasurer and demanded payment. The treasurer tendered him the several individual orders above mentioned, and the balance in currency. W. refused to receive this, indorsed the school-district order to C, who received it with full knowledge of all the facts: *held*, that a judgment in favor of C. for the full amount of the school-district order was erroneous, and should be reversed.

Error from Washington District Court.

ACTION by Collins, as assignee of one C. W. Walker, to recover the amount of a school-district order issued to the latter in payment of teacher's wages by *School District No. 10 of Washington County*. The *School District* answered, setting up two defenses—first, a general denial; second, that said Walker, after his money was nearly all earned, and before the district order therefor was issued to him, had drawn his three several orders on the district treasurer—(these orders are fully described in the opinion, *infra*)—which orders were accepted by said treasurer, and by him paid out of the teachers' fund; that afterward said Walker presented to said treasurer said district order for payment, when said treasurer tendered him the three orders so drawn by Walker and paid by said treasurer, and the balance in lawful currency in payment of said school-district order, which Walker refused to accept; that afterward the plaintiff Collins, with full knowledge of all the facts, and well-knowing that said school-district order had been fully paid and satisfied, took the same from said Walker, but without paying

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anything therefor—wherefore, etc. To this second defense the plaintiff demurred; and the district court, at the August Term 1874, sustained the demurrer. The *School District* not wishing to answer over, the court gave judgment on said demurrer in favor of *Collins* for \$180.15 and costs, and the *School District* brings the case here on error.

J. W. Rector, for plaintiff in error:

The court erred in sustaining the demurrer to the defendant's answer. Said district order was not a negotiable instrument. Such orders show on their face for what purpose, and by what authority they are issued, and thus carry notice to all holders, and they must ascertain, at their peril, what defenses exist against them. (*Newel v. School District*, Chicago Legal News, March 14th, 1874, page 198.) Hence there can be no such thing as an innocent purchaser or holder in good faith of such orders. But were it otherwise, still in this case Collins got said order after maturity, as Walker had demanded payment of it before assigning it to Collins, and it became due at the time of the demand, at the very latest. And even if said order *were* negotiable, and if Collins got it *before* due, still, said answer alleged that Collins took it with full notice, and without paying value. Therefore, in either event, Collins stood in the shoes of Walker, the original payee, and if Walker could not have compelled the district to pay said order to him a second time, then neither could *Collins* collect it. It is true, the money was paid on his private orders on the treasurer of the district, and not a regular order issued by the board; but after it had been thus paid at his request, and for his benefit, to pay his debts, he would not afterward be heard to deny that said payment was good in law and equity. Such a claim would be inequitable and fraudulent on its face, and he would be estopped from setting it up. *Bigelow on Estoppel*, 581; 5 *Allen*, 165; 97 *Mass.* 175.

Joseph G. Lowe, for defendant in error:

1. The second defense set forth in the answer of the school district constitutes no legal defense to plaintiff's cause of action. The treasurer shall pay over, on the order of the clerk, signed by the director, all moneys so received. (School Law, Gen. Stat. 923, § 38.) The duties of the treasurer are plainly prescribed by law. Any act of his unauthorized by the provisions of the statute is void. (6 Chicago Legal News, 198, March 14th 1874.) The payment by the treasurer of the order given by Walker to Barley & Young, Cullemore Bros., and Thomas Haak, was unauthorized, hence the payment did not amount to a payment by the district. It is but the individual payment of the treasurer of the private and individual orders of Walker, and did not liquidate the debt of the district upon the order regularly issued. It will be conceded that the treasurer exceeded his authority. Then, shall such violation of duty on the part of a public servant prejudice the claims of plaintiff below, who, acting upon the best authority in purchasing the order, found the same had not been paid, and that the district was liable on such order?

2. If it was error to sustain the demurrer to the second defense, such error did not prejudice the rights of the school district. (10 Kas. 128; 9 Kas. 620.) General denial raised every issue that could be raised by the special defense. If ordinarily the payment of the individual order by the treasurer would have been a defense, then as the record does not set forth the evidence the court cannot say whether there was error of the court below or not. The court should have a right first to correct its own errors. No notice for a new trial being made, no error appears.

The opinion of the court was delivered by

BREWER, J.: This was an action on a school-district order. The defense was payment. The facts are these: On March 11th 1874, a school-district order was drawn by the director and clerk of said school district upon its treasurer, and payable

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to C. W. Walker, or order, out of the teachers' fund, for \$126, for teaching school. In February 1874, Walker drew upon the said treasurer in payment of certain indebtedness three several orders, amounting to \$125.98, which, on the 10th of March, were accepted by the treasurer, and on or before the 16th paid by him out of the teachers' fund belonging to the district. This was one of the orders:

WASHINGTON, WASHINGTON COUNTY, KAS.,
February 18th, 1874.

Treasurer of District No. 10: Please pay to the order of Cullemore & Brothers twenty dollars, and this shall be your receipt to me for the same as teacher of school in said district.

C. W. WALKER.

The other orders were similar. On the 16th of March, Walker, then the owner and holder of the school-district order, presented the same to the treasurer, who tendered him the three orders so accepted and paid as aforesaid, and seven cents in currency, the same making the full amount of the school-district order, but Walker refused to receive this payment, and thereafter indorsed the order to plaintiff Collins, who received the same with full knowledge of all the facts.

Was the district liable? Of course, Collins has no higher rights than Walker; and any defense good against the latter is good against the former. And we think the facts make out a defense as against either. Of course, the district cannot avail itself of any private transactions between the treasurer and the teacher, or offset a debt due from the latter to the former against its own indebtedness. But on the other hand, if Walker has received out of the funds of the district payment of its indebtedness to him, no matter how irregularly it has been received, he is estopped from denying it to be payment. Supposing he had stolen so much money from the funds of the district in the hands of its treasurer: could not the district set off the amount thus stolen against his claim? So, if in any way without crime he has received out of the same funds any moneys, such receipt is to that extent payment of its debt. In the case before us, after the indebtedness had nearly

all accrued he draws an order, not upon any individual as such, and without naming any individual, but upon the *treasurer* of the district, the custodian of the funds of that corporation which is in debt to him, and specifies in the order that it shall be a receipt to him for the debt due by the district. This order is accepted and paid. Grant that it was done irregularly, and that the treasurer should have waited until the official evidence of the district's indebtedness was presented; but as it was done, and Walker received the benefit of it, he at least is estopped from saying that it was not regularly done. He cannot say that it was a mere private transaction between himself and the individual who happened to be at the time treasurer of the district, for the order which he drew shows the contrary. He has received his pay once, and neither law nor good conscience will tolerate that he recover it again.

It is scarcely necessary to say that after a question has been once fairly presented and decided on a demurrer, it is unnecessary, if it were proper, to raise it again by the offer of testimony.

The judgment will be reversed, and the case remanded with instructions to overrule the demurrer to the second defense, and for further proceedings in accordance with the views herein expressed.

All the Justices concurring.

MELVIN R. ROSS v. COMM'RS OF CRAWFORD COUNTY.

1. **CORRECTING ASSESSMENTS; *Compulsory Proceedings before County Clerk.*** In proceedings to correct an assessment under §§ 65, 66 and 67 of the tax law of 1868, the clerk is required to file in his office a statement of the facts or the evidence upon which he makes the correction. Where he filed a statement of the evidence, and the order is supported by the evidence, although he voluntarily and without any demand adds to his statement of the evidence something in the nature of a finding of facts, it is not a ground for setting aside his order that this finding of facts is not sufficiently precise and complete of itself alone to sustain the order. [See end of opinion.]
2. **TRIAL BY JURY, *When Not a Matter of Right.*** That in proceedings which are merely proceedings to correct assessments there is no provision for a trial by jury, does not render them void, or make them in conflict with § 5 of the Bill of Rights which provides that "the right of trial by jury shall be inviolate." [Same as to eminent domain, *C. B. U. P. Rld. Co. v. A. T. & S. F. Rld. Co.*, 28-453; as to equity cases, *Kimball v. Connor*, 3-415; as to contesting a will, *Rich v. Bowker*, 25-7; but party cannot be deprived of jury trial by seeking legal remedy through equity forms, as by injunction to recover possession of lands, *Bodwell v. Crawford*, 28-292; as to summary trials in criminal cases, see opinion of BREWER, J., at chambers, *In re Rolfs*, 30-758. Other points considered in opinion: Whether powers conferred on clerk are judicial, *Ross v. Comm'rs Crawford Co.*, 16-417, 418; that right to jury trial exists only in classes of cases triable by jury, as of right, before adoption of constitution, *id.*, 16-418.

Error from Crawford District Court.

PROCEEDINGS to discover taxable property which the owner refused to list. The record of such proceedings is as follows:

COUNTY CLERK'S OFFICE, GIRARD, July 18th, 1874.

On this 18th of July personally appeared before me at my office in Girard, Crawford county, R. E. Carlton, township trustee, and informed me that one Melvin R. Ross of Baker township in said county of Crawford, did not list the true amount of his personal property, and that he believes that he has about fifty hogs, whereas he the said Ross only listed three; also, he believes he has a large amount of money, notes and mortgages that he has not given in to him the said Carlton as assessor of said township of Baker. Said Carlton also named certain citizens of said township as competent witnesses to prove said allegations and information. Thereupon, I, as county clerk aforesaid, set Monday July 27th 1874 as the hour

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for hearing the testimony in regard to the matter, and gave the said Melvin R. Ross due notice as required by the statute.

Monday, July 27th, 1874: Parties appeared pursuant to notice, Melvin R. Ross in his own proper person, as well as by his counsel, Daniel Scott, Esq. The county was represented by J. T. Bridgens, for the county attorney. * * * * The following witnesses were duly sworn and examined, on behalf of the county: R. E. Carlton, A. Adams, E. R. Clark, Wm. Callwell, E. Stillwell, John Harrison, Thomas Bates, P. F. Holden, J. Cheney, and Jesse Timmerman; and on behalf of said Ross, the following—M. Schultz and E. Keeler. After hearing the testimony of the witnesses, and arguments of counsel, I do find the information as alleged to be true, and do further find that said Melvin R. Ross had in his possession on the 1st day of March 1874, which he refused to list to the said R. E. Carlton, assessor of said township of Baker, the following personal property, to-wit: 8 horses, 27 hogs, 4 head of cattle; notes, \$1,000; notes secured by mortgage, \$1,210.

It is therefore considered by me, that said personal property above described should and of right be assessed against him the said Melvin R. Ross, and that he pay the costs and expenses of this examination taxed at \$77.15. [Then follows an itemized statement of the costs.]

J. H. WATERMAN, *County Clerk.*

The transcript also contains "a synopsis of evidence taken down [on said examination] by Geo. W. Tipton, appointed for the purpose of writing down the testimony in the case of Melvin R. Ross." Ross, feeling aggrieved by the order and decision of the county clerk, removed said proceedings and decision to the district court by petition in error, where the action was docketed as "*Melvin R. Ross*, plaintiff in error against *The Board of County Commissioners of Crawford County*, defendant in error." Said petition in error was heard at the January Term 1875 of the district court, and said court affirmed the decision and order of the county clerk. Ross now brings the case here on error.

R. E. Burns, and *Blair & Hill*, for plaintiff in error:

This case originated under §§ 65, 66 and 67, of the tax law, and plaintiff submits the following legal propositions to

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this court for its consideration and opinion: 1st, Are the findings in this case supported by evidence? 2d, Are the findings supported by law? 3d, Is the act conferring judicial powers on the county clerk not in conflict with §§ 1 and 11 of article 8 of the constitution? 4th, Is not the whole act in conflict with § 5 of the bill of rights?

1. The court finds that Ross had in his possession on the 1st day of March 1874, which he refused to list, certain personal property. This finding calls for an examination of the evidence, which the clerk returns as the evidence upon which he based his finding; and as the law requires him to preserve the evidence, his findings must stand or fall upon that evidence. Now, as to the horses, hogs, and cattle, all the witnesses testify that they know merely from hearsay, and from seeing the property on the premises of Ross. Ross admits that part of this property was on his place, but that it belonged to others, and there is nothing to show but that the proper parties listed that property, nor that the county ever lost one cent, and certainly nothing with which to support the findings. As to the \$1,000 in notes: Where is there any evidence to support the theory that those notes, or any part of them, had any value whatever? Certainly none. Then, if they had no value, or if they were not good, certainly Ross was not compelled to pay taxes on them. As to the \$1,210 secured by mortgage: Take first, the Runnick mortgage. Mr. Ross and Mr. Stillwell are the only two persons testifying on the subject, and neither testifies that Ross had that mortgage on the first day of March, consequently we suppose there will be no dispute among legal gentlemen on that point. The next is the Richards mortgage, and the sum total of Richards' evidence is, that he gave to Ross a mortgage previous to the 1st of March 1874, for the sum of \$260, but he don't state one fact to support his conclusion that Ross held or owned that mortgage on March 1st. The next is the Wallace mortgage, for \$1,000, and the evidence clearly shows that \$700 of that was paid long before March 1st, leaving a balance of \$300. The next and last is what is known as

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the Pearce mortgage; and this, we contend, was not taxable property in the hands of Ross. The evidence is clear and explicit, without contradiction, that Ross held no property in that mortgage, but that he only took said mortgage as the agent of a third person.

Again, where is the evidence showing what property, or how much was given in by Ross to the assessor? The list as made out and delivered to the assessor should have been introduced by the county, in order that the clerk should have taken official notice of the actual amount of property. No court can say that Ross did or did not list all of his money, notes and mortgages. 6 Kas. 408.

2. Is the finding sustained by law? The county clerk has failed to find the only facts which the law required him to find, viz.: 1st, the value of the property; 2d, that the property was in Crawford county on the first day of March; 3d, that the property belonged to Melvin R. Ross; 4th, that Ross willfully and fraudulently failed to list said property, in order to compel him to pay costs. But what kind of mortgages were these? If they were mortgages on personal property, he could properly deduct from his indebtedness. This court cannot tell but what these mortgages were chattel mortgages; and if so, if he owed an amount sufficient to cover them, they would not be taxable.

3. What does the constitution mean when it says, "All judicial officers shall be appointed by the governor?" Is this a judicial proceeding? What is the nature of this proceeding, if not judicial? Does not the tax act confer upon the county clerk all the duties and powers of a court? If so, is it not clearly in conflict with §§ 1 and 11 of art. 3 of the constitution?

4. In all cases in which at common law a jury trial was allowed, the same so remains, provided that no tribunal had jurisdiction of some especial offense or matter before the adoption of the constitution. (Bill of Rights, §§ 5, 10.) Is this one of those cases in which a jury trial was allowed at common law? Now, while it may be a case unknown to common law,

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we find a safe criterion for a guide. A jury trial is allowed and guarantied by the constitution in all cases *quasi criminal* in their nature, depending upon a plea of not guilty for an issue. And this case does not come within the rule laid down in New York, viz., in cases where the tribunal trying the cause has not the power to call a jury, if there is an appeal to a court having a jury the act will not be deemed unconstitutional. As the act of the legislature is special, and must be followed, the clerk has no power to call a jury, nor to grant an appeal. Nor is this case within the rule laid down by some other states, viz., that when the act was special, and granted to a special tribunal, before the adoption of the constitution, the act will not be declared unconstitutional. This is an act found the first time in the statutes of Kentucky, and in that state the supreme court held the act unconstitutional. It is not found in the statutes of any other state or territory, so far as we have been able to investigate. The presumption of the law is that Ross did his duty. He listed his property, and swore to the listing. Now the issue is, that he *wrongfully* refused to list all his taxable property; and in this case we apprehend that he is entitled to a jury trial. *The State v. Allen*, 5 Kas. 218; *Work v. The State*, 2 Ohio St. 296; *Green v. Briggs*, 1 Curtis, 311; *Carson v. Commonwealth*, 1 A. K. Marsh. 290; *Hughs v. Hughs*, 4 Monroe, 48; 2 McCord, 55; 1 Howard, (Miss.) 102.

D. S. McIntosh, and *Daniel Scott*, for defendants in error.

The opinion of the court was delivered by

BREWER, J.: The proceedings in this case were had under §§65, 66 and 67 of the Tax Law, (Gen. Stat., page 1041.) Ross was cited to appear before the county clerk for failing to return all his personal property for assessment. He appeared, an inquiry was had, testimony heard, and the county clerk found that he had omitted from his return considerable property, and ordered that it be corrected. The case was taken on error to the district court, which affirmed the decision of the county clerk, and it comes to us on error from the district court.

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Several objections are made to the record. It is claimed that the evidence does not support the findings of the clerk. It is unnecessary to say more than that after examining the evidence, we are satisfied that there is enough to support both the findings and the order made by the clerk. Again, it is said that the findings do not support the order. The findings are—

“That the information as alleged is true, and that Melvin Ross had in his possession, on the 1st day of March 1874, which he refused to list to the said R. E. Carlton, assessor of said township of Baker, the following personal property, to-wit: three horses, twenty-seven hogs, four head of cattle, notes \$1,000, and notes secured by mortgage \$1,210.”

The objections are, that he failed to find, “First, the value of the property; second, that the property was in Crawford county on the first day of March; third, that the property belonged to Melvin R. Ross; fourth, that Ross willfully and fraudulently failed to list said property—in order to compel him to pay costs.” The order made by the county clerk was as follows:

“It is therefore considered by me, that said personal property above described should and of right be assessed against him, the said Melvin R. Ross, and that he pay the costs and expenses of this examination.”

The record stops with this order, and shows no further proceedings. Whether the county clerk himself valued this property, or referred the matter back to the assessor, and indeed whether the personal assessment of Mr. Ross has actually been raised a single dollar, are matters not appearing in this record. Perhaps if raised at all, it was only raised to the amount of the notes, whose face is *prima facie* their value. At any rate, until we are informed as to the actual increase in the amount of the assessment, we cannot say that there was error in failing to place a value upon any specific property.

In reference to the site and ownership of this property, it may be said that we may not expect the same precision in these proceedings as in those of courts, at least those of superior jurisdiction. The information given to the clerk was that Mr. Ross “did not list the true amount of his per-

sonal property." He finds this information to be true. Now what is fairly implied by this information—that he had failed to list *all his personal property*? or, that he had failed to list *all that he ought to have listed*—the true amount subject to assessment? This last seems a reasonable construction; and when the clerk finds the information to be true, he finds that Ross failed to list all his property subject to assessment, and then specifies the omitted property.

In reference to the costs, the statute provides that if the party makes "a false statement of the amount of property for taxation, to evade the payment of taxes," he shall pay all the costs and expenses of these proceedings. Where there is no intention to evade the payment of taxes the county pays the costs; (§ 66.) The county clerk charges the costs upon Ross. He finds that he "refused" to list this property. Such a refusal, it is true, may be consistent with an honest belief that the property was not taxable, and may not have been made with the intention of evading the payment of taxes. But there is no finding that the omission was from mistake, or an honest error of judgment; and a man is presumed to intend that which is the natural and necessary result of his actions. But again and chiefly, in these proceedings separate and distinct findings of fact are not essential, certainly not when none are demanded. The order is evidence of what the clerk found to be the facts. He may and must, it is true, file in his office a statement of the facts, or the evidence, on which he has made the correction; but it may be either the facts, or the evidence. Here he filed a statement of the evidence, and also of the facts he found therefrom. But as the latter was unnecessary, there is no error if it be incomplete. We can regard simply the evidence and the order. And when he charges the costs against Ross, it is equivalent to or rather implies a finding that Ross made an untrue return to evade the payment of taxes.

Again, it is said that the conferring of judicial powers upon the county clerk is in conflict with §§ 1 and 11 of article 3 of the constitution. The point in the counsel's mind seems

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to be, that as a vacancy in a judicial office is, according to the constitution, to be filled by appointment of the governor, while a vacancy in the county clerk's office is according to the statute filled by appointment of the county board, that therefore the county clerk is not a judicial officer, and no judicial functions can be committed to him. If it were conceded that these sections confer judicial powers upon the county clerk, that thereby he becomes *pro tanto* the judge of a court, and holds a judicial office, and that the constitution requires that all vacancies in judicial offices shall be filled by appointment of the governor, and that such provision applies to such an officer, the result, it seems to us, would be, that the statute providing for appointment by the county board would be void as conflicting with the constitution, and not that the grant of powers would be null because the constitutional method of filling vacancies was ignored in the statute. So that, if all be as counsel seem to claim, the result would not be as contended for. We do not wish however to be understood as deciding that the premises are as claimed.

Finally, it is insisted that these provisions of the statute are void, because there is no allowance for a trial by jury. We do not understand that the right of trial by jury, as preserved in the state constitution, entitles a party to a jury except in such cases and proceedings as prior to the constitution gave a right to a jury. As to all matters which prior to constitution were disposed of by summary proceedings, the legislature may make similar provision to-day. As to proceedings which (like the one before us) are simply proceedings in assessment, and not to enforce in any way a penalty, either by fine or by double or treble tax, no right to a jury existed prior to the constitution. It would be strange indeed if the state had not the right in a speedy and summary way to complete its assessments; and that is all these proceedings contemplate. (See *ante*, p. 411, and citations.)

We see no error in the record, and the judgment must be affirmed.

All the Justices concurring.

THOMAS MOODY V. CLARA ARTHUR, *et al.*

1. FINDINGS AND VERDICT; *Evidence not Preserved.* Unless it clearly appears that all the testimony given on the trial is preserved in the record, this court cannot set aside the verdict of a jury or the finding of a court on the ground that it is not supported by the evidence.
2. ——— Where the record reads that "the plaintiff, to maintain the issues on his part, offered testimony as follows, to-wit," then gives certain testimony, and adds, "Here the plaintiff rests," shows the same as to defendant's testimony, but omits such statements as to testimony in reply, of which the record contains some, and contains no affirmative statement that all the testimony is preserved in the record, and no other matter or statement tending to show such to be the fact, *held*, that it does not appear that all the testimony on the trial is in the record and before us for consideration. [*A. & N. R. R. Co. v. Wagner*, 19-335.]
3. PLEADING; PETITION; *Objection as to Sufficiency.* An objection to a pleading, that it does not state facts sufficient to constitute a cause of action, presented for the first time in this court, is good only when there is a total failure to allege some matter essential to the relief sought, and is not good when the allegations are simply indefinite, or statements of legal conclusion. [*Brenner v. Weaver*, 1-488; *McBride v. Hartwell*, 2-411; *Hale v. Johnson*, 6-137; *Greer v. Adams*, 6-203; *Laihe v. McDonald*, 7-254; *Moore v. Wade*, 8-380; *Mitchell v. Milhoan*, 11-625; *Polster v. Rucker*, ante, 115; *Nickliss v. Holman*, 17-22.]
4. ——— *General Averments, When Sufficient.* Where a party, in attempting to allege a valid preëmption of a tract of land in this state, alleges that the land was, at a specified date, open to preëmption, that he was a citizen of the United States, a resident of Kansas, and entitled to a preëmption right to said tract; that he did, at the given date, in strict conformity to the acts of Congress thereon, preëempt said lands at the proper land office, make full payment therefor, and receive a certificate of purchase duly executed by the proper officers; *Held*, That these allegations were sufficient to show a legal preëmption as against an objection (raised for the first time in this court,) that it was not stated that the party was the head of a family, an inhabitant of the tract, or had in person made a settlement and erected a dwelling house thereon prior to the time the land was applied for.
5. ——— *Statement Showing Title held in Trust.* Where after allegations of a valid purchase, as indicated in the above paragraph, the pleading also alleges that of all said facts the opposite party had full knowledge, and that more than a year thereafter in some manner and by some means to him unknown such opposite party obtained a certificate of purchase and a

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patent for said tract, and that his so doing was a violation of the laws of the United States and of the rights already vested in the first party, *held*, that the pleading (as against any objection raised for the first time in this court,) contained a sufficient showing of a full equitable title in the one party, and a naked legal title wrongfully obtained by the other, and held by him in trust for the first party.

6. PRACTICE; *General Findings*. Where there has been no demand for special findings, and the court finds generally that all the allegations of the pleadings of one party are true, such general finding will support a decree in favor of that party, although the general finding is followed by certain special findings which of themselves alone may not be sufficient to support the decree.
7. ACTION TO QUIET TITLE; *Possession; Improvements*. In a case involving the quieting of a title, and where no judgment for the possession is entered, no question can be raised as to improvements under the occupying-claimant act.

Error from Johnson District Court.

ACTION brought by *Moody* to quiet his title to the W. $\frac{1}{4}$ of N.W. $\frac{1}{4}$ of section 31, township 12, range 24 east, in Johnson county. He claimed said land by virtue of a patent issued August 1st 1860, to one Daniel Wisely, and through mesne conveyances from the heirs of said Wisely and others to himself. His action was against *Clara Arthur, James M. Arthur, and Fisher Hamilton*, heirs of Susan Arthur, deceased, and he alleged that said defendants claimed title to said premises adverse to the rights and title of the plaintiff. The defendants answered and filed a cross-bill, claiming therein the equitable title to said land by virtue of a preëmption certificate, issued by the register of the land-office at Lecompton, Kansas Territory, on the 27th of April 1858, to one Thomas Taylor, and by a deed to said Taylor and wife to Susan Arthur, the ancestor of defendants, which deed is dated October 14th 1858, and recorded in the office of the register of deeds of said county April 5th 1864. Trial as the November Term 1873 of the district court. Finding and judgment in favor of the defendants, and the plaintiff brings the case here on error.

Holmes & Dean, for plaintiff:

1. It is a presumption of law, that the patent to Wisely passed the whole title to the land in controversy. The patent itself is *prima facie* evidence that all the incipient steps had been regularly taken, authorizing the issuing of the same. 9 Cranch, 87; 3 Peters, 320; 6 Peters, 328; 13 Peters, 436; 19 Mich. 56. And before the defendants will be permitted to call in question the proceedings through which the patent issued to Wisely, they must allege in their cross-bill that Taylor possessed all the qualifications, and complied with all the conditions which the law prescribes authorizing him to preempt. This they have failed to do. 40 Cal. 373; 24 Cal. 630; 27 Cal. 483. The cross-bill should affirmatively show that Taylor had a right to preempt the land in question. It should appear therein, (1st,) that he was the head of a family, or a single man over the age of twenty-one years; (2d,) a citizen of the United States, or that he had filed his declaration of intention to become a citizen according to law; (3d,) that he was an inhabitant on the tract sought to be entered, (4th,) upon which *in person* he had made a settlement and erected a dwelling-house since the first of June 1840, and prior to the time when the land was applied for—the Indian title having been extinguished and the land surveyed. The bill alleges only that said Taylor was a citizen of the United States and a resident of the territory of Kansas, and failed, as we think, to state any cause of action in their cross-bill, and the same is wholly insufficient.

2. Defendants' cross-bill professes to be a proceeding in equity, but there is nothing alleged therein entitling them to the relief asked for, much less showing themselves worthy of it by their evidence. If they rely on fraud or imposition, they must specifically plead it, setting out the facts which constitute the fraud or imposition. Again, if they rely upon a trust, the facts which constitute the trust must be pleaded. Unless some question of fraud, imposition, or trust intervenes, a state court will not take cognizance of the case. 40 Cal. 166, 273; 54 Ill. 48; 45 Miss. 106; 19 Wallace, 646. The defendants allege

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that "in violation of the laws of the United States," and "in violation of the rights of said Taylor," and those claiming under him, Wisely obtained his patent. These are mere conclusions of law. It does not appear that it was by any act of fraud on the part of Wisely that Taylor was prevented from getting a patent to the land in question. 12 Minn. 236; 19 Mich. 56. The allegation that Wisely's patent was issued without the knowledge or consent of Taylor, or those claiming under him, avails nothing. In cases arising under conflicting entries of government land, the doctrine of notice is not recognized. 37 Ill. 32; 26 Iowa, 493; 16 Ark. 440; 7 Minn. 450.

3. We admit that this court rightfully regards with great disfavor questions raised before it for the first time as to the sufficiency of the petition, or cross-bill. But we take it for granted, where a party has procured a judgment or decree in his favor, when he shows by his own declaration to be entitled to none whatever, or when he obtains a judgment or decree which is manifestly wrong and unjust, that this court will not affirm it simply because no proper objection was made to it in the inferior court. In the case at bar, after the lapse of many years from the issuing of a patent, and the property therein described had been greatly improved in value, these defendants come into court and seek to attack it without pretending to show that they or those under whom they claim were injured by any fraudulent act on the part of the patentee, or that the patentee was guilty of any fraud whatever, or that any privity existed between him and Wisely, or that Taylor had ever performed the obligations and requirements of a law whose benefits he invokes. 8 Kas. 380, 390.

4. It may be fairly assumed that the record purports to contain all the evidence. The recitals in the record are equivalent to a statement that certain evidence, which is set out in full, was offered and received, and that the parties introduced no more, but ceased at that point. If this be true, then the record contains no evidence to prove that Taylor possessed the qualifications or performed the conditions entitling him to preëempt; that any fraud or imposition was prac-

Brief of Defendants.

ticed by Wisely on Taylor; that any privity existed between Wisely and Taylor which authorized the court to find that the former was the trustee in equity for the latter; that the plaintiff purchased with a notice of the claims of Taylor and those succeeding to his rights to the land in suit. On the contrary, it appears that, long before he purchased, Taylor's certificate had been canceled; that he paid value for the land, had taken possession of the same, and had made valuable improvements thereon. And the court erred in allowing defendants, after they had rested, and plaintiff had closed in chief and in rebuttal, to introduce Taylor to show that he had no notice of the cancellation of his certificate.

Devenney & Green, for defendants:

1. The "case made" does not contain *all* the testimony—a great portion being omitted—hence, this court will not review the facts. Nor does the record *purport* to contain all the evidence. It is well settled, this is fatal to a request to review the facts. It is also well settled, that the court below having sat as a jury, he being the judge of the facts and his finding being general, and there being some evidence to support the finding, this court ought not review the facts.

2. The plaintiff cannot now for the first time and in a reviewing court, raise the question, whether defendant's answer or cross-bill contains facts sufficient to constitute a defense or for affirmative relief, as against the cause of action stated in plaintiff's petition. 10 Kas. 266; 11 Kas. 617.

3. Where a person has acquired the legal title to that which another has a better right, a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title. This doctrine is applicable to a second preëmptor who has obtained a patent over the first preëmptor without legal authority on the part of the ministerial officers of the general government. 4 Wall. 232; 2 Black, 554; 6 Wall. 418; 16 Mo. 543; 14 Kas. 259. The "certificate of purchase" issued to Taylor, gave to him a "vested right" in

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and to the lands, and is *prima facie* evidence that he held the first and paramount equity to the land. 31 Cal. 264; *Macklot v. Dubroil*, 9 Mo. 473; 36 Iowa, 207. It was not necessary for defendants to allege or prove *fraud* in Wisely in order to recover on their cross-bill, as they could stand alone on the fact of Taylor's *purchase*. 7 Ala. 594; 28 Ill. 528; 7 Sm. & Marshall, 694; 10 Ohio St. 93; 2 Wallace, 535; 9 Iowa, 586. But we did prove it, without objection, and we are entitled to the benefit of it, as though we had pleaded it. 57 N. Y. 274.

If it appear on the face of the patent, or from the evidence, that the patent was issued in a case not authorized by law, the patent is inoperative and void, and may be assailed collaterally. 38 Cal. 80; 12 Ill. 317, 334.

The plaintiff endeavors to rebut our equities by showing attempts of the land officers to *cancel* Taylor's entry or "certificate of purchase;" and it may be *inferred* from certain letters (read in evidence by plaintiff, over objections of defendants,) that there had been a *contest* in the Lecompton land-office, between Taylor and Wisely, but, if any such attempts were made or proceedings had thereto, the "case made" discloses that they were purely *ex parte*. No notice to Taylor—no day in court—no opportunity to appeal from any decision that those officers might make in the premises. A judicial decree would not be binding on Taylor in such case—it would be an absolute nullity; and so, for a much stronger reason, is the decision of a mere ministerial officer.

Taylor had power to sell and convey, although he had not received a patent; and a sale and conveyance to a *bona fide* purchaser by one holding a "certificate of purchase," is protected by the very words of the preemption law. 1 Brightly Digest, 474, §86; 2 Minn. 168; 6 Kan. 112, 122; 33 Iowa, 374; 12 Kas. 284; 13 Wall. 296.

The opinion of the court was delivered by

BREWER, J.: This was an action to quiet title. Plaintiff alleged title and possession, and that defendants claimed title.

Opinion of the Court.

Defendants in their answer, and by way of cross-bill, alleged title in themselves, that plaintiff claimed title, but that such title was without foundation, and prayed that their title might be quieted. A decree was entered in favor of the defendants. To reverse this decree plaintiff comes to this court.

There are two principal questions before us on the record. Does the answer state a cause of action in favor of the defendants, and against the plaintiff? Do the facts as found, sustain the decree? We do not think the question of the sufficiency of the evidence to support the findings is presented by the record, for the reason that it does not appear that all the evidence is preserved. There is no affirmative statement that the record contains all the evidence. Perhaps that is not always necessary. Following certain testimony offered by the plaintiff, is the statement, "Plaintiff then rested." A similar statement follows testimony offered by the defendants. Then comes testimony of plaintiff, given in answer to the testimony of defendants in support of their cause of action, followed by a like statement. After this appears testimony of defendants in reply, but without any similar closing statement. Each party's statement opens with a statement that he "offered testimony as follows, to-wit." Now, whatever might be the legitimate inference, if the defendants' reply-testimony had been followed by a statement that, "here the defendants rested," or any statement clearly showing that at such point the introduction of testimony ceased, without any such statement it is clear that there is nothing upon which to found an assertion that all the testimony is given. Much other testimony might have been given, making clear and plain the very matters which plaintiff's counsel say are not proved, and still not a statement in the record be untrue in letter or spirit. We pass therefore to the first question.

Does the answer of defendants state a cause of action in their favor and against the plaintiff? : And here
3. Petition—
objection—
sufficiency. it may be remarked, that no objection to the sufficiency of the answer was raised in the court below. The parties tried the case as though defendants had stated a good

1. Where record
does not con-
tain all the
evidence.

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cause of action against plaintiff. In this court, for the first time, is any question made as to its sufficiency. In such a case the objection is good only when there is a total failure to allege some matter essential to the relief sought, and is not good when the allegations are simply incomplete, indefinite, or statements of conclusions of law: *Laithe v. McDonald*, 7 Kas. 254; *Mitchell v. Milhoan*, 11 Kas. 617. Turning to the pleadings, we find that the answer alleges, in that defense which is in the nature of a cross-bill, or counterclaim, that on April 27th 1858, and for a long time prior thereto, the land in controversy was a part of the public lands and open to settlement and preemption at the land-office at Lecompton; that Thomas Taylor was a citizen of the United States, a resident of Kansas Territory, and entitled to a preemption-right to said lands; that he did upon that day, in strict conformity to the acts of congress thereon, preempt said lands at said land-office, pay the full amount (\$210) therefor, and receive a certificate of purchase, entry, and preemption, duly signed and executed by the proper officers, of all of which facts Daniel Wisely, his heirs, grantees, and the plaintiff, had due and legal notice; that said Taylor's title, by certain conveyances, describing them, is vested in defendants; that after such preemption and purchase, and on June 20th 1859, Daniel Wisely, by some means and in some manner unknown to the said Taylor, or to these defendants, and without the assent, knowledge, consent or notice of his so doing, obtained a pretended certificate of preemption or purchase from said land-office, and afterward, and on August 1st 1860, a patent for said lands; that the issue and delivery of said certificate and patent to said Wisely were in violation of the laws of the United States, in violation of the rights of said Thomas Taylor, and these defendants, and void as against them, and by said certificate and patent no valid legal or equitable title was conveyed to said Wisely, and that said Wisely's claim had passed to the plaintiff. This was followed by a prayer for a decree quieting title and for possession of the lands. Upon

4. General averments, when sufficient.

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this answer counsel for plaintiff claim, that "The cross-bill should affirmatively show that Taylor had a right to preëempt the land in question. It should appear therein, (1st,) that he was the head of a family, or a single man over the age of twenty-one years, (2d,) a citizen of the United States, or that he had filed his declaration of intention to become a citizen according to law, (8d,) that he was an inhabitant on the tract sought to be entered, (4th,) upon which *in person* he had made a settlement and erected a dwelling-house since the first of June 1840, and prior to the time when the land was applied for—the Indian title having been extinguished, and the land surveyed." Perhaps all these matters are essential to give a right to preëempt; and if objection had been raised at the proper time, perhaps the court would have been compelled to sustain it. But it is alleged that he was *entitled* to a preëemption-right to said lands, and that he did preëempt them in strict conformity to the requirements of the acts of congress thereon. Now, this as a general allegation includes and covers all those specific statements; and if parties are content to try their case upon such general allegation, they waive all objection to it.

Again, it is claimed by counsel that the allegations of the answer show no fraud, imposition, or trust, and that unless some of these appear, a state court will not take cognizance of the case; that the allegations are, that the issue of the certificate and patent were in violation of the laws of the United States, and the rights of Taylor—without showing how or in what respect they were so in violation. To this it may be replied, that the allegations show a valid preëemption and purchase by Taylor, that of all this Wisely had full knowledge, that more than a year thereafter in some manner and by some means to the defendant unknown Wisely obtained a certificate of purchase and patent, and that his so doing was a violation of the laws of the United States and the rights of Taylor and his grantees. Does not this disclose a trust? Does it not show a complete equitable title in Taylor, and that Wisely by some illegal means had acquired the legal title?

a. Allegations
showing title
held in trust.

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Is not the legal title then held in trust for the equitable? It is true, the precise steps by which this legal title was acquired, are not shown, and the pleading could have been more full and specific; but still the fact is alleged, that it was acquired after the vesting of a complete equitable title in Taylor, and by some illegal means. This is now sufficient. It shows the equity in one person, the legal title in another, obtained illegally, and with full knowledge of the equity. In *Stark v. Starrs*, 6 Wallace, 419, it is said to be the well-settled doctrine, "that where one party has acquired the legal title to property to which another has a better right, a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title." See also, *Garland v. Wynn*, 20 How. (U. S.) 6; *Hughes v. U. S.*, 11 How. 568, and 4 Wall. 282; *Lindsey v. Hawes*, 2 Black, 554. These are all cases of contested titles; and in the last three cases a prior certificate prevailed over a subsequent patent. Counsel contends, that "it is a presumption of law that the patent to Wisely passed the whole title to the land in controversy. The patent itself is *prima facie* evidence that all the incipient steps had been regularly taken, authorizing the issuing of the same." This doubtless is correct; and it is a proposition equally correct when applied to the preëmption certificate to Taylor. That is *prima facie* evidence that all prior steps had been regularly taken, and that Taylor had acquired the full equitable title. The *prima facie* evidence of either may be overthrown by other testimony; but in the absence of any other testimony the title which is prior in time is the stronger in right. In *Carroll v. Safford*, 3 How. 441, the court uses this plain language, quoted in the case of *Stone v. Young*, 5 Kas. 282: "So far as the rights of the purchaser are concerned, they are protected under the patent-certificate as fully as under the patent. Suppose the officers of the government had sold a tract of land, received the purchase-money, and issued a patent-certificate: can it be contended that they could sell it again, and convey a good title? They could no more do this than they could sell land a second time which had been previously patented." It seems to us there-

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fore, that as against any objection that can now be raised the answer must be held sufficient to sustain a decree for affirmative relief.

This really disposes of the case, for in respect to the second question, it may be said that no special findings of fact were demanded, and that while the court does find specially certain facts, it prefaces them with a general finding that, "the allegations, all and singular, contained in the answer of the said defendants are true"—so that, whether the facts specially mentioned in the findings are of themselves sufficient to support the decree, is practically immaterial, the court having covered all with a general finding.

So far as the matter of improvements is concerned, that cannot be inquired into in this case. No judgment for possession was rendered, but only a decree quieting title. Whenever in an action of ejectment judgment is rendered for possession, the question of improvements under the occupying-claimant act will properly come up for decision.

The judgment will be affirmed.

It is understood that the case of the same plaintiff against Alexander Brown is similar, and the same judgment will there be entered.

All the Justices concurring.

a. General findings.

1. Action to quiet title.

CENTER TOWNSHIP V. ALEXANDER HUNT, as Treasurer, &c.

1. **PETITION, as a Pleading, and as an Affidavit.** Where a petition is used merely as a petition, it may sometimes be held sufficient, although its statements of the facts are so general and comprehensive as to be styled conclusions of fact, or conclusions of law; but where it is also used as an affidavit, and as evidence, it must then state the facts with all that fullness of detail required in affidavits or depositions. [*City of Atchison v. Bartholow*, 4-124; *Long v. Kasebeer*, 28-226.]
2. **PARTIES; TOWNSHIPS; Public Rights and Private Rights.** A township cannot maintain an action to enjoin the collection of an illegal tax levied on the taxable property belonging to the private individuals of such township. Such an action can be maintained only by the individuals themselves. [*Henderson v. Marcell*, 1-137; *State, ex rel., v. Marston*, 6-524; *Mo. R. R. S. & Gulf R. R. Co. v. Wheaton*, 7-232; *Bobbett v. State, ex rel.*, 10-9; *State, ex rel., v. Comm'rs Jefferson Co.*, 11-66; *State, ex rel., v. McLaughlin*, 15-228.]

Error from Wilson District Court.

THIS action was commenced in the district court January 2d 1875. The petition, after the caption and title, was as follows:

"Center township, in the county of Wilson, and state of Kansas, plaintiff, states that it is a municipal corporation, duly organized under the laws of the state of Kansas, and complains of the Memphis & Northwestern Railroad Company, a corporation duly organized under the laws of the state of Kansas, Alexander Hunt, treasurer of Wilson county, John Francis, treasurer of the state of Kansas, and O. V. Small, defendants, for that, whereas, heretofore, to-wit, on the 20th of March 1873, at the county of Wilson aforesaid fifty-six citizens, the same being electors and tax-payers of Center township in said county of Wilson, presented to the trustee, clerk and treasurer of said township a petition asking and praying that a special election be ordered in said township for the purpose of voting on a proposition to donate the sum of \$50,000 to the Memphis & Northwestern Railroad Company to aid said Railroad Company in the construction of a proposed line of railroad from the Leavenworth, Lawrence & Galveston railroad at or near Thayer to the city of Fredonia, in said Center township, upon certain conditions therein named; whereupon the trustee, clerk and treasurer

Statement of the Case.

of said Center township, after considering said petition ordered that an election be held in said Center township at the usual place of voting therein on the 7th of April 1873, and that due and legal notice of the same be given for the purpose of voting upon the following proposition, viz.:” [*Here is set forth the proposition in full, followed by a statement that the election was held, the votes canvassed, showing 108 votes “for the donation and bonds,” and “30 votes against the donation and bonds.” After which the petition proceeds:*] “Afterward, to-wit, on the 8th of April 1873, the trustee, clerk and treasurer of the said township of Center, on behalf of said township, in pursuance of the election aforesaid, made and entered into the following contract with the said Memphis & Northwestern Railroad Co., viz.:” [*Here follows the contract, after which is the following:*] “And afterward, to-wit, on the — day of — 1873, the said township of Center by its trustee and clerk executed and issued its said bonds, with coupons attached, in the sum of \$50,000 as follows, viz.: fifty bonds, with coupons attached, for the sum of \$1,000 each, numbered consecutively from 1 to 50, which said bonds are in words and figures as follows:” [*Copy set forth, showing the bonds to be payable in 30 years, with interest at 7 per cent., payable semi-annually on the 1st day of July and January. And then the petition alleges:*] “And afterward, on the — day of — 1873, the said fifty bonds of \$1,000 each, with the coupons attached as aforesaid, were delivered to the treasurer of the state of Kansas to be held by him in escrow, and delivered to the said Memphis & Northwestern Railroad Company on the conditions aforesaid. And plaintiff shows and alleges, that said railroad company, in pursuance of said contract before mentioned, proceeded and did grade said portion of said line of railroad to the said city of Fredonia, together with the stonework and masonry thereof as before mentioned; that afterward, on the 5th of September 1873, the said treasurer of the state of Kansas delivered to said railroad company \$28,000 in bonds, part and parcel of said \$50,000 in bonds delivered to him by the said Center township as aforesaid, and the remaining \$22,000 in bonds, part and parcel of said \$50,000 in bonds as aforesaid, are still and now are held by the said treasurer of the state of Kansas, who refuses and fails to cancel and deliver the same to said Center township, although due demand therefor has been made by the said Center township. Plaintiff farther says that a full and complete record of all and singular the things heretofore stated and al-

leged are now, and at all times have been, in the office of the clerk of said Center township.

"Plaintiff further says, that a large proportion of said bonds have been by the said Memphis & Northwestern Railroad Company sold and delivered to various parties who are unknown to the plaintiff, and that a portion of said bonds are now held by the said Railroad Company, and that a portion of said bonds are now owned and held by the defendant O. V. Small; and that the said Alexander Hunt, treasurer of Wilson county, owns and holds a portion of said bonds issued as aforesaid.

"Plaintiff further says, that the said Memphis & Northwestern Railroad Company, after having done the grading and masonry as aforesaid, have wholly abandoned the building of said railroad, and have wholly failed and neglected and refused, and still doth refuse, fail and neglect to complete said railroad, or any part thereof, according to the contract, as before set out, and have not nor will they construct and equip said railroad or any part thereof, or build and maintain the passenger and freight depots as agreed to in said contract before mentioned; that what work was done by said railroad company, to-wit, the grading and masonry, is poorly constructed, and so negligently and carelessly done as to render it of no value whatever; that the consideration, and the sole consideration for the issue and delivery of said bonds aforesaid was that the said railroad company construct and equip the said line of railroad as aforesaid, and erect and maintain good passenger and freight depots within the corporate limits of the said city of Fredonia, in said Center township, all of which the said railroad company hath wholly failed and refused to do or attempt to do according to the terms of said contract, within the time or within a reasonable time thereafter, and that the work already done, without the completion of said railroad, is of no value whatever to the said plaintiff, or any other person or persons.

"Plaintiff further complaining, says, that on the — day of — 1874, William Edminster, W. H. Morgan and P. S. Booth, the commissioners of said Wilson county, levied a tax of one and forty-five hundredths per cent. upon the taxable property of the said Center township, and caused the same to be placed upon the tax-rolls of said Wilson county, for the purpose of paying interest now due and to come due on the coupons attached upon said bonds issued to the said Memphis & Northwestern Railroad Company as aforesaid; that said tax so levied

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as aforesaid and placed upon the tax-rolls as aforesaid, is without authority of law, and is irregular, illegal and void. Plaintiff further says that the assessed value of the taxable property of said Center township, at the time said donation aforesaid was voted and donated, did not exceed the sum of \$218,492, and that the highest assessed value of said Center township for any year from its organization to the present time will not exceed \$220,000. Plaintiff avers that at the time of the issuing and delivery of said \$50,000 in bonds as aforesaid, for the purpose aforesaid, the said township of Center had an outstanding and existing bonded indebtedness in the sum \$7,000. Plaintiff further avers that the said \$50,000 in bonds issued by said Center township, and for the purpose aforesaid, and interest coupons thereto attached, and each and every part thereof, are illegal; that they were issued without authority of law, and are void, and that the said defendants, and each and every of them, and the owners and holders of each and every bond issued as aforesaid, had due and legal notice of the illegality and irregularity of said bonds before purchasing the same or any part thereof.

"Plaintiff further complaining says that the tax-rolls of Wilson county containing said illegal tax upon the taxable property of Center township, illegally levied as aforesaid, and for the illegal purpose as aforesaid, are placed in the hands of Alexander Hunt, treasurer of Wilson county, who will enforce the payment of the said illegal tax immediately, to the irreparable injury of the plaintiff, unless restrained by this honorable court. Wherefore," etc., [followed by a prayer for a temporary injunction, restraining the defendants from selling or assigning said bonds, or any of them, and that defendant Hunt, as treasurer, be restrained from collecting said taxes, etc., and on final hearing that said injunction be made perpetual, and that said bonds be surrendered up for cancellation, etc.]

This petition was duly verified. The then district judge, (Hon. JOHN R. GOODIN,) granted a temporary injunction. Defendant *Hunt*, the county treasurer, demurred, "for that it appears from the plaintiff's petition that said plaintiff has no legal capacity to sue." He also moved to vacate the temporary injunction, on the same ground, and because it did not appear that the plaintiff had or ever had any taxable property or any taxes to pay in said Center township. This

Center Township v. Hunt, *Treasurer.*

motion was heard on the 8d of March 1875, before District Judge TALCOTT, who. ordered that "said temporary injunction be so modified as to allow said *Alexander Hunt* to collect the taxes so as aforesaid enjoined." From this ruling and order the plaintiff, said *Center Township*, appeals, and brings the case here on error.

Kirkpatrick & Burge, for plaintiff:

1. The sole question presented by the record is, did the district judge err in dissolving the temporary injunction in this case? It is claimed that the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant. Neither the corporation nor its officers can do any act, make any contract, or incur any liability not authorized by law. All acts beyond the scope of the power granted, are void. Much less can any power be exercised, or any act done, which is forbidden by statute. 1 Dillon Munic. Corp. 173, § 55. And every person dealing with a municipal corporation must at his peril, inquire into their power to make the contract. And every person dealing with the agents of such corporation, is likewise bound to ascertain the extent of the agent's authority; and every contract made beyond the scope of their authority is void in the beginning—void in whomsoever's hands it may come. 1 Dillon on Munic. Corp. 463, § 372; Cooley's Const. Lim., §§ 196, 212 to 215; 9 Kas. 690; 12 Kas. 186. The plaintiff is not estopped from setting up its own want of power to make the contract in question. 2 Dillon on Munic. Corp., § 749.

The bonds for the payment of which the tax in question was levied are void because they were issued in excess of the statutory limit, and the plaintiff is no more legally bound to contribute to their payment than it is to the public debt of Cuba; and to appropriate the plaintiff's property for such illegal purpose would not be taxation, but plunder. Sec. 1 of ch. 68 of the laws of 1872 contains a proviso which ex

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pressly prohibits issuing bonds in excess of a certain limit. This limit is made to depend upon the value of the taxable property of the township. At the time this law was passed a prior law was already in force prescribing the method by which to ascertain the value of the taxable property of the township, and also providing that such value so ascertained should be a matter of record in the office of the recording officer of the board of county commissioners. Gen. Stat. 68, §48. When the legislature passed this law of 1872 making the value of the taxable property of the township the standard by which to determine the amount of bonds which could lawfully be issued, it had reference to existing law on the same subject, and intended the value, as shown by the last assessment-roll on file in the county clerk's office, at the date of issuing the bonds. The bonds in question were issued 8th April 1873, and their validity must be tested by the assessment of 1872, which was the only evidence known to the law from which the officers of plaintiff corporation could then ascertain the value of the taxable property of the township. The issue of \$50,000 is \$35,000 in excess of the statutory limitation, as will be seen by reference to the record. Such a disregard of the statutory provisions invalidates the entire issue.

2. It is an undisputed fact that the railroad company failed to comply with the terms of the contract with the plaintiff, and that the consideration for the issue and delivery of said bonds has wholly failed; that said railroad company, and others, hold \$28,000 of plaintiff's negotiable bonds, who received the same with full notice that the consideration of the same had wholly failed. Under such circumstances, a court of equity will order said bonds to be delivered up and canceled. 8 Ohio St. 565.

3. The tax in question is void for want of power in the commissioners to levy the same. The power to tax rests upon necessity, and is inherent in every sovereignty; but a mere municipal corporation cannot exercise this power, unless conferred by legislative grant. (Cooley's Const. Lim., §479; Blackw. Tax

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Titles, 8.) Then, most certainly one municipal corporation cannot impose a tax upon another without legislative grant. The board of county commissioners would have no more power to impose a tax on a township, than it would upon the District of Columbia. It is contended however that § 18 of the laws of 1874, page 48, confers such power. That section only refers to bonds to be issued in pursuance of that act, and not bonds already in existence. Section 7 of the same act, found on page 45, laws of 1874, in express terms makes it the duty of the proper officers of any *township* to levy a tax for the payment of all bonds issued prior to that act.

4. But it is said that the plaintiff had no legal capacity to sue. Such objection is only tenable where the petition discloses some legal incapacity in the plaintiff, such as infancy, lunacy and the like. 11 Kas. 128.

5. The last objection stated in said motion is, that plaintiff's petition does not show or allege that it has any property to be affected by said tax. The plaintiff states that the county commissioners levied a tax on all the taxable property of the plaintiff. If the petition is not definite and certain in this respect, a motion to have the same corrected would have been proper. 10 Kas. 131. Is it necessary that the plaintiff's petition should state such facts? We maintain it is not. The plaintiff stands charged with an unjust and illegal tax. It has, under the statute, a right to relieve itself of that charge, whether it had property or not. Its right to the remedy does not depend upon the extent of its possessions. 8 Kas. 284.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by Center township against Alexander Hunt and others for the purpose of having certain bonds delivered up, declared void and canceled, and also for the purpose of obtaining a perpetual injunction forever restraining the collection of a certain tax. The plaintiff also prayed for a temporary injunction for various purposes, among which was that the defendant Alexander Hunt, treas-

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urer of Wilson county, should be restrained *pendente lite* from collecting a certain tax levied on the taxable property of said township for the purpose of raising a fund with which to pay the interest on said bonds. Said temporary injunction was granted, but afterward it was so modified as not to further restrain said treasurer from collecting said tax. It is this order modifying said temporary injunction of which the plaintiff now complains.

Was said order erroneous? This is the only question in the case. The petition of the plaintiff was verified by affidavit; and the petition thus verified seems to have been the sole foundation upon which the plaintiff rested his temporary injunction. Was it sufficient? Where a petition is used merely as a petition, it may sometimes be held sufficient, although its statements of the facts are so general and comprehensive as to be styled conclusions of fact, or conclusions of law. But where it is also used as an affidavit, and as evidence, as in this case, it must state the facts with all that fullness of detail required in affidavits or depositions. (*Atchison v. Bartholow*, 4 Kas. 124; Gen. Stat. 675, code, § 289.) Every lawyer knows the difference between the statements of the facts in a petition, and the statements of the facts in an affidavit or a deposition. In an affidavit or deposition they are stated in such minute detail as to be proof or evidence of the more general facts as they are usually stated in a petition; and we generally call such detailed statements of the facts, evidence. In a petition, if the facts should be stated obscurely, the court upon motion of the adverse party may require that the petition be made more definite and certain by amendment. But no such practice is allowed with reference to affidavits. Hence, an affidavit must stand or fall upon the facts as it alleges them. If the affidavit is to be used as evidence, as in this case, and it should state the facts in such general and comprehensive terms as to be styled conclusions of fact, or conclusions of law, the affidavit would not be sufficient. Now for the purposes of this case we may admit that the petition was sufficient as a petition to sustain said temporary injunc-

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tion; but was it sufficient as an affidavit? Most clearly not. It does not show that the plaintiff would be injured in the slightest particular by the collection of said tax. It does not show that any of said tax was charged against the plaintiff, or that the plaintiff was in the slightest danger of ever being compelled to pay the least portion of the same. It is true, the petition alleges that the tax was levied "upon the taxable property of said Center township;" but from all the allegations of the petition, it is clear beyond all doubt, that the pleader meant that the tax was levied upon all the property taxable in said township. The court below so construed the petition; and unless it were clear that the court below erred we would not reverse its ruling. The petition does not allege that any tax was ever levied upon "the taxable property of the plaintiff," or that the plaintiff ever owned any property. The petition simply alleges, as we have before stated, that the tax was levied "upon the taxable property of the said Center township." Now this allegation would not be sufficient as evidence to prove that the township owned certain property upon which said tax was levied, even if it stood alone, and was not shown to mean otherwise by the other allegations. But other allegations show that this was intended to mean otherwise.

It is claimed by plaintiff that the tax is void because said bonds are void, and that said bonds are void because issued in excess of ten per cent. of "the taxable property of said Center township." (Laws of 1872, p. 110, § 1.) The petition alleges that the assessed value of "the taxable property of said Center township" never exceeded \$220,000, and therefore it is claimed that because more than \$22,000 of bonds were issued, the whole of such bonds are invalid. Now suppose they are invalid, still the plaintiff has no right to enjoin the tax levied upon the taxable property of the various individuals of the township to pay the interest on them. If any tax should be assessed against the plaintiff, the plaintiff might then perhaps maintain an action to enjoin that tax. But it cannot maintain an action to enjoin a tax assessed against the other taxpayers of the township. One

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taxpayer cannot enjoin a tax levied against another taxpayer. Each taxpayer must sue for himself, either in an action brought by himself alone, or in an action brought by himself and others with like interests. (*Bridge Company v. Wyandotte Co.*, 10 Kas. 326, 331, et seq.; *Hudson v. Atchison*, 12 Kas. 140, 146, et seq.) The mere fact that the plaintiff is a public corporation, is not enough to entitle it to sue for the taxpayers in such a case. There is no law making it the guardian of private rights. Besides, if it were as unfortunate in the protection of private rights as it has been in the protection of public rights, it would not be a very safe guardian. It is admitted that it has violated law, reason, and morality by issuing illegal bonds to the amount of \$50,000, without any adequate consideration therefor, probably without sufficient capacity to pay them, and certainly with no intention of ever paying them. It has made promise which it never intends to fulfill, and probably could not well fulfill. We think it would be better for it to let the private individuals of the township take care of their own interests. (As to the validity of similar bonds in the hands of a *bona fide* holder, see *Marcy v. Township of Oswego*, Labette Co., Kansas, recently decided by the supreme court of the United States.) But the law of this state is such that the public cannot sue merely for the protection of private rights. (*The State, ex rel., v. McLaughlin*, 15 Kas. 228.) Nor can private individuals sue merely for the protection of the rights of the public. (*Craft v. Jackson Co.*, 5 Kas. 518; *Bobbett v. Dresher*, 10 Kas. 9; *Turner v. Jefferson Co.*, 10 Kas. 16; *Bridge Company v. Wyandotte Co.*, 10 Kas. 326; *Miller v. Palermo*, 12 Kas. 14.) Public rights and private rights, public actions and private actions, are kept separate; and no action can be brought except by the party having a special interest in the result. (*Crowell v. Ward*, ante, p. 60.) That is, the public must sue to protect public interests, and private individuals must sue to protect their own interests. And each must sue in his or its own name. (*Crowell v. Ward*, supra.) The public must sue in the name of the state, county, city, township, etc., as the case

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may be; and each individual must sue in his or her own name. An action cannot be brought merely for the benefit of an individual in the name of the public. (*The State v. Jefferson Co.*, 11 Kas. 66; *The State v. McLaughlin*, and *Crowell v. Ward*, *supra.*) If said tax is illegal, then there can be no question as to the right of the individual taxpayers to sue separately, or jointly, as they may choose, for the purpose of enjoining the tax levied against them respectively. (*Gilmore v. Norton*, 10 Kas. 491; *Gilmore v. Fox*, 10 Kas. 509.)

It is understood that precisely the same questions are involved in the case of *Cedar Township v. Alexander Hunt*, and the *City of Fredonia v. Alexander Hunt*, as are involved in this case; and therefore this opinion is intended for each of the three cases, and the same judgment will be rendered in each of said cases.

The order of the judge of the court below in modifying said temporary injunction will be affirmed.

All the Justices concurring.

THE STATE OF KANSAS, *ex rel.*, v. E. W. MAJORS.

1. COUNTY TREASURER; *Removal from Office; Constitutional Law.* Sections 3 and 4 of the act passed by the legislature in special session on September 21st 1874, entitled "An act to provide for the publication of statements showing the condition of county treasuries, and examinations of same, and to prevent the improper use of public moneys, and for the punishment thereof," are constitutional and valid.
3. ——— Where the board of county commissioners under said act appointed examiners, who with the probate judge made an examination, and counted the funds in the county treasurer's office, and made a written report to the county clerk showing a deficiency in said funds, and the county clerk then notified the commissioners, and they immediately met in special session and notified the treasurer, and the treasurer appeared before them, and the commissioners then made another ex-

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amination of the county treasurer's office—the treasurer making such explanation as he could, and furnishing such vouchers as he had—and the commissioners also found a deficiency in said funds, and thereupon, in order to protect the public interests made an order removing said treasurer from office, and appointed another person in his place, *held*, that the acts of the commissioners in so removing said treasurer, and in appointing another person in his place, were and are valid.

Original Proceedings in Quo Warranto.

PETITION in the nature of *quo warranto*, filed in this court April 8th 1875, by the county-attorney of Crawford county, as relator, to oust *Majors* from the office of county treasurer of said county. The grounds upon which the removal was claimed are stated in the opinion.

Daniel Scott, county-attorney, for The State.

Playter & Pursel, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: The constitution of the state of Kansas provides, that "All county and township officers may be removed from office in such manner and for such cause as shall be prescribed by law." (Const., art 9, § 5.) On September 21st 1874, the legislature in special session passed an act containing among others the following provisions:

"SEC. 3. It shall be the duty of the probate judge in each county, once during each quarter of each year, without notice to said county treasurer, to examine and count the funds in the hands of the county treasurer; and the county commissioners of each county shall, prior to each examination, appoint two persons, citizens and taxpayers of the county, whose duty it shall be to assist the probate judge in making the examination aforesaid; but no person so appointed shall act as examiner more than once in the same year.

"SEC. 4. If the probate judge and the examiners find the funds in the treasury, as appears by the books of the county treasurer, they shall so certify in a report to be filed with the county clerk, and make oath to the same; and if they find a deficiency of funds in the treasury, they shall report the facts immediately in writing to the county clerk, and the county clerk shall immediately notify the county commissioners of

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the filing of said report, and the county commissioners shall meet forthwith and take such action as may be necessary to preserve and protect the funds of the county, and also to take any other action that may in the judgment of the commissioners be necessary and proper to protect the public interest, including the power to remove or suspend such treasurer, and the appointment of some competent person to discharge the duties of such treasurer during the time of such suspension, or for the unexpired term in case of a removal; and the person so appointed shall give a good and sufficient bond, to be approved by the county commissioners." (Laws of 1875, pp. 263, 264, §§ 8, 4.)

On November 9th 1874, the board of county commissioners of Crawford county, in accordance with the provisions of said act appointed two examiners to assist the probate judge in examining and counting the funds in the office of the county treasurer. The defendant, E. W. Majors, was at that time, and had been for several months prior to that time, the county treasurer of said county. The probate judge and said examiners performed their duty, and on December 4th 1874 made a written report of their proceedings to the county clerk of said county. Said report shows a deficiency in the funds of the county treasurer's office amounting to at least \$3,701.35. The county clerk immediately notified the county commissioners, and they met on December 5th in special session to consider the matter. They immediately notified the treasurer, who appeared before them, and they then proceeded to make another examination of the books, papers, funds, etc., in and belonging to the county treasurer's office. The treasurer made such explanations as he could, and supplied them with such vouchers as he had. After making a full examination the commissioners found that there was a deficiency in the funds of the county treasurer's office amounting to the sum of \$6,246.25. They therefore, on January 15th 1875, made the following order:

"Now therefore, in order to protect the interests of said county, the board of county commissioners, by authority in them vested by virtue of said law approved September 21st 1874, do hereby order, that E. W. Majors, county treasurer

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of Crawford county, Kansas, be and is hereby removed from said office, and further order and declare the said office of county treasurer for Crawford county to be vacant."

The county board also on the same day appointed Nelson Sennit to fill said vacancy. Sennit qualified, and demanded the office, but Majors refused to give it up; and this action is now prosecuted by the county-attorney of said county for the purpose of removing Majors from said office.

The pleadings are so framed that no question is raised as to whether Majors was in fact guilty of any dereliction of duty in said office or not. The only question under the pleadings, is, whether said proceedings of the commissioners, the probate judge, examiners, county clerk, etc., were had or not. The petition alleges them, and the answer denies them. The allegations of the petition are however amply proved by the evidence submitted to us, which of course puts an end to the issues raised by the pleadings. But a more serious question arises. Are said proceedings sufficient to authorize the present action? The defendant claims that the act of the legislature under which they were had, is unconstitutional, and urges many reasons therefor. Now we shall consider the question with reference to the present case only; for the act may be constitutional when applied to some cases, and unconstitutional as to others.

We do not think the act is unconstitutional because passed by the legislature in special session; for, although they were convened for another and different purpose, yet when they were assembled together they had the power to legislate upon any subject not specifically withdrawn from their consideration by the constitution.

We do not think that a county treasurer has such a vested right in his office that no law can be passed during his term of office creating a new cause in law for his removal therefrom, and creating a new tribunal and a new procedure for such removal, provided of course that the law shall apply to such causes of removal only as shall in fact be brought into existence subsequent to the passage of the law. The legisla-

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ture may create new offices, or new tribunals; or may confer new duties—judicial, *quasi*-judicial, or ministerial—upon officers already in existence. (*In re Johnson*, 12 Kas. 102, 104, and cases there cited; *Young v. Ledrick*, 14 Kas. 92.) The title to said act is evidently broad enough to cover all the provisions contained in the body of the act.

The proceedings authorized by the act are evidently "due process of law," because the act itself is authorized by the constitution. The legislature is clearly authorized by § 5 of article 9, if not by § 1 of article 2 of the constitution, to provide for the removal of county treasurers for just such causes, by just such a tribunal, and by just such a mode of procedure, as are provided for in said act. The wisdom of conferring such plenary powers upon county commissioners in such important cases, may well be doubted. But the power of the legislature to do so, if it chooses, we suppose cannot be doubted. It was evidently the intention of the legislature to confer upon county commissioners the power to remove county treasurers by proceedings summary in their nature, and not more formal than the ordinary proceedings of county commissioners are. About the time this act was passed, and immediately prior thereto, several county treasurers had become defaulters; and evidently the legislature intended to provide a means for the removal of county treasurers more speedy in its nature, and less formal than the ordinary action in the nature of *quo warranto*. And although the proceedings may be hasty, summary, informal, and by a tribunal not skilled in the law, yet the proceedings are none the less "due process of law." (*Gilchrist v. Schmidling*, 12 Kas. 264, 271, et seq.) It has been settled for more than forty years, that the 5th article of the amendments to the constitution of the United States applies only to the government of the United States, and does not apply to the several state governments. (*Barrow v. Mayor, &c.*, 7 Peters, 247.) Of course, it was necessary for the county commissioners to have jurisdiction in order to make their proceedings legal and valid. But how their jurisdiction could be questioned in this case, we cannot understand.

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The law gives them jurisdiction in this class of cases. And they obtained jurisdiction of this particular case by proceeding precisely in accordance with the statute. The defendant must have had knowledge of the fact, at the time it occurred, that the probate judge and the examiners were examining his books and counting the funds in his office. Then, on the very next day after the probate judge and examiners made their report, the commissioners gave him notice thereof. And he immediately appeared before the commissioners, and seems to have been present and participating in all the proceedings pertaining to his office, until the final termination of the commissioners' examination. Did not the commissioners then have jurisdiction of his person? It is not claimed that any unfairness was practiced by the commissioners in their examination. They examined all the vouchers the defendant presented to them, and listened to all his suggestions. They undoubtedly intended to act fairly and honestly. The defendant however claims in his brief that they were mistaken; that in fact there never was any deficiency in the funds of his office since he held it. What the real facts are, we are unable to determine from anything presented to us. But the commissioners found that there was such a deficiency; and for the purposes of this case we must presume that such finding is true. The commissioners undoubtedly had jurisdiction, and whether we consider that they acted judicially, *quasi-judicially*, or ministerially, still their acts must be considered as at least *prima facie* correct until the contrary is shown, and there is nothing in the case that tends to show the contrary. We therefore think that their action in removing the defendant from the office of county treasurer is valid; and therefore judgment of ouster must be given in this case in favor of the plaintiff, and against the defendant.

All the Justices concurring.

WILLIAM H. ODELL v. EDWARD J. DODGE.

1. *JUSTICES OF THE PEACE, Chosen at First Election, hold for Unexpired Term Only.* Barton county was organized May 16th 1872. Great Bend township was organized May 23d, and the first election held in said county and township was on July 1st. At this election county and township officers were elected, among which were two justices of the peace for said Great Bend township; *Held, That*, (under the rule prescribed by section 8, page 251, Gen. Stat.,) the justices elected at the first election held on said first day of July 1872 were elected to hold their offices only until the next annual township election to be held in April 1873, and until their successors were elected and qualified. [*Jones v. Gridley*, 20-584; *Wood v. Bartling*, ante, 109.]
2. ——— *First Full Term.* The justices elected in and for said township at the election in April 1873 were elected for a full term of two years.
3. ——— *To Fill Vacancy.* An election held in April 1874 in said township for justices was a nullity, unless it was to fill vacancies; and even if it was to fill vacancies the terms of those elected would expire in 1875.
4. ——— *Regular Elections for Justices of the Peace.* The election for justices of the peace, and other township officers, held in November 1875, was valid, and a person duly elected to the office of justice of the peace for said Great Bend township at said election is entitled to the docket, books, papers, etc., pertaining to the office, and may recover them from one who wrongfully withholds the same from him. The regular time for electing justices for said Great Bend township is at the regular township election in each alternate year, commencing with the year 1873.

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ODELL, as plaintiff, brought his action of *quo warranto* against Dodge, to determine his right to the office of justice of the peace of Great Bend township, Barton county. His petition was filed December 1st, 1875. All the necessary facts are stated in the opinion.

C. P. Townsley, for plaintiff.

Clayton & Clayton, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: This is an original action in the nature of *quo warranto*. The action was commenced for the purpose of having the question determined, whether the plaintiff Odell, or the defendant Dodge, is entitled to the office of justice of the peace for the township of Great Bend, Barton county. This is the only question in the case. The facts upon which this question depends are substantially as follows: Barton county was organized May 16th 1872. Great Bend township was organized May 28d, and the first election held in said county and township was on July 1st. At this election county and township officers were elected, among which were two justices of the peace for said Great Bend township, one of whom was the defendant Dodge. All these proceedings were had under the acts relating to the organization of new counties. (Gen. Stat. 249, et seq.; Laws of 1872, p. 243.) At each of the next two annual township elections held in said township, to-wit, on the first Tuesday of April 1873, and on the first Tuesday of April 1874, two justices of the peace were elected for said township, (provided of course that justices of the peace were to be elected at such elections,) one of whom was the defendant Dodge, who each time qualified and accepted the office. No election was held in April 1875, for before that time the legislature so changed the law that the annual township election is held on the Tuesday succeeding the first Monday in November of each year. (Laws of 1875, p. 128.) At the annual township election held on the Tuesday succeeding the first Monday in November 1875, (which was also the day on which the general election was held,) four different candidates were voted for, for the office of justice of the peace for said township; and if that was the proper time for holding elections for said offices the plaintiff Odell, and one Sells, were duly elected such justices, and the defendant Dodge and the other candidate were defeated. Both Odell and Sells qualified — Sells becoming his own successor, and the county commissioners designating Odell as the successor of Dodge, and caus-

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ing a certificate to that effect to be entered in the docket kept by Dodge. (Gen. Stat. 817, § 194.) Odell then demanded the docket, books, papers, etc., pertaining to the office, and Dodge refused to give them up. Dodge claims that on July 1st 1872 he was elected for a full term of two years, less the time that had elapsed between the first Tuesday of April of that year, and said 1st day of July; that his term did not expire until the first Tuesday of April 1874, when he was reelected for another full term, and that his second term will not expire until the holding of the annual township election for the year 1876, and therefore, that the election of Odell in 1875 was a nullity. The only defect in this reasoning is in the starting-point; but that is fatal. Dodge was not elected for a full term in 1872, but only to hold his office until the next annual township election. Section 8 of the act authorizing the election upon which the whole claim of the defendant is founded, and at which he was elected in 1872, provides that "Any person elected to a township office at the first election shall, when qualified as the law directs, continue to hold his office until the next annual township meeting, and until his successor shall be elected and qualified; and all county officers shall, in like manner, hold until the next general election, and until their successors shall be elected and qualified." (Gen. Stat. 251.) Said § 8 has been held to be constitutional and valid with reference to county officers. (*Hagerty v. Arnold*, 13 Kas. 367.) And hence it must also be held to be constitutional and valid with reference to township officers. For every ground upon which said section may be claimed to be unconstitutional, or invalid, when applied to township officers, may be interposed with equal or greater force when the section is applied to county officers. We suppose that it is admitted, that justices of the peace are township officers. (Const., art. 3, § 9; art. 9, § 4; Gen. Stat. 1083, ch. 110, §§ 3, 4, 5.) Now the regular term of office for a justice of the peace is two years. (Const., art. 3, § 9.) And all the justices for any given township, when elected for full terms must be elected in the same year, and at the same election. That is, they must all be elected at a regular township

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election held in each alternate year. (Gen. Stat. 1083, § 4.) But which of the alternate years—whether the election is to be held in the even years, or in the odd years—is nowhere designated by either the constitution or the statutes. We therefore think it follows from the foregoing premises, as necessary and logical sequences, that the justices elected in Great Bend township in April 1878 were properly elected at that time; that they then were each elected for a full term of two years; that they were the first justices elected for full terms in said township; that the first Tuesday of April 1878 was the first regular election for the election of justices of the peace for full terms in said township; and therefore, that the regular times for holding elections for the election of justices of the peace for full terms in said township has been and will be at the regular township election held every alternate year commencing in April 1878. And therefore it further follows, that the election of justices of the peace at the township election held in November 1875 was regular and valid as to time—that the plaintiff Odell was duly elected to said office, and is entitled to the docket, books, papers, etc., pertaining to the office, and that the defendant Dodge wrongfully withholds the same from him. The election for justices in said township in 1874 was a nullity, unless it was to fill vacancies. And even if it was to fill vacancies, the terms of those elected would expire in 1875. (*Hale v. Evans*, 12 Kas. 562.) So in any event, the election of Odell in 1875 was valid. For a further discussion as to the times when justices of the peace are to be elected, see case of *Wood v. Bartling*, ante, p. 109.

Judgment will be rendered for the plaintiff.

All the Justices concurring.

COMM'RS OF LABETTE COUNTY V. G. W. FRANKLIN.

1. SHERIFF'S FEES; *Mileage on Tax Warrants*. A sheriff is not entitled to mileage on a personal tax warrant returned "no property found." [*Titus v. Comm'rs Howard Co.*, 17-363; *Thralls v. Comm'rs Sumner Co.*, 24-594; see Comp. L. 1881, chap. 39, § 3.]
2. SERVICE OF WRITS; "*Not Found*," *No Service*. Service of a writ is the actual performance of the duty commanded by it; and when there is no performance of that duty, from whatever cause, there is no service.

Error from Labette District Court.

IN February 1874 the county treasurer of Labette county issued to *Franklin*, as sheriff, a large number of tax warrants for the collection of personal-property taxes levied in and for the year 1873. Many of these tax warrants were returned "no property found," etc., and in July 1874, *Franklin* made out and presented to the county board four bills for sheriff's fees on said warrants, as follows: One bill set forth the names of 260 persons against whom tax warrants had been issued, as to each of which persons the warrant was returned "no property found," and upon each warrant the sheriff charged \$3.20 as *mileage*, and 25 cents for *return*, making \$3.45 on each warrant, or \$897 on the 260 warrants. Another bill was for fees on 17 other warrants, on seven of which he had returned "not found," or "gone," and on ten "no goods"—his bill for "mileage" and "return" amounting to \$42.45. A third bill was for fees on 18 other warrants, all of which he had returned "no goods," his claim for "mileage" and "return" amounting to \$18.45. The fourth bill was for fees on 16 other warrants, on two of which he had returned "not found"—five, "gone"—seven, "no goods"—one, "dead," and one, "tax remitted by county board," his fees for "mileage" and "return" amounting to \$74.85. The total of the four bills was \$1,032.25. The county board allowed *Franklin* on the first of said bills the sum of \$68.20; on the second, \$18; on the third, \$7.55; on the fourth, \$13, (total \$101.75,) and disallowed the balance. (Such allowances were evidently

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intended by the county board, and counsel for plaintiffs in error in their briefs so state, as an allowance for making the "return" on each warrant, and for "mileage for the longest distance actually traveled on any batch of warrants.") *Franklin* refused to accept the amounts so allowed, and appealed to the district court, as provided by § 80 of ch. 25 of Gen. Stat. The case on appeal was tried at the November Term 1874 of the district court, D. K., judge *pro tem.*, presiding. A jury was waived. The court found in favor of *Franklin*, and gave judgment in his favor for \$1,055.65, being the whole amount of his several claims or bills, with interest—and the *Board of Commissioners* now appeal, and bring the case here on error.

Willard Davis, and *A. H. Ayres*, for plaintiffs in error.

H. G. Webb, and *W. B. Glasse*, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: There is but a single question in this case which requires consideration, and that is, whether a sheriff is entitled to collect mileage on tax warrants which are returned by him indorsed "no property." This is a mere question of the construction of the statute. The sheriff can collect just such fees as the law gives him, whether in the particular case they are adequate compensation for the work done or not. He is entitled to the same fees on tax warrants as on executions. (Gen. Stat., p. 1060, § 128.) He is given for "serving and returning any writ, process, order, or notice, except as hereinafter otherwise provided, for the first person 50 cents; for return of no property found, 25 cents; for every mile necessarily traveled in serving any writ, process, order, venire, or notice, 10 cents." (Gen. Stat. p. 476, § 3.) In § 32, page 485, Gen. Stat., it is provided that "no officer shall receive any fees for constructive services or mileage in any case." These are all the provisions to which our attention is directed, or which seem to bear upon the question. And under them, we think the sheriff is not entitled to mileage where he returns the warrant "no property

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found." He cannot be said to have *served* the warrant when he has not found any property upon which to levy it; and *mileage* is only given when he has *served* a writ. There must be an actual service. Nothing is to be taken by construction. Service of a writ, is the actual performance of the duty commanded by it. If that duty is unperformed, there is no service. It matters not what has caused the non-performance, whether the negligence of the officer, or the departure of the party against whom the writ runs, or his want of property, there is still no service. Whether mileage ought to be given to encourage effort on the part of the officer, is a question for the legislature. The function of the court is not *jus dare*, but *jus dicere*.

The judgment of the court below must be reversed, and the case remanded with instructions to grant a new trial.

All the Justices concurring.

THE STATE OF KANSAS V. ANDREW H. HORNEMAN.

1. CRIMINAL LAW; *Appeals, When to be Taken*. A defendant in a criminal case cannot bring to this court on appeal the ruling of the district court sustaining the demurrer on the part of the state to a plea of *autrefois acquit*, until after the trial and judgment on the merits. [*Cummings v. State*, 4-225; *State v. Freeland*, ante, 9.]
2. ——— *Autrefois Acquit; One Act—Distinct Offenses*. To an indictment charging a shooting with intent to kill, defendant plead, that he had once been tried and acquitted under a charge of maliciously shooting and wounding a horse, and that the shooting charged in the two prosecutions was one and the same shooting: *Held*, That a demurrer to this plea was properly sustained. [For discussion of *autrefois acquit*, see *State v. Ingram*, ante, 14; *State v. Shafer*, 20-226; *City of Olathe v. Thomas*, 26-233; *State v. Curtis*, 29-384; *State v. Kukuke*, 30-462; *State v. Colgate*, 31-511.]

Appeal from Cowley District Court.

INDICTMENT, charging that *Horneman*, at the county of Cowley, on the 18th of September 1875, with malice aforethought, unlawfully and feloniously assaulted one Enoch Willett, and

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with a certain loaded pistol or revolver shot him the said Willett with intent then and there him the said Willett to kill and murder. This indictment was found at the September Term 1875 of the district court. The defendant was arrested, and when arraigned for plea, he pleaded that he had already been arraigned and pleaded not guilty to the following complaint:

(*Title, and Venue.*) "George Hafer being first duly sworn says, that one Andrew H. Horneman, at the county of Cowley, on the 13th of September 1875, with a pistol or revolver loaded with powder and ball, willfully and maliciously did shoot and wound a horse, the property of one John W. Meadows, and hired by the said Meadows to this affiant"—(describing the horse, and stating its value.)

The record showing a trial of defendant upon said complaint, and his acquittal of the charge therein made against him, was made a part of his plea to the indictment; and *Horneman* alleged, "that the shooting stated and charged in said complaint, of which he was duly acquitted, and the shooting of which he is now indicted, are one and the same shooting, and not other and different shootings." To this plea the county-attorney demurred. The court sustained the demurrer; and from such decision and judgment *Horneman* appeals to this court.

Hackney & McDonald, and *Pryor & Kager*, for appellant.

A. J. Pyburn, county-attorney, for The State.

The opinion of the court was delivered by

BREWER, J.: Appellant was indicted for the crime of shooting with intent to kill. To this indictment he pleaded *autrefois acquit*. A demurrer to this plea was sustained; and without waiting until after a trial of the merits, defendant has appealed to this court from the ruling sustaining the demurrer. Doubtless the appeal is premature, and the case not properly before us. No judgment has yet been rendered, and appeals in criminal cases are only from judgments. (Gen. Stat., p. 865, § 281; *The State v. Freeland*, ante, p. 9.)

But waiving this, we think the ruling of the district court

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was correct. The plea disclosed a prosecution against appellant for maliciously shooting and wounding a horse, not the property nor in the possession of the party upon whom the assault with intent to kill is charged to have been made, and alleged that the shooting charged in the two prosecutions was one and the same shooting. Does this disclose an acquittal of the offense of which he is now charged? We think not. The two offenses are entirely distinct. One is not included in the other—is not a lesser degree of the other. The character of the testimony must be different in each. One fact, that is, "shooting," may be necessary for conviction under either charge. But something more is necessary in each, than the mere fact of shooting. The rule is thus stated by Wharton in his Criminal Law, (1 Wharton, 7th ed., § 565:) "It may be generally said, that the fact that the two offenses form part of the same transaction, is no defense, when the defendant could not have been convicted at the first trial, on the indictment then pending, of the offense charged in the second indictment." And again: "Where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea is generally good, but not otherwise." It was said by Lord Denman, in *Regina v. Button*, 11 Ad. & Ellis, New Series, 946, "The same act may be part of several offenses. The same blow may be the subject of inquiry in consecutive charges of murder and robbery. The acquittal on the first charge is no bar to a second inquiry, where both are charges of felonies; neither ought it to be, when the one charge is of felony, and the other of misdemeanor." In 1 Russell on Crimes it is laid down, that "The acquittal on one indictment, in order to be a good defense to a subsequent indictment, must be an acquittal of the same identical offense charged in the first indictment." In the case of the *Commonwealth v. Harrison*, 11 Gray, 808, a party who had been tried for selling liquors without license was convicted of the offense of keeping his saloon open on Sunday, although the sale of the liquor was part of the evidence to sustain the latter charge. In *Commonwealth v. Bakeman*, 105 Mass. 58, the defendant had

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been acquitted under a charge of willfully obstructing the engines and carriages of the C. Rld. Co., by placing an iron rail across the track, and was subsequently convicted upon a charge, under a different section of the statute, of willfully putting a rail across the track with intent to obstruct the engines and carriages of the same company, and the conviction was sustained, although the same act was referred to in the two charges. The court uses this language: "It may well be that both indictments refer to the same transaction; but that fact is not decisive as to the legal identity of the two offenses. The test as to the legal identity of the two offenses is to be found in the answer to this question: Could the prisoner, upon any evidence that might have been produced, have been convicted upon the first indictment of the offense that is charged in the second?" See also, *Commonwealth v. Roby*, 12 Pick. 496, in which it was held, that a conviction of an assault with intent to murder could not be pleaded in bar to an indictment for murder. In *Price v. The State*, 19 Ohio, 428, the rule is stated as taken from Archbold's Cr. Pleading, and also from Roscoe's Cr. Ev., that "the true test, by which the question, whether such a plea is a sufficient bar in any case, may be tried, is, whether the evidence necessary to support the second indictment would have been sufficient to prove a legal conviction in the first." These authorities are decisive of the question, and the ruling of the district court was correct.

The appeal will be dismissed.

All the Justices concurring.

THE M. K. & T. RAILWAY CO. v. WM. WEAVER.

1. **EXCESSIVE DAMAGES; New Trial; Prejudice of Jury.** The mere fact that damages are excessive, is not a ground for new trial. They must appear to have been given under the influence of passion, or prejudice. [*U. P. Rly. Co. v. Hand*, 7-380; *U. P. Rly. Co. v. Milliken*, 8-647; *U. P. Rly. Co. v. Young*, 19-488; *Clark v. Baldwin*, 25-120; *A. T. & S. F. R. R. Co. v. Brown*, 26-443; *A. T. & S. F. R. R. Co. v. Frazier*, 27-463; *K. P. Rly. Co. v. Peavey*, 29-170; *A. T. & S. F. R. R. Co. v. Moore*, 31-197.]
2. ——— **Injuries Sustained.** Where a passenger is wrongfully expelled from the cars, and it appears that while there was a sharp scuffle, some blows given, and some blood drawn, there were no broken limbs or bones, no permanent injury or disfigurement, no long confinement, no protracted pain and suffering, no heavy expenses for medicine, nursing, or physician, little loss of time, not to exceed a day's delay, and no circumstance of outrage and insult independent of the actual expulsion, held, that a verdict awarding \$5,000 damages was excessive.
3. **GENERAL VERDICTS—Sustained by Evidence; Particular Questions of Fact.** Where a general verdict is returned for the plaintiff, which is correct if either one of three several facts exist, and special questions are submitted to the jury as to existence of these facts, and all answered in the affirmative, the verdict will not be set aside as against the evidence if one of these answers is supported by the testimony, although the second answer is clearly and the third probably against the evidence.
4. ——— But the fact that these questions are thus answered, tends to show passion or prejudice on the part of the jury, and in this case does, with the amount of the verdict, show such a wrong as calls for the interference of the court, and a reversal of the judgment.

Error from Neosho District Court.

ACTION by *Weaver*, brought in October 1871, to recover damages sustained by reason of his being put off the cars of the *Railway Company*, near New Chicago, on the 15th of July 1871. The action was tried at the December Term 1873 of the district court. Verdict and judgment for plaintiff for \$5,000, and costs—and the *Railway Company* brings the case here on error.

T. C. Sears, for plaintiff in error.

Stillwell & Baylies, for defendant in error.

The opinion of the court was delivered by

BREWSTER, J.: This was an action brought by Weaver to recover damages for a forcible expulsion by the company from one of its coaches. Verdict and judgment were in favor of Weaver for \$5,000. Special questions of fact were submitted to the jury, and answered as follows:

1st.—Was the plaintiff informed by the agent of the defendant at New Chicago, that the paper in his possession, and upon which he demanded a ride in defendant's cars to Chetopa, was not a good ticket, and would not entitle him to a passage on defendant's cars? *Answer, No.*

2d.—Was the conductor of defendant's train, upon which the plaintiff entered, instructed by the defendant to eject from the cars any person who refused to produce a ticket or pass, duly signed, or to pay the money for his passage? *Answer, Yes.*

3d.—Did the plaintiff tender to the conductor of the defendant's cars a ticket entitling him to be carried from New Chicago to Chetopa, or any other point on defendant's road? *Answer, Yes.*

4th.—If the jury answer the last question in the affirmative, please describe the ticket. *Answer, From Kansas City to Chetopa.*

5th.—Did the plaintiff offer to pay his fare at any time before the stoppage of the train and the commencement of his expulsion, or did he offer a pass duly signed by any authorized officer of the company? *Answer, Yes.*

6th.—Did the conductor of the defendant's train inform the plaintiff that, in the absence of a ticket, he must pay for his passage in defendant's cars? *Answer, Yes.*

7th.—Did the conductor of the defendant's train inform the plaintiff that unless he so paid he should be compelled to stop the train and expel him from the cars? *Answer, Yes.*

8th.—After he so informed him, did plaintiff refuse to produce a ticket or pay for his passage before the train was stopped, and his expulsion attempted? *Answer, No.*

9th.—Did the servants and agents of the defendant use more force in the expulsion of the plaintiff from the cars of the defendant than was necessary to eject him and overcome his resistance? *Answer, Yes.*

10th.—Was any unusual or unnecessary violence or force em-

ployed by the defendant's servants and agents, before the plaintiff was put upon the ground? *Answer*, Yes.

11th.—After the plaintiff had been ejected and put on the ground, who was the aggressor in the conflict that afterward ensued, if there was any conflict? *Answer*, Defendant.

A motion was made to set aside the verdict on the ground that it was against the evidence, and that the damages were excessive. This motion was overruled, and this presents the principal question for our consideration.

Are the damages excessive? We are constrained to think they are greatly excessive. We quote so much of the plaintiff's testimony as bears upon this matter. He testified as follows, on his examination in chief:

"Mr. Hall was the conductor. He passed on some distance in the cars, and came back to me, and he asked me something in regard to my ticket, where I purchased it, and said I had the wrong coupon. He stated I'd have to pay my fare to Chetopa. I remarked that I did not feel willing to pay it a second time; that I paid it once. We discussed the matter in friendly tone and quiet, in the beginning of it. I told him that if a mistake was made, it was their mistake, and not mine. Hall said he should put himself to no trouble to correct the mistake of the other road. I said I did not intend to deprive them of anything; that as soon as we arrived at a station they could telegraph to know if I had bought a ticket. I told him I would deposit a hundred dollars with him or any other responsible man in the car, for the purpose of indemnifying the company that I was not wronging them out of their rights. He then stated I should pay, or he would put me off the train; and I refused to pay under the circumstances. He stopped the train, and there was two or three men came to his assistance. I did not think they were going to do it, and I held on to the seat some time, and they finally pulled me loose and took me toward the door. I offered to pay, and Hall said, 'Pay hell,' and shoved me out. There were three, and perhaps four, had hold of me. There was nothing unusually abusive until I was out of doors. I don't remember anything that occurred after I reached the steps. I had used a great deal of exertion in trying to keep in. The last I remember we were all tugging on the platform—some had hold of me in front, and some behind. The blood rushed to my head so that I was as blind as a bat. I remember

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nothing after that. I was sitting on the ground when I came to myself. My face was bloody, and my mouth was bleeding. My mouth was cut, and there were two other wounds on my head. About the time I got up, some one threw my hat out of the window. The cars were just moving off. I walked about forty rods, to what I took to be a railroad station-house. There I washed, and lay down, and rested a while. The section hands I hired to take me to New Chicago on the hand-car.

"Q.—What was the condition of your health at the time you were ejected from the cars?

"A.—It was poor; I had been in poor health for four years, and had been to the mountains to see if I could improve it. This trip was on my return from the mountains."

On cross-examination he testified: "Hall insisted on having the money. Don't think he said anything about instructions. I refused to pay, and he put me off. I was very near the center of the car. I struggled and held on to the seats as long as I could. I was very near the steps when my recollection ceased. Don't remember when striking the ground of hitting any one a severe blow. At the time my consciousness ceased, there had been no blows struck at all. I don't recollect of striking Alexander a severe blow and cutting his cheek open."

Wm. A. Nichols, who saw the plaintiff after his expulsion; and the same day, testified:

"Plaintiff's appearance at the time was that of a man who had had a fight. I think there was a cut about Mr. Weaver's mouth. His clothes were bloody. I think it was his shirt the blood was on. I saw no other wounds but those he complained of.

"Q.—You may state whether at the time he complained of physical suffering or wounds? [Objected to by defendant, as incompetent, as calling for declarations of party. Objection overruled, and excepted to by defendant.]

"A.—He complained about his head. He said he was suffering from the rush of blood to his head."

Joseph A. Wells, also a witness for the plaintiff, testified:

"About this time the train came to a stand-still, and Hall said he had no time to talk now—that he must get off the train. They then started to eject him from the train, and he held on to a seat on the left side. Then he was dragged to a seat on the right side of the car, and he then clutched a seat

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on the other side of the car before he reached the door. About the time they reached the door, Weaver remarked to the conductor, not to put him off on the open prairie—remarked he would pay his fare to the next station, rather than be put off there. The proposal not being accepted, he was taken to the door onto the platform, and to the steps leading to the right side of the coach, his face fronting to the coach, with one hand holding to the platform, and one to the car railing, when one of the parties jumped down on the ground from the car and took hold of Weaver in the rear, and by the efforts of the three they put him on the ground. My impression is, that he struck the ground with his feet and staggered backward, and recovered, coming nearly to an upright attitude. After they were off the car, Weaver made a kind of old-woman's lick, sorter round like. I thought he was trying to strike the brakeman. The brakeman came at him, and struck him three or four times. Weaver got up afterward, and staggered off to the side of the ditch and sat down. I then went in the car and took Weaver's hat and ticket, and threw off the hat and ticket. I was present when it was done. I saw the parties that removed Weaver from the cars after they came back, and were washing up. The smallest one of the three got his face cut with the glass of the door. I believe now that Hall got cut with the glass, and that the smallest one of the three got a cut under the left eye. I could not say positively that Weaver hit him or not."

This was all of the testimony given by the plaintiff which in any way bears upon the question of the injuries sustained. The expulsion was participated in by three parties—Hall, the conductor, and two other employes, Alexander, and Holcomb. All were retained in the employ of the company thereafter, and one, Holcomb, was shortly promoted. They were all witnesses on the trial. We quote the testimony of Alexander—the others being far more favorable to the company, and being less full and detailed than his. Alexander says:

"The first I noticed was when the train stopped, and I went back to see. When I went back into the coach, Hall and Holcomb, the brakeman, were trying to get Weaver out of the train. Hall ordered me to assist in expelling him. We took hold of him and started to get him toward the door, when he got down into another seat. Next move we got him on the

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platform, and he got hold of the railing of the car. I then jumped down on the ground and got hold of him by the right arm and pulled him down on the ground. I turned round partly to get on the train, and Weaver invited Hall to get down and fight him. Hall didn't accept the invitation, and he turned round to me, and said, *You son of a bitch, I'll give you one*—and turned round to strike, and struck round this way, (witness motions,) and hit me here. Weaver had something in his hand that cut me. Then I struck him. The blow from Weaver didn't knock me down. No force was used except what was necessary."

On cross-examination, witness said: "I did not know of any difficulty. My going back into the car was simply caused by the train stopping. When I went in, Weaver was in a seat. They were trying to get him out. I believe Hall had hold behind him, and Holcomb was in front. They got him started before I took hold of him. When about three seats from the door, Weaver got into another seat. Holcomb said, *You may as well get off first as last*. We got him into the aisle, and to the door. When outside of the door Weaver got hold of the railing of the car. When I got down on the ground and took hold of his right arm, Holcomb and Hall were on the platform of the car, when Weaver invited Hall to fight. The blow he gave me was not so heavy, but it cut my face. Next I struck him, and knocked him down. I attempted to strike him again; he put his hands over his face. I got on him; I was trying to take his arms away so that I could strike him. There was so much blood flowing from my face that I could not see whether any come from plaintiff or not. I did not see any blood coming from his nose or mouth. Weaver did not say, 'enough.' Hall called me, and I got on the train. Did not hear Weaver say that he would pay when on the ground, if they would let him ride."

Now, what may fairly be deduced from this testimony? That there was a sharp scuffle in which three men overpowered one, and ejected him from the cars; that some blows were given; some blood drawn, but no broken limbs or bones, no permanent injury or disfiguration. There was no aggravated insult and abuse; no circumstances of gross outrage independent of the forcible expulsion. There was little loss of time, as the expulsion was within three miles of the place where Weaver entered the cars, and he was taken back there

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the same day. There was no long confinement, no protracted pain and suffering, no heavy expenses for medicine, nursing, or physician. In short, if an individual had committed the assault and battery, a few hundred dollars would have been deemed ample compensation for the injury. We know that this is not a parallel case—that there is a special duty on the carrier to protect his passengers, not only “against the violence and insults of strangers, and co-passengers, but *a fortiori*, against the violence and insults of its own servants,” and that for a breach of that duty he ought to be compelled to make the amplest reparation. The law wisely and justly holds him to a strict and rigorous accountability. We would not relax in the slightest degree this strict accountability. We know that upon it, in no small degree, depends the safety and comfort of passengers. The carrier selects his own agents, and unless he finds that violence and abuse on the part of such agents toward his passengers meets with swift and severe punishment, he will soon become indifferent to the character and conduct of such agents, and rudeness, insult and violence will take the place of politeness, courtesy, and assistance. Any one who travels sees so much of rudeness and inattention on the part of employes, is subjected to so many annoyances, petty and large, and not seldom is witness to so much actual outrage and abuse, that we would be exceedingly loth to have any relaxation of the rule which holds carriers to the most rigorous accountability for violence and wrong to their passengers. We know that in the case of *Goddard v. G. T. Railway Co.*, 57 Maine, 202, where the supreme court of Maine discussed the obligations and liabilities of railroad companies in an opinion of great ability, and with an exhaustive examination of authorities, (and with the general conclusions of which we heartily agree,) a verdict for \$4,850 was sustained where there was no actual battery, but only a gross, outrageous, and protracted assault. But the circumstances of that outrage were so wanton, so vilely abusive, as perhaps to justify the verdict. Here, the expulsion may have been wrongful, but it does not seem to have been wanton, or excessively cruel.

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We are constrained therefore to believe that this verdict was excessive, and that the jury, in their anxiety to punish the company for its wrong, have failed to administer equal and impartial justice between it and its passengers.

Was the verdict, or were any of the answers to the special questions, against the evidence? Counsel contends earnestly that some of them were. He challenges, in the first place, the third and fourth answers, and contends that it is clear that Weaver had no ticket when he entered the company's train at New Chicago. Upon this point we think the counsel is mistaken, and that there was testimony sufficient to support these answers. Weaver testifies that he purchased a ticket at Kansas City for Chetopa, and paid between eight and nine dollars for it, and gives the day upon which he purchased. There is no contradictory testimony upon this. It was evidently a coupon ticket, for he says that soon after leaving Kansas City a conductor came along and tore off a portion, and afterward another conductor tore off another portion. Upon cross-examination he says that there were two coupons and a stub to the ticket. When he reached New Chicago he unquestionably had some portion of the paper given him as his ticket at Kansas City. Here he entered the cars of the defendant. Before entering, he presented this paper to the baggage-master, who upon the faith of it checked his baggage to Chetopa. The baggage-master, who was also ticket agent, testified to a conversation with Weaver concerning this paper, which Weaver denies. The conductor took up this paper, punched it, and passed along through the car. He shortly returned, and told Weaver that he had the wrong coupon. There was some talk about a mistake having been made by the conductor on the other road, (the L. L. & G. railroad,) and Hall said he should put himself to no trouble to correct the mistake of that road. Nichols testifies to seeing this paper, that on it was printed, "Kansas City to Chetopa," and also in one corner, in small letters, "Chetopa," and that it was punched. The conductor testifies that Weaver handed him a "portion of a coupon reading from Kansas City to

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Tioga;" that he said to him that it was not good; may have said that it belonged to L. L. & G. road, and did tell him that he could hold the ticket, and that it was as good as a bank note. He says that "punching" generally destroys a ticket, and that he does not recollect whether he punched this ticket or not. The paper itself was lost before the trial. There seems no reason to doubt the good faith and honesty of Weaver. He offered to deposit \$100 with the conductor, to be forfeited if his statement as to the purchase of the ticket was not correct. And it is clear that he bought a ticket to Chetopa, and that he had in his possession all that had not been taken off by prior conductors. This remnant was good enough to secure the checking of his baggage, and was taken by the conductor at first as good for his ride. Further than that, the testimony is conflicting. It seems quite probable that the conductors on the L. L. & G. road had removed all the coupons, and left nothing but the stub; but still this is not clear, certainly not so clear as to entirely do away with the presumption arising from the purchase and use of the ticket. We think therefore, the answers of the jury to these questions cannot be held to be against the evidence and wholly unsupported by it.

The answer to the fifth question is challenged, and it is claimed that there was no testimony tending to show a "pass," or that Weaver offered to pay the fare before the stoppage of the train and the commencement of his expulsion. Here we think counsel is correct. There was no pretense that Weaver had a "pass," and the testimony of Weaver and Wells (his witness) heretofore quoted, plainly shows that Weaver's offer to pay was not till after the stoppage of the train and the employes had commenced to eject him. We fail to find any testimony which tends to show any offer to pay before the stoppage of the train and the commencement of the expulsion.

The answer to the ninth question is also challenged, and it is contended that it is clear that no unnecessary violence was

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offered. We think the testimony discloses about this, that no unnecessary force was used in actually removing plaintiff from the cars, but that after he was landed on the ground there was unnecessary violence done to him. Whether this needless violence was so disconnected from the expulsion as to be wholly a volunteer assault by the brakeman, or a part of the force used to complete the expulsion, by preventing Weaver from getting onto the train, is not clear, though we are inclined to consider it a mere volunteer assault. If a volunteer assault, the answer was not supported by the evidence; if not, it was.

A general verdict was returned. This verdict can be sustained upon either one of three facts, that Weaver tendered a ticket entitling him to a ride, or that before the stoppage of the train he offered to pay his fare, or that unnecessary violence was used in ejecting him. In our review of these facts, it will be seen that we have concluded that the findings of the jury can be sustained as to the first fact, that it is clearly against the testimony as to the second, and probably so as to the third. The first fact however sustains the verdict as against a motion to set it aside on the ground that it is against the evidence. What then should be the disposition of the case in this court? We have found that the damages were excessive, that to each of the three principal questions asked of the jury they answered yes—one of which was clearly not warranted by the testimony, one probably not, and the third only barely supported by the evidence. The mere fact that damages are excessive, and above that amount which the court thinks would be just, is not of itself sufficient ground for a new trial. The statute says, "excessive damages, appearing to have been given under the influence of passion or prejudice." (Gen. Stat. p. 687, Code, § 306.) But often the amount of the verdict may be so excessive as of itself to indicate passion or prejudice. It may be so wholly disproportioned to the wrong done, and injury sustained, as to be susceptible of no other explanation than that the jury were carried away by an improper eagerness to punish. We are not prepared to say in

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this case that the mere size of the verdict carries a conviction of that, considering the special duty of care and protection due from the company to the passenger. It would, if the assault were free from that special consideration, and regard were to be had simply to the extent of the injuries received by Weaver. But here, in addition, the state of mind of the jury is disclosed by the answers they returned. Everything was decided against the company, and in favor of Weaver, and decided too in some instances in plain disregard of the testimony. Not content with resolving every doubt in his favor, they answer every question in the same way, and without regard to the facts. This shows that they were not so impartial, so free from passion or prejudice, as to be fit triers of this controversy. It shows that they failed to give due consideration to those matters making in favor of the company; and if they did as to the facts of the case, it tends strongly to show that they did also as to the damages sustained. We are constrained therefore to order a reversal of the judgment, and remand the case for a new trial.

All the Justices concurring.

H. H. MCGLOTHLIN V. JOHN H. MADDEN.

1. REPLEVIN—*When not Maintainable; Property in Custodia Legis.* Where after the expiration of the time for which execution of the judgment of a justice of the peace has been stayed, the justice issues execution under § 12 of chapter 88 of the laws of 1870, against the judgment-debtor and the surety on the undertaking for the stay, and the constable finding no property of the judgment-debtor levies upon the unexempt property of the surety, *held*, that the latter cannot maintain an action of replevin therefor against the officer. [*Westerberger v. Wheaton*, 8-169; *Bailey v. Bayne*, 20-660; *Blair v. Shew*, 24-280.]
2. EXECUTION AGAINST SURETY, *on Justice's Judgment.* While the legislature has unquestionably the power to authorize the entry of a judgment as upon confession upon an undertaking to stay execution, it is doubtful whether further legislation directing the entry of such a judgment be not necessary before execution can properly issue against the surety on such undertaking.

Error from Linn District Court.

REPLEVIN, brought by *Madden*, against *McGlothlin*, to recover the possession of one horse and one colt which *McGlothlin* had seized and held upon an execution as constable. The material facts are stated in the opinion. The district court, at the October Term 1874, gave judgment upon demurrer for the plaintiff, and *McGlothlin* brings the case here on error.

Stephen H. Allen, for plaintiff in error.

James D. Snoddy, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: On the 10th of June 1872, Decker & Bro. obtained a judgment before a justice of the peace against Josiah Sykes. Sykes obtained a stay of execution, Madden, the defendant in error, going upon the undertaking therefor as surety. When the stay expired, the judgment still remaining unpaid, the justice issued execution against Sykes as principal, and Madden as surety, as authorized by §12 of ch. 88 of the laws of 1870, and placed the same in the hands of the plaintiff in error, as constable. The latter, finding no property of the principal, levied as directed by the writ on certain personal property of the surety. The surety brought his action of replevin, claiming that said §12 was unconstitutional, and that therefore the writ was no protection to the officer. The writ was in the exact form prescribed by the statute; so that the only inquiries in the case are, whether the proceedings before the justice of the peace were such as to warrant him in issuing an execution against the surety, and if not, whether that can be determined in an action of replevin against the officer. The latter question seems to be settled by the case of *Westenberger v. Wheaton*, 8 Kas. 169. In that case the Chief Justice, giving the opinion of the court, uses this language in reference to one portion of the statute: "The object of the clause, as drawn from its language, and from other parts of the section,

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as well as from the history of the action known as replevin, is to compel a party who desires to test the validity of *any* judgment or order of a court, or *any* tax, fine or amercement, or *any* other mesne or final process, so to do in some other way than by seizing property already in the custody of the law." That language is appropriate to the facts of this case. Here was process issued from a magistrate having unquestionably jurisdiction of the subject-matter. It was in the form of final process—a writ of execution. It recited the fact of a judgment against one party, and also subsequent proceedings by another, and commanded the officer to levy upon the goods of these two parties. It was really a notice to the officer, that the magistrate had adjudged a liability against both the parties. It was final process, which he had issued upon proceedings had before him in matters within his jurisdiction. Now, whether he had erred or not in those proceedings and his adjudications thereon, was a question which under the authority cited could not be raised by an action of replevin against the officer. It was not a case, it may be remarked, where the writ reciting a judgment against "A.," without any semblance of excuse therefor commands a levy upon the property of "B." It recites proceedings against both "A." and "B.," and gives the officer no alternative but to obey the process or review the rulings of the magistrate. We think therefore, under the authority of that decision this action cannot be maintained. As the writer of this opinion was the counsel for the unsuccessful party in the *Westenberger case*, and strenuously and honestly contended for an opposite doctrine, he is unwilling to do more than rest the decision of this case upon the authority of that.

As to the other question, it may be remarked that it seems clear from the authorities that it is within the power of the legislature to provide that the execution of a bond to stay a judgment shall be taken as the confession of a new judgment upon which final process may issue at the end of the stay without further inquiry. See among many authorities, the following: *Ramsey v. Luck*, 8 Munford, (Va.) 484; *Bank v. Patton*, 5 How. (Miss.) 200; *Brown v. Clarke*, 4 How. (U. S.) 4; *Cov-*

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ender v. Heirs of Smith, 5 Iowa, 157; *Buckman v. Williams*, 10 Iredell, 126; *Murray v. Edmonston*, 6 Jones Law, (N. C.) 515; *Williams v. Hall*, 2 Dana, 97; *Roberts v. Cross*, 1 Sneed, 235; *Hemigar v. Mee*, 4 Sneed, 38; *Morgan v. Coleman*, 8 Head, 352; *Cheatham v. Brien*, 3 Head, 53; *Robinson v. Yon*, 8 Florida, 350. In some cases it would seem that the old judgment was extinguished, and a new judgment entered upon the bond against both principal and stayor. In other cases the stayor simply became a party defendant to the existing judgment. It is immaterial which practice may prevail. The principle which underlies both is the same, that of judgment by confession. And surely, there is no constitutional inhibition upon such judgments. The real question then is, whether the provisions of the statute can fairly be construed as making the proceedings of stay tantamount to a confession of judgment. It is clear that there is no express direction or authority to enter a formal judgment, and it is a matter of grave doubt whether further legislation be not necessary to warrant such an execution against one who has simply signed as surety an undertaking for a stay. We forbear however deciding that question until it is strictly before us.

The judgment will be reversed, and the case remanded with instructions to overrule the demurrer to the answer, and for further proceedings in accordance with the views herein expressed.

KINGMAN, C. J., concurring.

THOMAS HUDSON v. M. K. & T. RAILWAY CO.

1. **MASTER AND SERVANT; Tortious Acts of Servant.** A master is not responsible for the tortious or wrongful acts of his servant, when these acts are not directly authorized by him, nor done in the course or within the scope of such servant's employment. [*Maier v. Randolph*, 33-340.]
2. ——— **Allegations in Pleadings.** A general allegation that the master by his servant made the assault, is overborne by a statement of the actual facts which shows a mere volunteer assault by the servant, and one outside the scope of his employment.
3. ——— **Where Servant is Personally Liable.** Where it appears that plaintiff was authorized to receive freight for certain parties, and in pursuance thereof went to the depot of defendant and demanded the same of the agent who was in charge of the depot and authorized to receive and deliver freight, and while so demanding it the said agent made an assault upon him, and it does not appear that said assault was made in ejecting or attempting to eject plaintiff from the depot, or in preventing or attempting to prevent him from committing any injury to the property of the defendant, or from transgressing any rules for the regulation of its depot and the transaction of its business, *held*, that it did not appear that the company was liable for the assault, and that only the agent who actually made it was liable.

Error from Labette District Court.

ACTION by *Hudson* to recover from the *Railway Company* damages for personal injuries inflicted by one Trotter who was at the time a servant in the employ of the defendant company. The facts as stated in the petition will be found in the opinion. The *Railway Company* demurred. The district court at the November Term 1874 sustained the demurrer, and gave judgment in favor of the defendant for costs. *Hudson* brings the case here on error.

Cory & Kimball, for plaintiff, cited 14 How. 485; Story on Agency, § 452; Smith on Master & Servant, 152; 1 Redf. on Rlys. 582; 57 Me. 202; Edw. on Bailments, 579.

T. C. Sears, for defendant, cited Smith's Master & Servant,

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151; Wharton's Law of Neg., § 162; Shear. & Redf. Neg., § 62; 19 Ohio St. 110; 38 Cal. 681; 6 Cowen, 189; 89 N. Y. 881; 12 Allen, 49; 26 Ind. 70; 70 Penn. St. 119; 24 Conn. 54; A. & A. on Corp., § 310; 18 Iowa, 200; 38 Ind. 126.

The opinion of the court was delivered by

BREWER, J.: The district court sustained the demurrer to the petition, and this is the ruling complained of. The petition is as follows:

(*Court, and Title.*) "The plaintiff, Thomas Hudson, shows to the court and alleges, that at the time of the committing of the wrongs and grievances hereinafter mentioned, the defendant, the Missouri, Kansas & Texas Railway Company, was a railroad corporation duly incorporated and acting under the laws of Kansas, and doing business as a public carrier of persons and goods in and through the city of Parsons, in Labette county, and was the owner of a certain railroad known as the Missouri, Kansas & Texas railroad, together with the tracks, cars, locomotives, engines, depots, freight-houses and appurtenances thereunto belonging; and that said defendant had at said city of Parsons freight-houses and depots for the purpose of receiving, storing and caring for the goods and freight shipped on and over the said railroad, by and for the patrons of said defendant; that said defendant, on February 7th 1874, had in its employ, at the said city of Parsons, one certain Marcus L. Trotter, as agent, whose duty and business it was, under and by virtue of his said employment, to have the *care, charge and control over the said freight-houses and depots of the said defendant, and to receive and deliver freight and goods consigned to and delivered at said depot, to or from the proper parties and their agents entitled thereto*; and that at the time, and while said freight-house and depot were in the possession of, and under the control of the said Trotter, under and by virtue of his said employment as agent of said defendant, and when said freight-houses and depots were open for the free exit and entrance of persons who had business of any kind or nature appertaining thereto, to transact in or about said freight-houses or depots, and while the said plaintiff was in the due and legal prosecution of his business, on said February 7th 1874, at and in the said freight-houses and depots of the said defendant, with proper orders and authority from Vanmeter & Bro., John Conroy, M. M. Neely, and other merchants and persons, as the hired agent of

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said persons, and for them asking and demanding of the said defendant, and its agent said Marcus L. Trotter, the delivery of, and to him, the said plaintiff, certain goods and freight which had been shipped and carried on and over the said defendant's railroad for him, the property of said Vanmeter & Bro., Conroy, and Neely, and others in whose employ the plaintiff was, and which goods and freight were consigned to said parties at Parsons, and by said defendant placed in the said freight-houses and depots at said Parsons, the said defendant, by its said agent Marcus L. Trotter, did unlawfully and of force assault, insult, beat, bruise and wound the said plaintiff, by striking him the said plaintiff on his head, face and neck, with a large iron rod or poker, by means of which striking by the defendant the plaintiff was felled to the floor, and the bones of his face and neck fractured and broken, and the defendant by its agent then and there assaulted, struck, kicked, beat, bruised and otherwise misused and maltreated the said plaintiff, by reason of which striking with the iron rod or poker, and the kicking, knocking, beating, bruising and wounding of the plaintiff, by said defendant, and its agent said Marcus L. Trotter, he the said plaintiff became and was sick and disabled for a long space of time, and was obliged to and did expend large sums of money in doctoring and trying to cure himself from the sickness, wounds, and bruises so as aforesaid inflicted and caused by the said defendant, and its said agent, all to his great damage of \$8,000—wherefore," etc.

The question of course raised by the demurrer is, whether the facts stated show a cause of action against the company for the assault and battery actually committed by one of its agents. The mere fact that Trotter was in the employ of the defendant at the time of the assault, does not render it responsible therefor. It must appear that the assault was a part of the employment, or in the course of the employment; otherwise the assailant is himself alone responsible. There is no question as to the rule of law applicable, as will appear from the following citations:

"A master is ordinarily liable to answer in a civil suit, for the tortious or wrongful acts of his servants, if those acts are done in the course of his employment in his master's service. The maxim applicable to such cases being, *respondent superior*, and that before alluded to, *qui facit per alium, facit per se*. This rule, with some few exceptions which will hereafter be pointed

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out, is of universal application, whether the act of the servant be one of omission or commission; whether negligent, fraudulent, or deceitful; or, if it be an act of positive malfeasance or misconduct, if it be done in the course of his employment, his master is responsible for it *civiliter* to third persons."—Smith's Master and Servant, p. 151.

"It has already been said that to make the master liable for the servant's negligence, this negligence must be in the course, or, as it is sometimes called, 'scope' or 'range' of the latter's employment."—Law of Negligence, Wharton, § 162.

In *Story v. Ashton*, 4 L. R. Q. B. 426, Chief Justice Cockburn laid down the rule as follows: "The true rule is, that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, *in the course of his employment as servant.*"

"A master is not responsible for *any act or omission* of his servants which is not connected with the business in which they serve him, and does not happen in the *course of their employment.*"—Shearman & Redfield on Negligence, § 62.

The only difficulty is in the application of this rule to the facts. Was Trotter acting in the course of his employment in making the assault? For it does not appear that it was a part of his employment, that is, that he was employed directly to make the assault. Was it in the line of his duty, and growing out of the services he was employed to perform? He was as it appears in charge of the company's depot. As such it was his duty to remove therefrom all persons improperly there, or improperly conducting themselves, though otherwise lawfully there. If in the supposed performance of this duty, and in ejecting plaintiff from the depot he had improperly ejected him, or had used unnecessary force in ejecting him, the company would have been liable, because he was doing that which the company had employed him to do, acting in the very line and course of his employment, and any mistake or violence on his part was the mistake or violence of his principal, the company. But it is not pretended in the petition that this assault was committed in ejecting or attempting to eject plaintiff. Neither is it pretended that the assault was made in preventing or attempting to prevent the plaintiff

from improperly taking away goods, or from committing any injury to the property of the plaintiff, or from transgressing any of its rules for the regulation of its depot or the transaction of its business. It is merely charged that the assault was committed by Trotter upon plaintiff while he was asking and demanding freight which he was entitled to receive. The gist of the complaint is very fairly and forcibly stated by the learned counsel for plaintiff in error when they say, "The plaintiff at the time he received the injury complained of was rightfully in defendant's depot inquiring about and demanding the freight of his principals of and from the said agent of the defendant; and while there, in the prosecution of his duties with the said defendant, and in their depot, he received from the said agent, not the freight of his principals, but the iron poker of the defendant, causing the injury complained of." In other words, Trotter was employed to deliver freight; plaintiff came and demanded freight; Trotter replies to his demand with an assault. Was such assault in the course of Trotter's employment? Did it grow out of any services he was engaged in, or was it in the line of his duty? It seems to us it was clearly disconnected therefrom, and a mere volunteer assault. True, the employment may have given the opportunity and occasion, but it was not an act which in any fair sense the company could have been said to have employed him to do, or to have anticipated that he would do, nor an act which was the act of the company. Reverse the circumstances, and suppose that plaintiff, as the servant and in the employ of certain merchants, went to the depot of defendant in charge of the agent Trotter, to receive their freight, and while so demanding and receiving freight assaulted Trotter with a poker: would the merchants, his masters, and in whose employ he was, be responsible for that assault? Would it have been in the line or scope of his employment? Clearly not. A party goes into a store to purchase goods, and is therefore rightfully there. He makes an inquiry as to the price of an article of a clerk behind the counter, who in reply takes a weight and knocks him down with it. Can this be said to be an act which the proprietor

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contemplated, when he employed the clerk? That it was in the line of the clerk's employment, and that therefore the employer was responsible? But the cases are parallel. The employment in each furnishes the opportunity and the occasion; but in each the act is not one the agent was employed to perform, nor within the scope of his employment. The general allegation, that the company by its agent made the assault, signifies nothing when the actual facts and circumstances of the assault are disclosed. See upon the general questions here involved, *Little Miami Rld. Co. v. Wetmore*, 19 Ohio St. 110; *Baker v. Kinsey*, 38 Cal. 631; *Malis v. Lord*, 39 N. Y. 381; *I. P. & C. Rly. Co. v. Anthony*, 43 Ind. 183; *Railroad Co. v. Donahue*, 70 Penn. St. 119.

The judgment of the district court will be affirmed.

All the Justices concurring.

THE STATE OF KANSAS V. ANDREW M. BOWEN.

1. CRIMINAL LAW; *Verdict to be Construed as a Whole.* Under an information charging murder in the second degree, this verdict was returned: "We the jury find the defendant not guilty in manner and form as charged in the information, but do find him guilty of manslaughter in the second degree." *Held*, that all the parts of the verdict should be considered in determining its effect, and that so considered, it was evident that the jury only intended to acquit of the major crime in terms charged, to-wit, that of murder in the second degree, and did not intend to acquit of the lesser offenses, the different degrees of manslaughter included therein.
2. JUDICIAL NOTICE, *Taken of all Prior Proceedings in an Action.* The court takes judicial notice of all prior proceedings in a case, and it is unnecessary to offer evidence of a former trial, and the verdict returned on such trial, on the hearing of a plea in bar of "once in jeopardy" by such trial and verdict.
3. QUESTIONS OF LAW—*Exclusively for the Court.* Where the question is purely one of law, it is, although arising in a criminal case, one exclusively for the court.

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4. INFORMATION FOR MURDER; *Venue; Place of Death.* An information for murder is sufficient which charges the giving of the fatal blow in the county in which the prosecution is had, and the fact of ensuing death, although it failed to allege specifically in what county or state the death took place.

Appeal from Wilson District Court.

INFORMATION for murder—the information charging that *Bowen*, “at the county of Wilson, on the 10th of October 1874, with a double-edged dagger or stiletto, purposely and maliciously did inflict two mortal wounds in and upon the side and abdomen of one John Hoppeler, then and there being, of which said two mortal wounds the said John Hoppeler afterward, and on the 13th of October 1874, died.” Plea, not guilty. There were two trials—the first at the November Term 1875, at which a verdict was set aside and a new trial granted. A second trial was had at the February Term 1876. Verdict, “guilty of manslaughter in the fourth degree,” and *Bowen* was sentenced to “imprisonment in the county jail for a period of nine months.” From this judgment and sentence the defendant appeals.

Kirkpatrick & Hudson, for appellant.

The opinion of the court was delivered by

BREWER, J.: Appellant was convicted of manslaughter in the fourth degree, under an information charging murder in the second degree; and from such conviction brings this appeal. Three questions are presented.

I. Two trials were had. Upon the first, the jury returned the verdict, “We the jury find the defendant not guilty in manner and form as charged in the information, but do find him guilty of manslaughter in the second degree.” Upon this defendant moved to be discharged, on the ground that, as murder includes all the degrees of manslaughter, the information in fact charged all those degrees, and the first part of the verdict finding him “not guilty in manner and form

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as charged," was responsive to all the charges, and acquitted him of guilt, not only as to murder, but as to all the degrees of manslaughter; and that therefore the latter part of the verdict must be disregarded as surplusage. The point was not well taken. The verdict must be taken as a whole, and its meaning determined from a consideration of every part. So taken, there is no chance for misconception as to the meaning of the jury. It finds the defendant guilty of a crime, and states the crime of which it finds him guilty. That crime is included in the offense charged, and the verdict of guilty is good under the information. So much as declares the defendant not guilty, is plainly, when taken in connection with the other part of the verdict, to be limited to the major offense in terms charged.

II. After the motion to discharge defendant had been denied, a motion for a new trial was sustained. Before the second trial the defendant entered a plea in bar of "once in jeopardy," and by it presented anew the question of the effect of said verdict. Upon this plea he demanded that the

1. Verdict to be construed as a whole.
2. Judicial notice taken of all prior proceedings.

state be compelled to demur, or reply, and also that a jury be called to try the truth of the plea; but the court refused. Now whatever might have been the proper course, if the plea had raised a question of fact to be settled upon evidence, we see nothing in the ruling here of which defendant has cause to complain. All that was presented was as to the effect of a prior proceeding in the case. Upon this, no testimony was required, because the proceedings of record had in a case are always taken judicial

3. Questions of law.

notice of. It was a question of law, as to the effect of a certain verdict, which it was proper for the court to determine; and changing the mere form of presenting the question, did not affect the right of the court to determine it.

III. It is claimed that the information is insufficient, in that it fails to allege the place of the death. It charges that on the

4. Indictment; homicide; place of death.

10th of October 1874, at the county of Wilson, the defendant inflicted two mortal wounds upon John

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Hoppeler, of which wounds the said Hoppeler afterward, and on October 13th 1874, died, but it does not charge that he died in Wilson county, or in the state. Hence it is said, that as the offense of murder or manslaughter is consummated only by the death of the party assailed, the place of the death is as important as the place of the assault, and that a failure to allege the one is as fatal as a like failure to allege the other. Waiving any question as to the effect of the second clause of §110 of the criminal code, (Gen. Stat., p. 838,) and conceding that except upon a strained and unnatural construction there is no allegation as to the place of Hoppeler's death, we still think the information must be sustained. It does not appear that any question was raised in the district court as to the sufficiency of the information. The defendant plead "not guilty," and went to trial upon it. Perhaps this is immaterial, and the defendant has waived nothing. There has been much confusion and conflict as to the jurisdiction and power to punish in cases in which the fatal blow is given in one county or state, and death ensues in another county or state. So far as counties are concerned, the statute settles all question. (Gen. Stat., p. 824, § 29.) It is however silent as to cases in which the wound is given outside the state and death ensues within, or the reverse. In *The State v. Carter*, 3 Dutch. 400, the power of the state to punish, was denied in a case where the fatal blow was given in New York and the injured party voluntarily came into New Jersey and there died. On the other hand, the power was sustained under similar circumstances in the cases of *Tyler v. The People*, 8 Mich. 320, and *Commonwealth v. Macdon*, 101 Mass. 1, in which last case is a very full and exhaustive examination of the authorities, English and American. In the case in 8 Mich. is a dissenting opinion by Judge Campbell, whose judgment in criminal cases is entitled to the highest consideration, in which he holds the law to be, in the absence of statute, that jurisdiction to punish for the homicide is in the state and county in which the fatal blow was struck. In *Riley v. The State*, 9 Humph. 646, the supreme court of Tennessee decided that according to the principles of common

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law, where the fatal blow was given in one county, and death ensued in another, jurisdiction of the homicide was in the first county. In *State v. McCoy*, 8 Rob. Rep. 545, followed in *State v. Foster*, 7 La. An. 255, and same cases in 8 La. An. 290, the supreme court sustained the jurisdiction where the fatal blow was given within but death ensued without the state. They rested their decision however, it should be said, upon the act of the legislature of 1805 adopting the common law of England, which they construed as including a statute of 2 Geo. II, upon this matter. In *The People v. Gill*, 6 Cal. 637, where intermediate the blow and the death a change in the statute had been made, the crime was held to be of the date of the blow, and governed by that law. See also, *Grosvenor v. St. Augustine*, 12 East, 244; 1 Bishop Cr. Law, §§112, 116; 1 Bishop Cr. Procedure, 51, 52, and cases cited on both sides of the question. It seems to us, without pursuing the authorities further, reasonable to hold that as the only act which the defendant does toward causing the death is in giving the fatal blow, the place where he does that is the place where *he commits the crime*, and that the subsequent wanderings of the injured party, uninfluenced by the defendant, do not give an ambulatory character to the crime; at least, that those movements do not, unless under express warrant of the statute, change the place of offense; and that while it may be true that the crime is not completed until death, yet that the death simply determines the character of the crime committed in giving the blow, and refers back to and qualifies that act. It follows, that there was no error in rendering a judgment against the defendant upon this information. No other question being presented the judgment must be affirmed.

All the Justices concurring.

THE CITY OF OSWEGO V. W. H. BELT.

1. CRIMINAL TRIAL; *Verdict, or Finding, of "Not Guilty," Conclusive.* In a criminal prosecution, where the defendant has pleaded not guilty to the charge, and where the case is submitted to the court without a jury for decision, either upon testimony or an agreed statement of facts, and the court finds the defendant not guilty, such finding is conclusive, and cannot be set aside and a new trial granted either upon appeal or by petition in error. [*State v. Carmichael*, 3-102; *City of Olathe v. Adams*, 15-391; *Sau v. Crosby*, 17-396.]

Error from Labette District Court.

COMPLAINT against *Belt* for selling intoxicating liquors without license. The district court, at the May Term 1875, found defendant not guilty, and *The City of Oswego* brings the case here for review.

Nelson Case, for plaintiff.

F. A. Bettis, for defendant.

The opinion of the court was delivered by

BREWER, J.: Defendant was charged with selling liquor without a license in the city of Oswego, in violation of an ordinance of said city. He was convicted on a trial before the police judge of the city. On appeal to the district court, the case was submitted upon an agreed statement of facts to the court, who found the defendant not guilty. The city seeks by petition in error to reverse this acquittal, and secure a retrial of the charge. This cannot be done. *City of Olathe v. Adams*, 15 Kas. 391.

As to the question whether a druggist is allowed to sell liquor without having a license, see the case of *City of Salina v. Seitz*, ante, 148.

The petition in error will be dismissed.

All the Justices concurring.

THE MISSOURI VALLEY LIFE INS. CO. v. DAVID KELSO.

1. **LIFE INSURANCE; Contract—Stipulations—Policy Obligations.** A life-insurance policy issued on the joint lives of husband and wife for \$5,000 to be paid to the survivor, contained the following stipulation, to-wit: "And the said company promises and agrees that if default shall be made in the payment of any premium after the second annual payment, it will issue a paid-up policy for a sum equal to the full amount of the ordinary annual premiums so paid at the time of such default, provided written application be made therefor, and this policy and all interest therein be surrendered within three months of the day of such default." The first two annual premiums were paid, amounting to the sum of \$570. The third annual premium was not paid. The original policy was then surrendered, and the proper application was made for a paid-up policy in accordance with the terms of said stipulation. The company failed and refused to issue said paid-up policy. The insured then assigned their claim to the plaintiff: *Held*, That the company should have issued to the insured a paid-up policy for the amount of \$570.
2. ——— **Breach of Contract; Liability.** By failing and refusing to issue said paid-up policy, the company rendered themselves liable to an action by the insured for damages for breach of their contract, or for the specific performance of their contract, at the option of the insured.
3. ——— **Measure of Recovery.** In the action for damages where both of the insured are still living, a judgment cannot be rendered for more than the survivor of the insured would be entitled to at the end of their joint lives, if the paid-up policy had been issued.
4. ——— **Damages.** Ordinarily, in an action for damages, in such a case, where both the insured are still living the plaintiffs should recover an amount as damages which would be sufficient to purchase just such a policy as was stipulated for in a good and responsible life-insurance company.
5. ——— In such a case it devolves upon the plaintiff to prove damages, and where no damages are proved, the plaintiff can at most recover only nominal damages.
6. **Assignment, by Assured.** The claim for damages against the insurance company, in such a case, is assignable.

Error from Labette District Court.

THE FACTS fully appear in the opinion. Trial at the May Term 1874. Findings and judgment in favor of *Kelso* for

§614, and the *Insurance Company* brings the case here on error.

T. A. Hurd, for plaintiff in error.

W. C. Webb, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: On the 23d of March 1871, the plaintiff in error issued to Joseph A. Cox and Mary Cox a joint life-policy of insurance in the sum of \$5,000, loss payable to the survivor, the annual premium on which was \$285, payable on or before the 23d day of March in each year. The first and second annual premiums were paid, but the premium which became due March 23d 1873 was not then paid, nor has it since been paid. In the body of the policy is a stipulation in these words:

"And the said company promises and agrees, that if default shall be made in the payment of any premium after the second annual payment it will issue a paid-up policy for a sum equal to the full amount of the ordinary annual premiums so paid at the time of such default, provided written application be made therefor, and this policy and all interest therein, be surrendered within three months from the date of such default."

In the body of the policy were several conditions, the 2d, 8d, and 5th being in the words following:

"2d. If the said premiums shall not be paid at or before 12 o'clock noon, on or before the day above mentioned for the payment thereof, at the office of the company, or to agents when they produce receipts signed by the president or secretary, then and in every such case, the company shall not be liable for the payment of the whole sum insured, but only such parts thereof as is expressly stipulated above, and the remainder shall cease and determine.

"3d. In case this policy shall cease and become null and void, all payments thereon shall be forfeited to the company."

"5th. If this policy is assigned or held as security, written notice shall be given to the company, and due proof of interest produced with proof of death."

A complete copy of the policy is attached to the answer.

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The assured, on the 21st of April 1873, returned the policy to the company for the purpose of obtaining a paid-up policy. The policy has ever since remained with the company, and no paid-up policy has ever been issued. The policy was not assigned to the plaintiff below, nor ever delivered to him. On the 23d of January 1874, the assured made a written assignment, as follows:

"For value received we hereby transfer and assign to David Kelso our claim and account amounting to \$579, with the interest thereon, against the Missouri Valley Life Insurance Company.

JOSEPH A. Cox,
MARY Cox."

"Oswego, Kansas, January 23d, 1874.

The insurance company now claims that neither the petition below, nor the evidence, shows any cause of action in favor of the plaintiff below and against the insurance company. We however think they both do. The fault of the insurance company was, in failing and refusing to issue a paid-up policy in accordance with the terms of its agreement. And this failure and refusal we think the petition sufficiently alleges, and the evidence sufficiently proves. A correspondence was had between the company and the insured with regard to the issuing of a paid-up policy prior to any default on the part of the insured, and the correspondence was continued until after such default. The company seemed to be entirely willing to issue a paid-up policy until April 23d, 1873, when its secretary wrote and sent the following letter to the insured, to-wit:

LEAVENWORTH, KANSAS, April 23d, 1873.

J. A. Cox, *Oswego, Kansas.*

DEAR SIR: We are in receipt of your favor of the 21st instant, with policy 2870, for commutation. We discontinued the issue of joint policies a year ago, and consequently have no blanks of that form. We would be glad to issue you a paid-up policy of increased amount upon the life of either yourself or Mrs. Cox, if such an arrangement could be effected. Please let us hear from you.

Truly yours,

J. I. JONES, *Secretary.*

No offer was subsequently made by the company to issue a paid-up policy on the joint lives of Cox and his wife. And no

paid-up policy of any kind was ever in fact issued. This letter we think proves that the insured made the proper application for a paid-up policy, and it, together with the fact that the company never issued such paid-up policy, proves that the company were in default. And this default we think furnished a sufficient basis for a cause of action. But it is claimed that an action for damages cannot be maintained, but only an action for the specific performance of the contract. Now we should think that the insured would have his election as to which kind of action he would bring. He might not want a paid-up policy in an insurance company that had already violated its contract with him. He might not consider a policy in such a company as very valuable. But whatever his opinion might be, we would think that he would have the right to sue the company for damages for the breach of the contract, or to sue the company for a specific performance of the contract, at his option.

But probably the most difficult question in an action for damages, such as this, is, what should be considered the measure of the damages? In the present case the paid-up policy should have been issued on the joint lives of Cox and wife, and under it the survivor would have been entitled at the death of the other to the sum of \$570. But when such death would occur, or when this sum would become due, of course no one can tell. It might be on the same day on which the policy were issued, or it might not be for fifty years thereafter. Evidently then, while both the parties are living, they should not be entitled to recover in an action for a failure to issue the policy more than one of them would be entitled to recover on such policy at the death of the other. In fact, it would not seem that they would be entitled to recover as much. The use of the money is surely worth something. If one of the parties should die before judgment were rendered, then the amount of the judgment should probably be the amount for which the policy should have been issued, together with interest from the date of such death. If however both of the parties were living at the date of the judg-

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ment, the judgment should probably be for a sum which would purchase such a policy in a good and responsible life-insurance company. But if no evidence should be introduced—and that is the case—to show what such a policy could be purchased for, then we would think that the judgment should be rendered for nominal damages only. It always devolves upon the plaintiff to prove his case, and to prove his damages; and where he does not do so he can at most recover only nominal damages. In the present case, the insured are both still living, and there was no evidence introduced to show what their damages were. We would therefore think that it would hardly be fair that the plaintiff should now recover, because of said failure to issue such paid-up policy, more than either of the parties could ever under any circumstances recover under or by virtue of the said paid-up policy if the same had been issued. As we have before stated, the amount for which the policy should have been issued was \$570. The court below however rendered judgment in favor of the plaintiff and against the defendant for \$614 and costs. And this was done without any evidence or finding showing specifically what the damages were. The case was tried by the court without a jury, and no evidence was introduced showing what the damages were, and the only finding of the court is in the following words, to-wit: "It is the finding of the court therefrom, that the plaintiff's petition is true, and that he is entitled to the judgment therein demanded." The defendant moved the court for a new trial upon nearly all the statutory grounds, but the court overruled the motion. In this we think the court erred. And the court also erred in rendering the judgment it did.

As the cause of action in this case arose out of contract, and is for damages to be paid in money only, we suppose there can be no question as to its assignability.

The judgment of the court below will be reversed for the errors above mentioned, and cause remanded for a new trial.

All the Justices concurring.

EHRGOTT & KREBS v. THE BRIDGE MANUFACTORY OF TOPEKA.

CORPORATION—*When not Bound by Acts of Officers.* Where certain officers of a corporation, having general authority to execute promissory notes for their corporation in proper cases, but having no authority in the particular case in question, do, in a transaction having no connection with the corporate business, and not authorized by the corporation, and without any consideration going to the corporation, execute, in the name of their corporation, to a third person who has no actual knowledge of their want of authority, a promissory note for a claim which such third person holds against another and a different corporation, *held*, that the first-mentioned corporation is not liable on said note to the payee thereof where there has been no subsequent ratification by the corporation of the acts of its officers. [*Rahn v. Bridge Co.*, ante, 277.]

Error from Shawnee District Court.

ACTION by *Ehrgott & Krebs* as plaintiffs against *The King Wrought-Iron Bridge Manufactory and Iron Works of Topeka*, as defendant, upon a promissory note in words as follows:

“TOPEKA, KAS., January 13th, 1873.

“Sixty days after date we, The King Wrought-Iron Bridge Manufactory and Iron Works of Topeka, Kansas, promise to pay to the order of Ehrgott & Krebs nine hundred and eighty 65-100 dollars, payable at the Kansas Valley National Bank of Topeka, Kansas, value received.

\$980.65.

DANIEL M. ADAMS, V. President.

B. M. SMITH, Secretary.”

Trial and judgment for defendant, at the June Term 1874, and plaintiffs bring the case here on error.

James D. McFarland, and *Case & Putnam*, for plaintiffs.

Alfred Ennis, and *C. M. Foster*, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: At the trial in the court below the court instructed the jury to find for the defendant. This is the only ground for error presented by the plaintiffs in their brief. Was this error? The evidence tends to prove the following

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facts: On January 13th 1873, the "Iola Bridge Company" (a duly-organized corporation,) owed the plaintiffs the sum of \$980.65; and on that day the secretary of the defendant, B. M. Smith, and the vice president thereof, Daniel M. Adams, executed said note to the said plaintiffs for said sum. The note purports on its face to be the note of the defendant; but it is signed only by "Daniel M. Adams, V. President," and "B. M. Smith, Secretary." Smith then caused an entry of the note to be made in the "bill book" of the defendant, and three entries thereof to be made in the ledger of the defendant. But the same were afterward canceled by order of certain other officers of the defendant. There is no evidence that Smith and Adams, or either of them, ever had any authority from the defendant to execute or sign said note, except the general power they had as officers to sign notes in proper cases. And there is no evidence that the defendant ever ratified their acts. The plaintiffs had no actual knowledge of any want of power on the part of Smith and Adams to execute said note, but they received the same in good faith. About the time this note was signed, but whether before, or after, is not very clearly shown, the defendant bought of the Iola Bridge Company its goodwill, and certain property, and assumed and agreed to pay certain indebtedness of said Iola Bridge Company, but the claim of the plaintiffs was not included in said indebtedness. The witness Ennis testifies: "The claim of Ehrgott & Krebs was never mentioned, and I am quite positive that their claim was not assumed at any meeting of the board of directors or stockholders." There is no evidence that the defendant ever assumed or agreed to become responsible for the payment of said note, or said claim of the plaintiffs, further than we have already stated. There was some evidence contained in the deposition of the witness Mills, and possibly some in the deposition of the witness Gress, tending to show that the defendant assumed and agreed to pay the plaintiffs' claim; but all of such evidence was stricken out by the court, and was not permitted to be read to the jury. We do not think that the court committed any error in this respect; but still, as the question is not

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presented to us by the plaintiffs' brief, it is not necessary to decide the same. The only question therefore, for this court to decide, is merely this: Where certain officers of a corporation, (for the defendant is a corporation,) having general authority to execute promissory notes for their corporation in proper cases, but having no authority in the particular case in question, do, in a transaction having no connection with the corporate business, and not authorized by the corporation, and without any consideration going to the corporation, execute in the name of their corporation to a third person who has no actual knowledge of their want of authority a promissory note for a claim which such third person holds against another and a different corporation, is the first-mentioned corporation liable on said note to the payee thereof, where there has been no subsequent ratification by the corporation of the acts of its officers? We answer this question in the negative. *Rahn v. Bridge Manufactory*, ante, p. 277.

The judgment of the court below will be affirmed.
All the Justices concurring.

JOSEPH C. STONE, Sheriff, &c., v. ALBERT BIRD.

1. PRACTICE; *Evidence*; *Striking out Improper Answer*. Where a proper question is asked, and an improper answer is given to it, the only way to get rid of the answer is by motion to strike it out. Simply excepting to its being received, raises no question for the court to act upon. [*Hynes v. Jungren*, 8-391; *City of Wyandotte v. Gibson*, 25-236; *Barons v. Brown*, 25-412.]
2. DECLARATIONS OF PARTY; *Res Gestæ*. While as a general rule the declarations of a party are not competent evidence in his own behalf, yet an exception to this rule exists where the declarations accompany some principal fact which they serve to qualify or explain, and are thus said to be a part of the *res gestæ*. [*Backus v. Clark*, 1-308; *State v. Montgomery*, 8-351; *State v. Gurnee*, 14-111; *Swenson v. Aultman, et al.*, 14-273; *State v. Pomeroy*, 25-349; *Jenkins v. Lewis*, 25-481.]
3. ——— Where the question in issue was the ownership of a horse, and the record shows that several witnesses testified in behalf of the plaintiff as to his statements and declarations concerning the animal, and

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his claims of ownership therein, and this testimony is given in the narrative form, omitting all questions asked, and no objection appears to any specific sentence or paragraph, but at the close of the testimony of plaintiff is found the general statement that the defendant objected at the time they were offered, to all testimony of the declarations of the plaintiff in his own behalf—and where it appears highly probable that much if not all of this testimony must have been given in response to questions entirely proper and legitimate, and that no motion was made to strike it out, and that some of it was clearly proper as coming within the exception to the general rule concerning hearsay testimony, and where it does not clearly appear that any testimony improper as hearsay was admitted upon a direct ruling that it was proper and legal testimony, this court will not reverse the judgment on the ground of error in the testimony, although certain clauses and sentences, standing by themselves, appear to be merely hearsay testimony.

4. **REPLEVIN; Demand and Refusal; Wrongful Detention.** Where an officer under process against the property of B. seizes the property belonging to A., and at the time of the seizure is notified by A. that it is his property, and forbidden to take it, *held*, that A. can maintain replevin against the officer for the property, without any other or further demand. [*Shoemaker v. Simpson*, ante, 43, and cases cited.]
5. **VERDICT, Returned on Sunday.** Where a trial is completed by the introduction of testimony, the arguments of counsel, and the charge of the court, and the case has passed to the jury for consideration before midnight of Saturday, the fact that they do not finally arrive at and return their verdict until some time in the early hours of Sunday morning, does not vitiate the entire proceedings, and compel a retrial. [*State v. McKimsey*, 31-585; *State v. Muir*, 32-481.]

Error from Montgomery District Court.

ONE Seth B. Doane commenced an action in the district court of Montgomery county against one Richard Bird, and obtained therein an order of attachment, which *Stone*, as sheriff, levied upon a stallion and a filly, as the property of said R. B., and took them into his possession. Thereupon *Albert Bird*, as plaintiff, brought replevin against *Stone* to recover possession of said stallion, claiming ownership and right of possession in himself. Trial at the December Term 1874. Verdict and judgment for plaintiff, and defendant *Stone* brings the case here on error.

Turner & Ralstin, for plaintiff in error.

Nathan Cree, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: The question in this case is, whether at the time of the seizure the property in controversy belonged to Richard Bird, or to the plaintiff, Albert Bird. Said Richard and Albert were father and son, the latter being at the time of the attachment, 22 years of age. Up to that time they had lived together, and upon the father's farm. The horse was a stallion of some speed, and had been driven in a race or two, the father handling and training him. Albert claimed to have bought the animal when a colt from his father, and given him two calves in exchange. Several witnesses were permitted to testify in behalf of the plaintiff, that prior to the seizure he claimed the horse as his, stated that he owned him, and what he intended to do with him; and the admission of this testimony is alleged as error. We quote the testimony of one witness, Robert Bates, which perhaps is as open to criticism as any:

"I am acquainted with the parties herein, and the horse and filly. They belong to Albert Bird. He has owned them always, so he told me. Don't know only what Albert Bird told me. Have known Albert Bird a little less than two years. He told me several times within the last year that he owned the horse, and a year ago last August he showed me the horse, and said the horse was his—said he always owned him; he said he considered the horse valuable."

At the close of the entire testimony on behalf the plaintiff, appears the statement, that "All the foregoing testimony of plaintiff's witnesses, proving or tending to prove the statements of plaintiff on his own behalf, were objected to at the time they were offered," etc. The questions propounded to these various witnesses are not preserved; and there is nothing in the record, other than as quoted, tending to show in what manner the question was presented to the court for its decision, or upon what its ruling was made. Now in support of the ruling of the court, it may be said that if a proper question is asked, and an improper answer given to it, the only way to get rid of that answer is by motion to strike it

1. Evidence;
striking out
improper
answer.

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out. Simply objecting to its being received, raises no question for the court to act upon. (*Hynes vs. Jungren*, 8 Kas. 391.) Thus, supposing in the case before us the question had been asked the witness, "To whom do these animals belong?" No objection to it could have been sustained. It would have been a perfectly legitimate and proper question. If to that the witness had answered, as we find in the record, that "They belong to Albert Bird; he has owned them always, so he told me; don't know only what Albert Bird told me"—merely objecting to the *answer*, would have raised no question for the court to act upon, even though a part of the answer was conceded to be improper. The only way to have brought the matter properly before the court for decision, would have been by a motion to strike out the improper part. And that much of the testimony objected to must have come in, in this way, seems probable. Indeed, it seems wholly improbable that questions could have run, not merely to every sentence in the testimony, but also to every clause in each sentence. And the first clause in each sentence of the testimony quoted, and very generally through the entire testimony, seems to be not only perfectly competent and proper testimony, but naturally responsive to a perfectly legitimate and proper question. Again, it may be remarked, that while as a general rule the declarations of a party are not admissible in his own behalf, yet an exception to the rule exists where the declarations accompany some principal fact which they serve to qualify or explain, and are thus said to be a part of the *res gestæ*. And the exception has been held to cover cases where the possession of personal property has been a principal fact in the case. *Oden v. Stubblefield*, 4 Ala. 42; *Thompson v. Mcwhinney*, 17 Ala. 366; *Nelson v. Iverson*, 24 Ala. 9; *Upson v. Rasford*, 29 Ala. 188; *Overseers, &c., v. Overseers, &c.*, 2 Caine, 106; *Willis v. Farley*, 8 Car. & Payne, 895; *Yarbrough v. Arnold*, 20 Ark. 592; 1 Phillips on Ev. (C. H. & Edw. Notes,) p. 188, and note. In this very case a considerable portion of the testimony of the defendants consisted of the statements and declarations of Richard Bird made while in possession of the

a. Res gestæ;
declarations
of party.

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horse, and tending to show a claim of ownership by him. A common application of this exception is in the case of a party charged with larceny, where recent possession of the stolen property is a principal fact in the evidence of the state. The defendant may offer in his own behalf proof of the statements he made while holding that possession, in explanation and qualification of it. It may be that some of the testimony objected to in this case, may be upheld as coming within the terms of this exception. We do not decide that either this exception, or the proposition we first suggested, make it perfectly clear that no error was committed in the admission of testimony. It may be that some of the testimony was nothing more than the mere declarations of plaintiff, disconnected from the actual possession of the horse, and in no way qualifying or explaining any act of his in connection with the animal. And it may be that such testimony was admitted over objection in response to a question as improper as the answer; or that in some other way a direct ruling of the court was obtained in such a manner as to preserve the error. But we are in so much doubt upon these matters, that we are constrained to hold that no error is apparent. The party who alleges error must make it clear that there was error, otherwise the presumptions in favor of the rulings of the district court will compel an affirmance.

A second proposition of counsel is, that the verdict was against the evidence. This claim cannot be sustained. The only positive and direct testimony as to the ownership, was from Albert and Richard Bird, and both testified that the animal belonged to the plaintiff. It is true, this testimony was very much shaken by the other evidence in the case; but still upon the whole case a fair question of fact was presented to the jury, and their decision thereon is conclusive.

Again, it is claimed that no demand was alleged in the petition, and none proved on the trial. The petition was in the ordinary form in replevin, alleged in general terms that plaintiff was the owner and entitled to the possession, and

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4. Replevin;
demand and
refusal.

that the defendant wrongfully detained the property. It did not attempt to specify how the defendant obtained possession, or under what claim he held it. Under those circumstances it was unnecessary to specify what particular fact, whether demand, or other matter there was, that made the detention wrongful. The testimony of plaintiff was, that when the officer came with the writ against Richard Bird and took the horse, it was in his (plaintiff's) possession, and that he told the officer it was his, and forbade him to take it. The officer denied this. Upon this the court charged that a demand was necessary, unless at the time of the seizure the officer was notified that the property belonged to the plaintiff and not to defendant in the attachment. Of this we think the plaintiff in error has no cause of complaint. A writ against A. gives the officer no authority to take the property of B. And if the officer takes the property of B., and is notified at the time that it is the property of B., the taking is unlawful, and the subsequent detention wrongful. The circumstances under which demand is necessary have been recently considered by this court in the case of *Shoemaker v. Simpson*, ante, p. 48, and it is unnecessary to enlarge upon the matter here.

A final objection is, that the verdict was returned on Sunday. The journal entries show that the proceedings were had upon Saturday and Monday; but an affidavit of one of the attorneys of the defendant was filed on the motion for a new trial, alleging "that the verdict of the jury in the above-

4. Agreeing to
a verdict on
Sunday.

entitled case was arrived at by the jury and returned into open court on Sunday, the 20th day of December 1874, between the hours of 12 o'clock midnight and 10 o'clock A. M., and about 20 to 30 minutes past midnight." There is nothing other than this affidavit tending to show that any proceedings were had on Sunday, or that all proceedings were not, as appears by the journal entries, on Saturday and Monday. Though we were to concede that this affidavit must be taken, even against the journals, as conclusive evidence of the facts therein stated, still we should be

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constrained to sustain the verdict. The question is not one of morals, or propriety, but one of strict law. Does the fact that the jury, at the close of a trial had during the hours of Saturday, fail, after retiring to consider of their verdict, to agree before midnight, do not actually arrive at and return their verdict until the close of the half-hour thereafter, vitiate the entire proceedings, and compel a new trial? The question as to how far judicial proceedings are vitiated by being had on Sunday, has been frequently before the courts. In *Bass v. Irwin*, 49 Geo. 436, a verdict received on Sunday was declared a nullity. In *Arthur v. Mosby*, evidence was received, the case submitted to the jury, verdict returned, and judgment rendered on Sunday, and the proceedings were set aside and a new trial ordered. In *Davis v. Fish*, 1 G. Greene, (Iowa) 410, the charge was given to the jury, the verdict returned, and judgment entered on Sunday, and they were held erroneous. In *Shaw v. McCombs*, 2 Bay, 282, a verdict received on Sunday was set aside, but in the subsequent case of *Heller v. English*, 4 Strobhart, (S. C.) 486, the court, in an elaborate opinion, after saying that the opinion in 2 Bay was incorrectly reported, sustained a verdict agreed upon and returned into court after midnight of Saturday, and before morning of Sunday. In *Huidekoper v. Cotton*, 8 Watts, 56, a verdict returned at 5 o'clock Sunday morning was held good. In the following cases verdicts returned on Sunday were held good: *Commonwealth v. Marrow*, 3 Brewster, 402; *Cory v. Silcox*, 5 Ind. 370; *Rosser v. McColby*, 9 Ind. 587; *McCorkle v. The State*, 14 Ind. 89; *Houghtaling v. Osborn*, 15 Johns. 119; *Baxter v. The People*, 3 Gilman, 385; *Webber v. Merrill*, 34 N. H. 202. In *True v. Plumley*, 36 Me. 466, a verdict agreed on and sealed up on Sunday was held good. The great weight of authority goes to this extent, (and it is sufficient to sustain the proceedings in this case,) that where the trial is completed by the introduction of testimony, the arguments of counsel, and the charge of the court, and the case has passed to the jury for consideration before midnight of Saturday, the fact that they do not finally arrive at and return a verdict until

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some time in the early hours of Sunday morning, does not vitiate the entire proceedings and compel a retrial.

There being no other question in the case, the judgment will be affirmed.

All the Justices concurring.

THE CITY OF EMPORIA, *et al.*, v. MOSES H. BATES, *et al.*

CITIES; REASSESSMENT OF SPECIAL TAXES; *Power to Reassess, after Injunction Decreed; Legislative Authority.* Where in consequence of the omission of some statutory prerequisite which the legislature might in the first instance have dispensed with, the assessment proceedings taken by a city to collect from certain lots the cost of improvements on the street in front of said lots are defective, and the city is in consequence thereof enjoined from collecting the special taxes thereon, and where it appears, that the improvements were among the ordinary objects of municipal government, and it is not inequitable that the adjoining lots bear the burden thereof, that there was no fraud in the contracts for the work, no excessive expenditures, and no inequality or injustice in the apportionment, *held*, that the city might, notwithstanding said injunction, and after the passage of an act of the legislature curing such defects and granting new authority, proceed by a reassessment and relevy to collect from said lots the cost of said improvements. [Assessment, etc., under curative acts, see *Hines v. City of Leavenworth*, 3-186; *City of Emporia v. Norton*, 13-569; *post*, 498. But where assessment fails for want of power, not from mere irregularity, the legislature cannot cure. *Shawnee Co. v. Carter*, 2-115; *A. & N. R. R. Co. v. Maquilkin*, 12-302.]

Error from Lyon District Court.

THE City of Emporia levied certain special taxes or assessments in 1871 to pay for certain street improvements which had been constructed under a contract with the city. The collection of these taxes was perpetually enjoined by decree of the district court, at the April Term 1872, at the suit of *Bates* and nine others, abutting lot-owners. In July 1872 the mayor and council of said city passed an ordinance for the reassessment of said taxes, and in August thereafter said city council reassessed the same. This action was commenced in

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December 1872, to enjoin the collection of said reassessed special taxes, the plaintiffs, *Bates* and others, claiming that such reassessment was an evasion of the injunction previously decreed. Trial at the October Term 1873. Judgment and decree in favor of plaintiffs, and the *City of Emporia* appeals, and brings the case here on error.

J. Jay Buck, for plaintiff in error.

The opinion of the court was delivered by

BREWER, J.: This case is stated by counsel for plaintiff in error, to be in all respects save one, similar to the case of the same plaintiff in error against Norton and others, heretofore decided by this court and reported in 13 Kas. 569. An examination of the record seems to support the statement of counsel; and as no brief is filed for the defendants in error, and no question made as to the correctness of the statement, we shall assume it to be true. It will be needless therefore to consider any of the questions considered in that case, either upon the hearing, or the motion for a rehearing, (*ante*, p. 236.) The point of difference is this: It appears that subsequent to the first proceedings of the city to assess and collect the special assessments, an injunction suit was brought to restrain the city from collecting said assessments, in which suit a final judgment was rendered as prayed for, enjoining the city from collecting said assessments, which judgment was not appealed from, and remains in full force and effect. Thereafter, to subject the lots to the payment of the same improvements, and after the curative legislation of 1872 noticed in the opinion in 13 Kas. 569, the city proceeded to a reassessment and relevy; and it is claimed that the former judgment operates, on the principle of *res judicata*, to prevent such reassessment and relevy. The defect in the prior proceedings was in this, that no estimate of the cost of the improvements was ever made by the city engineer, or submitted to the city council. It was not pretended that the improvements were not among the ordinary objects of municipal government; or that there was any fraud

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in the contracts; or that it was inequitable that the adjoining lots should bear the burden thereof; or any excessive expenditures, or any inequality or injustice in the apportionment. There was simply the omission of one of the statutory prerequisites to a valid assessment. Now the injunction restrained any further proceedings to collect the tax under that assessment; but it does not appear that it went beyond that. The city is not disobeying that injunction. It has abandoned that assessment, and does not seek to collect any tax under it. But it is attempting, by new proceedings, and under new authority from the legislature, to charge upon and collect from the lots the cost of the improvements made in front of them. That this may be done, is clear. In *State v. City of Newark*, 34 N. J. 36, a similar question was presented, and in deciding it the court uses this language: "The contention is, that this court having in 1868 set aside the assessment made against the prosecutor for the improvement in question, the judgment then pronounced cannot be nullified or rendered inoperative by act of the legislature. The legal proposition is undoubtedly correct. The judgment of a court of competent jurisdiction cannot be reversed, avoided, or set aside by the legislative power. The question here is, whether the act of 1868 properly considered, has the effect ascribed to it. It must be borne in mind that the act does not revive or attempt to render valid the assessment which this court has declared illegal and set aside. It simply orders a new and independent assessment to be made to collect moneys which the city had expended for the benefit of the prosecutor and others. It leaves the judgment of the court upon the first assessment untouched. Its effect is not to nullify the judgment of this court, but to reimburse the city, by means of a subsequent assessment, for moneys expended in improving a street. I know of no provision of the constitution which restrains the legislature from passing an act authorizing such an assessment, and thus compensate a municipality for benefits conferred." See also, *Howell v. City of Buffalo*, 37 N. Y. 267; *Mills v. Charlton*, 29 Wis. 400. In this last case the court says: "The reassessment of a tax, the proceedings for

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the collection of which have once failed, is not a reopening of the judgment by which such former proceedings were declared invalid. Such judgment remains a perpetual stay of the proceedings to enforce the first assessment; but it only affects that assessment, and does not operate upon new proceedings subsequently taken to reassess. It is a judgment merely in abatement of the original proceedings, and by which they are annulled, and not one affecting the groundwork or basis of the tax itself, upon which the legislature may again proceed in the exercise of its unrestricted power over the subject. The original proceedings having failed for reasons which the legislature may lawfully obviate, and the basis for taxation still remaining, namely, the public benefit or improvement received, for which the legislature say the property of the citizen should pay, a reassessment may be authorized."

The judgment of the district court will be reversed, and the case remanded with instructions to enter judgment in favor of the plaintiffs in error, defendants below. It is understood that the next three cases on the docket—City of Emporia v. N. Whittlesey and others, City of Emporia v. I. D. Fox and others, and City of Emporia v. H. Conner—are similar, and the same judgment will be entered in them.

All the Justices concurring.

COMMISSIONERS OF SEDGWICK COUNTY V. H. W. BUNKER,
County Clerk.

1. **COUNTY INDEBTEDNESS**—*Existing at Time of Division; Constitutional Law.* Chapter 142 of the Laws of 1873, relating to "taxation on the change of boundary lines," applies to cases where county bonds were legally issued and delivered by a county previously to such county being divided, or having a portion of its territory detached; and so far as it so applies, it is constitutional and valid. [*Comm'rs Ottawa v. Nelson*, 19-234; *Chandler v. Reynolds*, 19-249; *Hunt v. Hamilton*, 25-82; *Comm'rs Marion Co. v. Comm'rs Harvey Co.*, 26-181.]
2. **RETROSPECTIVE LEGISLATION**—*How far Valid.* There is no constitutional provision in this state against retrospective legislation, where such legis-

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lation is designed and intended to afford civil remedies or relief in cases where there is an existing moral obligation to do or perform the act or duty prescribed thereby; and to this extent such legislation is valid.

8. **DIVISION OF COUNTIES; Apportionment of Indebtedness and Property.** Where a county is divided, the rule for the division and apportionment of the debts and property between such county and the detached territory, belongs exclusively to the legislature, and not to the courts; and when the legislature has determined how the debts and property shall be divided and apportioned, the courts cannot interfere.

Original Proceedings in Mandamus.

PETITION for a mandamus filed in this court in December 1875 by the *Board of County Comm'rs of Sedgwick Co.*, as plaintiff, to compel *Bunker*, as county clerk of Harvey county, to enter upon the tax-roll of his county, and against the taxable real estate therein which was detached from Sedgwick county and included within the new county of Harvey created by §5 of ch. 97, Laws of 1872, (p. 184,) certain taxes certified to him. An alternative writ was issued. *Bunker* answered, and among other reasons for not inserting said taxes, he submitted that, at the time said territory was detached from Sedgwick and included in Harvey county there was no law requiring Harvey county nor any part thereof to pay any portion of the bonded indebtedness of said Sedgwick county; and second, that ch. 142 of the laws of 1873, under which the plaintiff levied the taxes in question, "does not provide for a uniform and equal rate of assessment and taxation," in this, that it "provides for the assessment and taxation of real property only, exempting from taxation the personal property situated upon the territory detached from said Sedgwick county and attached to Harvey county, and that by reason thereof said ch. 142 of the laws of 1873 is null and void." The case was heard upon an agreed statement of facts, which sufficiently appear in the opinion.

W. E. Stanley, for plaintiff.

C. S. Bowman, and *H. W. Cook*, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: On the 29th of February 1872, the county of Harvey was created, and in establishing the boundaries thereof a certain strip of territory was detached from the county of Sedgwick, and incorporated into the county of Harvey. (Laws of 1872, p. 184, § 5.) At the same time, and by the same act, the legislature specifically expressed their intention that said detached territory should not be relieved from any obligation which it was then under to pay its proper proportion of the railroad bonded indebtedness previously incurred by said Sedgwick county; (§ 6 of said act.) And only three days prior to that time the same legislature, by a general law, expressed its intention that no detached territory should, by reason of any change in county boundaries, be released from the payment of its just and equitable proportion of any indebtedness previously incurred by the county to which it had formerly belonged. (Laws of 1872, p. 180, § 9.) But the legislature failed to make its will and intention as expressed in these acts effective, as applied to this particular case. The provisions by which the legislature attempted, in the act creating Harvey county, to make its said will and intention effective, were not covered by the title to the act, and were therefore unconstitutional and void. (*Sedgwick County v. Bailey*, 13 Kas. 600.) And the general law above mentioned (Laws of 1872, p. 177, et seq.) applies only where county lines are changed by the county commissioners and a vote of the people, and not where new counties are created and county lines changed by a special act of the legislature. Said strip of territory was therefore left by the legislature under a supposed moral obligation to pay its proportionate share of the said bonded indebtedness of Sedgwick county, but without any legal means of enforcing such moral obligation. Now in all cases, as we understand the law, where the legislature divides a county without making any legal provision for a division or apportionment of the debts or property thereof, the old county

1. County indebtedness — division of counties. Statutes construed. Ch. 143, Laws of 1872, held valid.

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pays all the debts, and takes all the property. (*Larmie Co. v. Albany Co.*, recently decided by the supreme court of the United States, 13 Albany Law Journal, 229.) But we do not understand that the legislature is in all cases and under all circumstances bound to make the provision for such division or apportionment of the debts and property in the same act by which they divide the county. They may certainly provide for such division or apportionment by a general law passed previously to the act dividing the county. And in some cases and under some circumstances we think that they may, by either a general or special act, make provision for such a division or apportionment even after the act dividing the county has itself been passed. Why should they not have such power, where the very act dividing the county expressly contemplates such a thing? Probably in such a case the county would not be divided except for such contemplated division and apportionment. It would seem that when the legislature divides a county, and attempts in the same act to make an equitable apportionment of the debts, but fails to do so merely because of a failure (as in this case) to make the title of the act comprehensive enough to include the provision making such apportionment, then the legislature should have the power by a subsequent act to provide for such apportionment. Perhaps the legislature would have the power to do so indirectly, by reannexing the detached strip to the old county, and then detaching it again. But they ought to have the power to do the same directly, for doing it indirectly and in such a manner would seem like trifling. But subsequently to the passage of the act dividing Sedgwick county, and on March 8d 1878, the legislature passed the following act, to-wit:

"SEC. 1. All bonds heretofore or hereafter legally authorized and issued by a vote of its electors in any county or township, shall become and be a lien upon all the real estate in such county or township for the payment of the principal and interest of said bonds.

"SEC. 2. No person or property hereafter attached by a change of boundary lines to any county or township wherein any bonds previously authorized by a vote of the electors of such county

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or township shall have been previous to such change of boundary lines legally issued, shall be subject to taxation for the payment of the principal or interest of such bonds.

"SEC. 3. All real estate heretofore or hereafter detached by a change of boundary lines from any county or township, wherein any bonds shall have been previous to such change of boundary lines legally authorized and issued by a vote of the electors of such county or township, shall be subject to taxation for the payment of such bonds and the interest thereon, in the same manner as though no such change of boundary lines had been made.

"SEC. 4. It shall be the duty of the county clerk of every county from which any real estate shall be detached, as soon as it shall be determined, to certify to the county clerk of any county to which any such real estate shall have been attached, the per centum of tax to be levied for the payment of any bonds, or interest thereon, issued, as in the last section described; and such tax shall be levied and collected by such last-mentioned county from the real estate so attached thereto, the same as other taxes, and when collected, shall be paid over to the county treasurer of the county to which such taxes belong."—(Laws of 1873, p. 267, ch. 142.)

Prior to the passage of the act of 1872 detaching said territory, Sedgwick county had subscribed to the capital stock of the Wichita & Southwestern Railroad Company to the amount of \$200,000, and had received from the railroad company that amount of stock; and had, in consideration therefor, legally issued to the railroad company \$50,000 of the bonds of the county, and had also "signed, executed and placed in escrow" \$150,000 more of the bonds of said county "to be delivered to the [said] railroad company whenever they complied with the terms and conditions prescribed in the [said] subscription." At the time of the passage of said act of 1872 said terms and conditions had not yet been fully complied with, and said \$150,000 of bonds had not yet been delivered. But afterward said terms and conditions were fully complied with, and on June 1st 1872 said bonds were duly delivered to said railroad company.

The question now to be considered is, what force and effect has said act of 1873, with reference to the liability of said strip

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of territory to pay a proportion of the indebtedness created by the issue of said \$50,000 of bonds, and said \$150,000 of bonds. That is, to what extent does said act apply to this case? and if to any extent, is it constitutional and valid? That that act covers and applies to the indebtedness created by the issue of \$50,000 of bonds, we think is clear beyond all doubt. But it is not so clear that the act covers and applies to the rest of said indebtedness. That the \$50,000 of bonds were legally issued and delivered to said railroad company prior to any change of boundary lines, we think the evidence sufficiently shows. But it can hardly be said that the \$150,000 of bonds were issued prior to that time; and if not, then the act of 1873 does not apply to them. (See §8 of said act of 1873.) At the time said boundary lines were changed, said \$150,000 of bonds were held in escrow, having no force or effect as bonds. And whether such bonds would ever have any force or effect as bonds depended upon a contingency which might or might not happen, and whether it would happen or not, no one could foretell. At the time when said boundary lines were changed no one could tell whether any indebtedness would ever accrue on said \$150,000 against said Sedgwick county, or not. And therefore, as to these bonds, we hardly think the act of 1873 applies. Even if we should assume that a moral obligation rests upon said detached territory to assist in paying said bonds, still we do not think that it would assist the plaintiff in this case, for the courts cannot enforce merely moral obligations where no legal obligation exists. And if there was any such moral obligation the legislature should have known it, and should by unmistakable language have made the act of 1873 broad enough to provide for enforcing it. That is, they should have converted the moral obligation into a legal obligation. But as they did not do so, although they had the subject under consideration, it would seem that they did not intend that such moral obligation should be enforced. We therefore think that the act of 1873 applies only to the \$50,000 of bonds, and to that extent we think the act is constitutional and valid. There is no constitutional provision in

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this state against retrospective legislation. And therefore, the legislature may in many cases pass retrospective laws to enforce previously existing moral obligations. And we think we have already shown that this is one of such cases, unless some special provision of the constitution can be found interdicting this particular kind of legislation. The only special provision of the constitution supposed to interdict this kind of legislation, to which we have been referred, is that portion of § 1 of article 11 which provides that "The legislature shall provide for a uniform and equal rate of assessment and taxation." We are inclined to think this provision of the constitution cannot in the nature of things be made to apply to the same extent to exceptional cases like this, as it does to the ordinary cases of assessment and taxation. Wherever and whenever in the nature of things this provision can be made to apply, we think it ought to be made to apply, and it ought to be made to apply to the fullest extent possible. But where in the nature of things it cannot be made to apply, legislation with regard to taxation should not be declared void merely because it does not apply to the fullest extent. When a debt is created against a county, all the taxable property therein, real and personal, becomes liable to pay the same. The real estate becomes permanently liable, (except for subsequent legislation,) because the owner thereof cannot remove it out of the county; but the personal property does not become so liable, for personal property may be removed out of the county at any time at the pleasure of the owner. If the legislature should change the boundary lines of any county, and in doing so should set off a strip of the territory thereof to some other county, then the legislature might at the same time enact that such strip should continue to be liable for the payment of its share of the debts of the county to which it formerly belonged, or the legislature might entirely relieve such strip from all such liability. And it would seem that the legislature ought to have the power to relieve such strip from a portion of such liability, and to continue its responsibility for the other portion. At

2. Retrospective
legislation.

a. Apportionment
of debts and
property, in
cases of county
division.

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least, it would seem that the legislature should have the power to say that the real estate shall continue liable, and the personal property not. It would hardly seem that the detached territory should complain because of such an arrangement, for the taxpayers of the strip would have no more taxes to pay on their real estate in proportion to its value than the taxpayers of the county from which the strip was taken would have to pay on their real estate, and they would have nothing to pay on their personal property. They would have the advantage of the taxpayers of the county in not having any personal-property tax to pay. Not taxing the personal property of the strip, however, makes the tax on all the other property, both of the county from which the strip is taken, and the strip itself, higher than it otherwise would be. But as such a thing would not make the tax void as to the taxpayers of the county, could it make it void as to the taxpayers of the strip? But suppose the personal property of the strip should also be taxed: then must the personal property brought onto the strip after its separation from the county be also taxed? It was not liable for any debt of the county before the separation. Perhaps if the strip had remained attached to the county it never would have been brought onto the strip, and therefore never would have been liable for any tax or debt of the county. Perhaps the detaching of the strip had a controlling influence in bringing such property onto the strip. Then should such property be taxed to pay such debt? The debt may not be due for thirty years after the detaching; and should property brought onto the strip twenty or thirty years after its separation from the county, be taxed to pay an old debt of the county? These are probably questions for the legislature, and not for the courts. But even if any portion of the personal property situated on said strip should not be taxed to pay said debt, then the uniformity of taxation contended for by the defendant would be destroyed. Where a strip of territory is detached from one county, and attached to another, and is made liable for a portion of the debts of the county from which it is detached, such detached territory becomes a taxing district of itself for

the purpose of raising revenue to pay its proportionate share of said debts; and the tax levied for such purpose in said taxing district should be made as near equal and uniform as in the nature of things and under the circumstances of the particular case it could well be done. A wanton violation of the rule of uniformity in taxation, would probably even in such a case render the taxes void. Where a county is divided, the rule for the division and apportionment of the debts and property between such county and detached territory belongs exclusively to the legislature, and not to the courts; and when the legislature has determined how the debt and property shall be divided and apportioned, the courts cannot interfere.

A peremptory writ of mandamus will issue in this case to the defendant, commanding him to place upon the tax-roll of his county the amount of taxes which should have been charged against the real estate of said detached territory for the years 1874 and 1875. The questions with regard to the taxes for the years 1872 and 1873 have been determined in other cases; *Sedgwick County v. Bailey*, 11 Kas. 631, and 13 Kas. 600; and we shall not reconsider such questions in this case.

BREWER, J.: I concur in the judgment, but am not prepared to assent to all the propositions discussed in the opinion.

KINGMAN, C. J., not having heard the argument, takes no part in the decision.

THE STATE OF KANSAS V. JAMES CUMMERFORD.

1. **OBSTRUCTING HIGHWAY; When Owner of Land, Not Liable.** When the defendant owns a certain piece of land, and it is uncertain from the county records and otherwise whether any public road has ever been laid out across it, and such supposed road has never been opened by any competent authority, and there is but very little travel upon it, and the defendant believing that such road has no legal or valid existence, plows up the same along with his other land, and plants corn thereon, and also, for the purpose of protecting his crops, places posts across such road so as to obstruct the same, *held*, that such conduct on the part of the defendant does not render him guilty of *willfully* obstructing a public road, even if said road was legally laid out and established.
2. **PARTIES; No Day in Court, No Judgment.** The supreme court cannot order a judgment to be rendered against the prosecuting witness in a criminal prosecution where such prosecuting witness has not been brought before the supreme court, and has had no opportunity of being heard before such court. [*Ex parte John Polster*, 10-204; *Ferguson v. Smith*, 10-394; *Hodgson v. Billson*, 11-357.]

Appeal from Saline District Court.

THE facts and proceedings in this case fully appear in the opinion. Trial at the November Term 1875. *The State* brings the case here on appeal.

John Foster, and *J. G. Mohler*, for *The State*.

T. F. Garver, for defendant.

The opinion of the court was delivered by

VALENTINE, J.: This action was commenced by information filed by the county-attorney of Saline county, November 8d 1875, charging that the defendant "on the 12th day of August 1875, in Saline county aforesaid, did unlawfully and willfully obstruct a public road, to-wit, a public road established by a statute of the state of Kansas, entitled, 'An act to establish certain state roads,' and subdivision 13 of section 2 of said statute, and which said statute was approved February 27th 1866, and that said public road was located on or about the 17th of November, 1866." The case was tried before the

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court, without a jury. The court, by request, made special findings of fact and conclusions of law, and found as conclusions of law—

“1st, That the law mentioned in the information, and upon which the proceedings of the road in question are founded, is void.

“2d, That there is and was at the time mentioned in the information no public highway as therein alleged.

“3d, That the defendant is not guilty as charged.”

The court then rendered judgment discharging the defendant. The state by its counsel then requested the court to tax the costs of the case to the prosecuting witness, which the court refused to do, and the court taxed the costs made by the state to the county. The state saved proper exceptions to all the rulings of the court below, and now brings the case to this court for review.

We suppose this action was prosecuted under § 17 of the road laws of 1874; (Laws of 1874, 171.) This section of the road law provides among other things that any person who “shall *willfully* obstruct” any public road shall, on conviction, be adjudged guilty of a misdemeanor, and be punished by fine and imprisonment. Now, passing over all other questions, was the defendant guilty of *willfully* obstructing any public road? We think not. In the vicinity of said supposed road a large portion of the community have never believed that the road has ever had any legal or valid existence. They have believed that the act under which it was laid out was unconstitutional and void. They have believed that the road was never legally established under the act. And it is certain, that the road has never been opened by any competent authority. There are no public records anywhere sufficiently showing it to be a public road, and there has never been any considerable amount of travel upon it. The defendant owned the land when and where said supposed obstruction was created, and now owns the same. And believing that no legal public road ever existed in that place, he plowed up his land where said supposed road was located, along with his other land, and planted corn thereon. The said supposed obstruction consisted of hard

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wood posts, set in the ground across said road, four or five feet apart, and each extending about three feet above the ground. The defendant placed these posts there merely for the protection of his crops, and not with any intention, willfully or otherwise, of obstructing a public road. We therefore do not think that the defendant was guilty of *willfully* obstructing any public road.

The question whether said act of the legislature is valid or not, and whether said road was legally laid out or not, are too important to be decided upon a slight investigation of the same; and it is not necessary to decide them in this case. Before deciding them we would prefer to have them elaborately argued before us. Even the question, whether the said conclusion of law of the court below, "that the defendant is not guilty as charged," is conclusive, or not, is a question of too much importance to be decided now and in this case. In this case the court below made special findings of fact, and this was only a conclusion of law from said facts, and therefore the case of the *City of Olathe v. Adams*, 15 Kas. 391, does not decide this question. In that case the only finding made by the trial court was a finding for the defendant.

The plaintiff also claims that the court below erred in rendering a judgment against the county for the costs of the case made by the state, and in not rendering judgment against the prosecuting witness for all the costs. Now this is a question in which the defendant is but very little interested; and the parties really interested in the question are not before the court. Before we can order a judgment to be rendered against the prosecuting witness for costs, we must have the prosecuting witness before us. *Ex parte Polster*, 10 Kas. 204; *Ferguson v. Smith*, 10 Kas. 394; *Hodgson v. Billson*, 11 Kas. 357. He should have an opportunity to be heard in this court.

The judgment of the court below will be affirmed.

All the Justices concurring.

L. L. & G. RAILROAD CO. V. CHARLES COFFIN, *Treas'r, &c.*

OSAGE CEDED LANDS; *Claims of Railroad Companies, under Land Grants, Not Sustained.* The question in this case—the claim of the plaintiff in error to certain lands in the Osage Ceded Tract—being one whose ultimate decision belongs to the supreme court of the United States, and such question having been decided by that court, must also be decided by this court in the same way, adversely to the claim of the plaintiff in error. [See *L. L. & G. Rld. Co. v. United States*, 92 U. S. (2 Otto,) 733; *Baker v. Newland*, 25-26.]

Error from Neosho District Court.

THIS action was commenced in April 1872, in the district court of Neosho county, by the *Leavenworth, Lawrence & Galveston Rld. Co.*, as plaintiff, against *Thomas Leahy*, the then treasurer of Neosho county, to enjoin the collection of taxes for the year 1871 which had been assessed and levied on about 125 sections, or 80,000 acres, of the Osage Ceded Lands lying in said Neosho county, which lands said *Railway Company* claimed to own in fee, but which plaintiff claimed were not subject to taxation for said year 1871. Plaintiff claimed that it had received said lands under the act of congress of March 3d 1868 granting lands to the state of Kansas to aid in the construction of certain roads and telegraphs, and the act of the legislature of the state of Kansas, approved February 9th 1864, (Laws of 1864, p. 149; Gen. Stat., p. 885,) and by virtue of the treaty between the United States and the Great and Little Osage Indians, concluded 29th September 1865, and proclaimed January 21st 1867, and by virtue of constructing its railroad through said lands to the south line of the state of Kansas—but claimed that it did not so construct such road to the satisfaction of the Secretary of the Interior, and the acceptance of the Governor of Kansas, until December 1871, and that the patents from the state of Kansas to plaintiff for said lands were not executed until March 1872. The case came here on appeal from an order of the district court sustaining a de-

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murrer to plaintiff's petition. (*L. L. & G. Rld. Co. v. Leahy*, 12 Kas. 124, decided at the July Term 1873.) This court reversed the order of the district court; but in regard to the real merits of the controversy, as disclosed by the facts alleged in the petition, the court (12 Kas. 126) said:

"There is nothing in all this which tends to show that these lands were taxable in 1871, or to limit the previous general allegation [in the petition] that they were not subject to taxation for that year. It does present however a very serious question as to *whether it does not show that the company has no title whatever to these lands*, and therefore has no right to maintain this action. It does not appear from this petition whether these lands are all within, or all without, or part within and part without, the limits of the tract formerly owned by the Osage Indians, and covered by the provisions of the treaty of 1865. If they are *without those limits* then it is easy to see how title could pass by the grant of congress, the acceptance by the state, and the construction of the road. *If they are within*, then it may not be so easy to see how any title could thus pass to the company. Outside of this case, (for counsel are silent in their briefs as to the effect of the treaty provisions on the question of title, and in fact ignore the treaty entirely,) we are aware that a grave controversy is pending as to the title of these lands. We know as a matter of public history, as well as from the petition, that the secretary of the interior has declared that the title to the lands covered by that treaty did pass to plaintiff on the completion of its road; and *we do not decide that it did, or that it did not*. We shall not decide a question of that importance until it is fairly before us." *

[* REPORTER'S NOTE.—The brief opinion in the case in the text, *The L. L. & G. Railroad Co. v. Coffin, Treasurer, &c.*, renders it unnecessary to insert counsels' briefs wherein the whole merits of the case are discussed at length. But the history of the legal contests with respect to the title and conflicting claims set up to said Osage Ceded Lands, is hardly completed with the mere publication of the final decision in the *Coffin* case. A portion of this history, and a discussion of many of the questions involved, will be found in the reported cases of *Wood v. M. K. & T. Ry. Co.*, 11 Kas. 323; *L. L. & G. Rld. Co. v. Leahy, Treasurer, &c.*, 12 Kas. 124, and *Lounsberry v. Rakestraw*, 14 Kas. 151, heretofore decided in this court. In the *Wood* case in 11 Kas., the title of the Railroad Companies to any of said Osage Ceded Lands, either under the act of congress of March 3d 1863, the Osage treaty of 1865-1867, or the act of the state legislature, and patents issued thereunder, was denied by counsel for Wood, and in the *Leahy* case, in 12 Kas., it was questioned by the court; and in the case in the text, the counsel for Coffin, Mr. HURCHMAN, submitted an elaborate brief, in which, in reference to said act of March 3d 1863, granting certain lands to the state of Kansas to aid in the construction of certain railroads, and under which act the *Railroad Company* claims title, he says:

"At that time the land described in the petition was a part of a large tract reserved under the treaty of June 2d 1823, (7 U. S. Stat. at Large, 240,) for the use and occupancy of the Osage

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The case being remanded, and the term of office of *Leahy*, the former treasurer, having expired, *Charles Coffin*, his successor in office as county treasurer, was substituted as defendant. And thereafter, at the April Term 1874, the action was submitted to the district court upon an agreed statement of facts. The district court held that under the agreed facts, and the pleadings, the plaintiff did not have any title to or interest in the lands, and consequently could not maintain the action; and judgment was rendered against the plaintiff for costs. To reverse this judgment the plaintiff brought the case to this court. The petition in error was filed May 21st 1874, but the

Indians so long as they might choose to occupy the same. These Indians were entitled to the perpetual and exclusive use of the reservation. * * * It will scarcely be contended that the government could have granted what it did not at the time possess: and it has been decided by the highest authority that a legislative grant does not amount to a warranty. *Bice v. Railroad*, 1 Black, 329; *Politz Lessee v. Wendell*, 9 Cranch, 29; 5 Wheaton, 33; *Pontaraso v. Wain*, 11 Wheaton, 388. The lands embraced in the treaty of June 2d 1825 were reserved to the Osage tribe of Indians forever, if they chose to occupy them. Could this legislative grant then, made in 1863, be construed to anticipate and convey any title that the government might obtain in the contingency that the Osage Indians in some indefinite future might choose to occupy the lands no longer? The plaintiff (the L. L. & G. Railroad Co.) in the numerous contests concerning these lands has attempted to anchor its claim to a grant through this reservation to some opinions of Attorneys-General BLACK and CUSHING, to the effect that such a grant carries the land subject to the Indians' right of occupancy. These opinions would seem to be in conflict with the authorities just cited, and also with the well-established doctrine 'that whenever a tract of land shall have once been legally appropriated for any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it.' (*Wilcox v. Jackson*, 13 Peters, 498; *Spalding v. Martin*, 11 Wm. 271.) However this may be, we regard it unnecessary to examine or make any refinements upon the possible difference between *military* reservations (to which the last cases refer) and *Indian* reservations like that made by the treaty of June 2d, 1825; (though as impliedly denying any difference, see *Wolcott v. Navigation Co.*, 5 Wall. 681; *Williams v. Baker*, 17 Wall. 144; for in the act of March 3d 1863 there is an *express* reservation of these lands, which puts the question of the legislative intentment beyond a doubt. This reservation is in the form of a proviso to the first section and follows closely the *granting-clause* of the act."

He then examines the Osage Treaty of 1865-1867, and contends that said treaty does not warrant the claim set up by the railroad companies, that the title of said companies to said lands under the act of March 3d 1863 is "recognized" by said treaty. And he argues, that as the act of March 3d 1863 by its terms excludes the idea of a grant through the Osage Ceded Lands, neither the treaty-making power, nor a subsequent congress, could by negotiation or enactment "recognize" or construe such act into a grant, unless such subsequent enactment or negotiation would itself amount to a grant independent of the act of 1863—and he denies that the treaty of 1865, the joint resolution of April 10th 1869 (16 U. S. Stat. 55), or the act of April 19th 1871, (authorizing the L. L. G. Railroad Co. to relocate a portion of its road south of Thayer,) or all three together, constitute a grant. And this was the opinion generally entertained by the members of the bar and district judges in southern Kansas, for a long time before any action or proceeding was instituted in the United States courts to contest the claims set up by the railroad companies to said Osage Ceded Lands.

As early as 1871 the settlers on the Osage Ceded Lands in Neosho and Labette counties organized as the "Settlers' Protective Association," for the purpose of contesting the validity of the alleged title of the M. K. & T. Railway Co., and the L. L. & G. Railroad Co., to said lands. Said association was active in prosecuting or defending on behalf of the settlers all actions between settlers and the railroad companies concerning said lands. Public meetings were held. The state legislature, congress, and the executive government of the United States, were petitioned or memorialized to grant relief to the settlers, until finally, on the 15th

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hearing was postponed from term to term, by consent, pending the determination of cases in the United States courts referred to in the opinion.

Solon O. Thacher, for plaintiff.

C. F. Hutchings, for defendant.

The opinion of the court was delivered by

BREWER, J.: The principal question in this case is, as to the title of the plaintiff in error to certain lands in the Osage Ceded Tract. This question having been recently decided by

of January 1874, Hon. GEORGE H. WILLIAMS, Attorney General of the United States, issued an order to the District Attorney of the U. S. for the District of Kansas, "to commence suits in the name of the United States against the L. L. & G. Railroad Co. and the M. K. & T. Railway Co. for the purpose of testing the validity of certain grants which said companies allege have been made to them of lands known as the 'Osage Ceded Lands' in the State of Kansas, and for the purpose of obtaining the cancellation of patents or other evidence of title held by said companies to said lands." Upon receipt of this order, and on the 26th of February 1874, Hon. GEORGE B. PECK, U. S. District Attorney for Kansas, for the government, with Hon. WILSON SHANNON of Lawrence, and Messrs. MCCOMAS & McKEIGHAN of Fort Scott, as counsel for the settlers, commenced two actions in the United States circuit court, in the name of *The United States* as complainant, in one of which *The Leavenworth, Lawrence & Galveston Railroad Company* was defendant, and in the other of which *The Missouri, Kansas & Texas Railway Company* was defendant. [Two days after these suits were commenced the Kansas legislature appropriated \$2,500 "to the treasurer of the Settlers' Protective Association," for the purpose of aiding the settlers to test the validity of the title claimed by said railroad companies; Laws of 1874, p. 13.] Hon. SOLON O. THACHER appeared for the *L. L. & G. Rld. Co.*, and Hon. T. C. SEARS for the *M. K. & T. Rly. Co.* They submitted substantially the same defense, claiming title under said act of 3d March 1863, and treaty of 1865-67, and the provisions of the act of the legislature of the state of Kansas, passed in 1864, (Gen. Stat., p. 585.) The patents to the *M. K. & T. Rly. Co.* were issued in June 1870; those to the *L. L. & G. Rld. Co.* were issued in March 1872. Said actions were so instituted and prosecuted to set aside and annul the certificates from the Secretary of the Interior, and said patents issued to said railroad companies by the Governor of Kansas, and to perpetually enjoin said railroad companies respectively from setting up any claim, either legal or equitable, in or to any of the lands situate and being within the boundaries of said Osage Ceded Lands. The cases were argued before Justices MILLER and DILLON, at the June Term 1874 of the U. S. Circuit Court, (two months subsequent to the decision made by Judge GOODIN in the Coffin case.) On the 22d of August 1874, the decision of Justices MILLER and DILLON, in favor of the settlers' claim, and against the title of the railroad companies, was announced. From this decision the railroad companies appealed to the Supreme Court of the United States, and the cases were there heard and submitted at the October Term 1875. The decision of that court however was not announced until April 10th 1876. The decision of the circuit court was affirmed. The opinions of the court were delivered by Mr. Justice DAVIS, five Justices concurring. (Justices FIELD, SWAYNE, and STROWE, dissented.) The majority opinions are published in full in the Central Law Journal of June 22d 1876, pp. 403, 407. The propositions decided are as follows:

1. *Cancellation of Patents.*—Where patents have been issued by the officers of the government without authority, the United States may file a bill in equity and maintain such suit in its own name to set them aside.

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the supreme court of the United States, (the court of last resort upon this question,) adversely to the plaintiff in error, it is sufficient for us to direct an affirmance of the judgment below in accordance with the conclusion reached by that court. Judgment affirmed.

All the Justices concurring.

2. *Construction of Land Grants.*—Grants of lands by congress will be construed strictly, and will not extend beyond the meaning and intent expressed in the act. If a grant admit of different meanings, that will be accepted which is more favorable to the grantor.

3. *Words of Grant.*—The words, "there be and is hereby granted," vested a present title in the state of Kansas, though a survey and location were necessary to give precision to it, and attach it to any particular tract. After the location of the road, the grant became certain, and by relation had the same effect upon the selected parcels as if they had been specially named at the date of the act.

4. *Rights of Indians.*—The Indians have the unquestionable right of the lands they occupy until that right is extinguished by voluntary cession to the government.

5. *Osage Lands.*—On a construction of the treaty of the United States with the Osage Indians of June 2, 1825, and the subsequent treaty with the same Indians of January 21, 1867, and the act of congress of March 3, 1863, granting lands to the state of Kansas to aid in the building of railroads, *Held*, that lands which, under the said treaty of 1825, had been set apart and reserved for the said Indian tribe, and which was in their actual use and occupancy, did not pass under the said railroad grant. Congress did not intend that this grant should reach the Osage lands, further than to allow the company to construct its line of road through them.

6. *Innocent Purchasers.*—That money has been advanced on the faith of the title, cannot be considered. The title to land is not strengthened by giving a mortgage upon it; nor can the fact that a mortgage has been given throw any light on the title of the mortgagor.

JOHN C. DOUGLASS V. EDGAR NUZUM.

1. **ACTION TO QUIET TITLE; Possession of Plaintiff.** In an action to quiet title under §594 of the code, the plaintiff must allege and, prove an actual possession by himself or tenant. [*Eaton v. Giles*, 5-24; *Salé v. Bugher*, 24-434; *Pierce v. Thompson*, 26-714.]
2. ——— **When Land is Vacant.** An action to quiet title may be maintained by the holder of the legal title, when he is not in possession, if the premises be vacant and unoccupied. [*Keith v. Keith*, 26-41; *Pierce v. Thompson*, 26-714.]
3. ——— **Pleading; Title; Necessary Facts.** The relief in these cases is of a kind given under the old practice only in courts of equity; and in cases outside the limits of the statute, (such as are mentioned in the last preceding proposition of this syllabus,) the same facts must be stated substantially as in a former bill in equity.
4. ——— **Issue; Naked Averment of Adverse Claim.** Equity will not, upon the mere allegation of the existence of an adverse claim, examine its nature and extent, and determine as to its sufficiency. [*Howe Machine Co. v. Miner*, 28-445; *Allen v. Douglass*, 29-412.]
5. ——— If the adverse claim is based solely upon proceedings of record which are void upon their face, and which by no lapse of time or change of condition can ever become other than thus void, there is no case for equitable interference. But where such claim is apparently valid, and can be shown to be void only by testimony *aliunde*, especially if it be parol testimony, where it rests upon proceedings which however irregular may result by lapse of time in an instrument, evidence *prima facie* or conclusive, of the regularity of those proceedings, such as a tax-deed under our statute, and indeed wherever it is of a character to cast doubt or suspicion upon the title of plaintiff, or seriously embarrass him either in maintaining his rights, or disposing of his property, equity will grant relief.
6. ——— A petition, therefore, in such a case, should show the nature of the defendant's claim, if known; and if not known, should aver ignorance thereof, and pray a discovery.
7. ——— **Practice; Objection to Sufficiency of Petition.** Where the defect in a petition to quiet title is, that it omits such essential matters as are named in the last subdivision of the syllabus, it is not waived by a failure to demur, or cured by an answer alleging title in defendant, but may be taken advantage of by an objection to the introduction of any testimony under the petition.

THE CASE ON RE-HEARING.

8. **TAX TITLES; Rights of Holder of Tax Certificates; Duty of County Clerk.** Where all the prior proceedings are regular and legal, and the time for

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redemption has passed, the holder of a tax certificate is entitled to a deed in the legal and statutory form, one that shall be *prima facie* evidence of the regularity of such prior proceedings; and if through mistake or inadvertence one substantially departing from that form is executed, the county clerk can thereafter be compelled by mandamus, and may without it, to execute a deed in the correct and statutory form. Neither the power nor the duty of a county clerk, is exhausted by the execution of an irregular and imperfect deed. [*Corbin v. Bronson*, 28-532.]

9. ——— Where A., B., and A., are for three successive years respectively the purchasers of the same tract at the tax sales, each deed issued thereon may be good as against the original owner of the land. [*Morrill v. Douglass*, 14-293.]
10. *Costs, on Reversal of Judgment.* A judgment of reversal in this court, in favor of plaintiff in error who was defendant in the court below, will carry all the costs of this court, although the defendant sought affirmative relief in the lower court, and a large part of the "case made" is composed of the testimony offered by him in support of his claims for affirmative relief, and although the reversal is ordered because of error in granting the plaintiff any relief under his petition, and no adjudication is made upon the defendant's claims.

Error from Jefferson District Court.

ACTION by *Nuzum* against *Douglass* and two others, to quiet his title to the S.E. $\frac{1}{4}$ of sec. 28, township 7, range 18, in Jefferson county. The answers of the defendants, and the proceedings in the district court, sufficiently appear in the opinion. The district court, at the May Term 1873, gave judgment in favor of *Nuzum*, as prayed for in his petition, and *Douglass* brings the case here for review.

John C. Douglass, plaintiff in error, for himself, among other propositions contended, that *Nuzum's* petition was fatally defective. In support of the proposition, that the petition should set forth the defendant's title if known, and aver that it is void, or if unknown aver that fact before asking discovery, he cited Story Eq. Jur., §§700a, 64 to 74a; Nash Pl. & Pr. 52, 661; 4 Johns. Ch. 437; 1 Danl. Ch. Pr. 377, 412; 7 Wheat. 522; 3 Monroe, 188; 20 Mo. 429; 2 Comst. 123; 4 Hen. & Munf. 423; 7 Ves. 16; Story's Eq. Pl., §227; 9 Paige, 388; 3 J. J. Marsh. 284; 11 Peters, 229; 16 Ohio, 190, 449; 10 Yerg. 218; 13 Simons, 245; 7 Conn. 342; 7 Kas. 283; 7 Vt. 357.

W. W. Guthrie, for defendant in error, submitted that, as Douglass had answered the petition, and set up a title in himself, and thereon an issue of title alone was joined and fully tried and determined, neither party can complain that such issue was not properly joined; (*Parrish v. Ferris*, 2 Black, 606; *Reedy v. Gift*, 2 Kas. 392, 400;) and that having by his answer pleaded title in himself, and set up specifically his muniments, viz., three certain tax-deeds, Douglass is concluded by such assignment, and must stand on his title as so pleaded: *Hall v. Kellogg*, 16 Mich. 185, 188. He cannot now take any advantage of any supposed defect in the petition.

The opinion of the court was delivered by

BREWER, J.: Defendant in error brought his action in the district court of Jefferson county for the purpose of quieting his title to certain premises. He filed a petition making plaintiff in error, Patrick M. Lyon and S. S. Cooper defendants, in which he alleged that he was the owner and held the legal title to the premises, that they were unimproved and unoccupied by any one, and that the defendants were "setting up and claiming some estate and interest in and to said real estate adverse to his estate and interest." The prayer was, that the defendants might be compelled to show and disclose their title or interest, and that it be adjudged void, and his title declared to be full and perfect. The separate answer of defendant Douglass contained, first, a general denial, and then what is called a cause of action and counterclaim against the plaintiff and his co-defendants, in which he alleges that he is the owner in fee simple, and in peaceable possession of the premises, and that the plaintiff and the co-defendants claim some interest adverse to him, the nature of which he is ignorant of, but which he avers to be null and void. He then alleges the execution of three tax-deeds, two of which are set out in full, claims the benefit of the statute of limitations as to them, and closes with this prayer for relief:

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"Wherefore, by reason of the foregoing and other muniments of title, defendant prays that his title in and to said land, and his possession of the same, and his right to said possession, may be quieted, and that all claim and interest, or pretended claim and interest of said plaintiff may be determined and adjudged to be void," etc.

To this answer, or at least to all except the general denial, a reply was filed, containing a general denial, and then pointing out specific objections to the tax-deeds. When the case was called the defendant objected to the introduction of any evidence, for the reason that the petition did not state facts sufficient to constitute a cause of action, which objection the court overruled, and defendant excepted. Was there error in this? This it must be borne in mind is not an action under the statute. By § 594 of the code, a party in possession may maintain an action against any person who claims an adverse interest. But possession in that section means actual possession. *Eaton v. Giles*, 5 Kas. 24. It would seem that this language was broad enough to cover any adverse claim, whether based upon color of title or not, though as that question is not before us we pass it for further consideration. *Shepardson v. Supervisors, &c.*, 28 Wis. 593; *Holbrook v. Winsor*, 23 Mich. 394. Whether also it is necessary in a petition under that section to set out the nature of the defendant's claim, and the grounds of its invalidity, or allege ignorance of its nature and pray a discovery, or sufficient simply to allege that the defendant claims an adverse interest, does not now demand a decision. See upon the question, *Wales v. Grosvenor*, 81 Wis. 681, and *Holbrook v. Winsor*, supra. Nor is this action brought under § 118 of the Tax Law of 1868, (Gen. Stat., p. 1057.) That section authorizes an action to recover possession against any one placing a tax-deed on record. It is immaterial in such an action whether the holder of the tax-deed be in possession or not. Probably the statutory petition for the recovery of real estate would be sufficient in such case, and proof of the record of the tax-deed would be conclusive upon the matter of possession. Under that section a man in actual possession may maintain an action to recover possession from one who was

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never on the land. The plaintiff in this case is proceeding independently of these statutes. He is seeking a character of relief not given under the old practice in courts of law, but only in courts of chancery, and he must show such a state of facts as under the rules of equity-practice would entitle him to relief. Would equity interfere upon the mere allegation that defendant had an adverse claim, investigate its nature, and determine as to its sufficiency? Clearly not. Only when it appeared that there was a cloud upon the title, would the chancellor act. If the adverse claim was based upon proceedings of record, void upon the face, and such as by no lapse of time or change of condition could become otherwise than thus void, there was no cause for equitable interference. There must be something to "cast doubt or suspicion upon the title, or seriously embarrass the owner, either in maintaining his rights, or in disposing of his property." A deed from one who has no shadow of title casts no cloud. *Stark v. Chitwood*, 5 Kas. 141. "The rule is well settled, that when a defect appears upon the face of the record through which the opposite party can alone claim title, there is not such a cloud upon the title as to call for the equitable powers of the court to remove it. But when such claim appears to be valid upon the face of the record, and the defect can only be made to appear by extrinsic evidence, particularly if that evidence depends upon oral testimony to establish it, it presents a case for invoking the aid of a court of equity to remove it as a cloud upon the title." *Ward v. Dewey*, 16 N. Y. 519. So also, where the claim rests upon proceedings which, however irregular, may result through lapse of time in an instrument, evidence *prima facie* or conclusive of the regularity of those proceedings, such as a tax-deed under our statutes. *Hibernia S. & L. Society v. Ordway*, 88 Cal. 679. See further upon these points, *Mayor, &c. v. Meserole*, 26 Wend. 182; *Van Doren v. The Mayor, &c.*, 9 Paige, 888; *Scott v. Onderdonk*, 14 N. Y. 9; *Hatch v. City of Buffalo*, 88 N. Y. 276; *Allen v. City of Buffalo*, 89 N. Y. 886; *Orooke v. Andrews*, 40 N. Y. 547; *Levy v. Hart*, 54 Barb. 248; *Barron v. Robbins*, 22 Mich. 85; *Shepardson v. Supervisors, &c.*, 28 Wis. 598; *Dunklin County v. Clark*, 51 Mo. 60;

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Springer v. Rosette, 47 Ill. 223. If equity will not interfere in all cases of adverse claim, it would seem to follow that the petition should show something more than the mere fact that defendant makes an adverse claim. It ought to disclose such a state of facts as calls for the exercise of equitable jurisdiction. It should allege the nature of defendant's title or claim, and show how it operates as a cloud; or, if it is unknown, this should be alleged, and a discovery prayed. See in addition to authorities heretofore cited, *King v. Higgins*, 8 Or. 406; *Wales v. Grosvenor*, 31 Wis. 681; *Holbrook v. Winsor*, 23 Mich. 394. It is impossible to anticipate and therefore to notice all the circumstances and cases in which an adverse claim calls for the exercise of the powers of a court of chancery. All that can be said is, that it must appear that the plaintiff's rights may be endangered unless the defendant's claim is judicially determined to be null and void. If this claim is known, it should be disclosed, that the court may see the danger. If unknown, it should be alleged to be unknown, and the defendant called upon to disclose it. It is unnecessary to inquire what would be the result if the claim was alleged to be unknown and proved to be known. It seems to us therefore, that this petition, inasmuch as it fails to show the nature of the defendant's claim, or allege ignorance of its character, is insufficient, and does not state a cause of action.

Was the defect waived by a failure to demur, or cured by an answer setting up title in defendant? We think not. The objection to the petition is not, that it is not sufficiently definite and certain, in which case a failure to move that it be made definite and certain waives the defect, but that it wholly omits certain essential elements of a cause of action. This a failure to demur does not waive. Nor does the answer help the plaintiff. True, if the parties had without objection gone to trial upon the pleadings, it might perhaps have been thereafter too late to object. It may be that they would have been held bound by the issues they had once accepted and tried, and been estopped to say that neither in the petition nor answer was there a sufficient statement of a cause of action to call for

judicial determination. Plainly, there was a claim of title on both sides, and an allegation of possession on the part of the defendant, with a denial thereof on the part of the plaintiff. This cannot be deemed a case where the defect of the petition is cured by the allegations of the answer, for the allegation of the answer is of *full title in defendant*, based partially it is true upon certain tax-deeds which may or may not be valid, but *only partially* upon such deeds, and is therefore an allegation inconsistent with the averment and claims of the the petition, and if true entirely overthrows such petition. It seems to us therefore, that the objection was in time, and should have been sustained. For these reasons the judgment of the district court will be reversed, and the case remanded for further proceedings. As we cannot anticipate in what shape the case may be again (if at all) presented for trial, we shall not stop to examine the numerous tax-deeds offered in evidence, and the many questions arising thereon discussed by counsel in their briefs.

All the Justices concurring.

THE CASE ON RE-HEARING.

THE foregoing opinion was filed June 23d 1875, but as defendant in error, *Nuzum*, immediately filed a motion for a rehearing the opinion was withheld, (and mandate reversing the judgment below recalled,) to abide the argument and decision on said motion for rehearing. Said motion was argued in October 1875, and is now decided.

W. W. Guthrie, for defendant in error, in support of his motion for a rehearing, submitted: This motion is made upon the belief that the question of practice, upon which alone this court ordered a reversal, was not the full consideration to which this case was entitled, even should the court feel compelled to change what has been considered its former holdings upon such question of practice. It should be the policy of a supreme court to decide all questions necessarily involved in determining the case, which are contained in the record, at

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least when ordering a reversal; and rather to aid the final determination of controversies than to pass upon questions outside the merits of the controversy, and leave litigants in doubt as to when their "day in court" shall end. In this case, while but one state of facts existed, *each party*, by his pleading, made an independent action for affirmative relief, and only the determination of *both cases* thus made could be an *examination of the decision* of that case presented in the record. Nuzum sued *quia timet*, standing on a full legal title, and the land vacant. Douglass answered, denying Nuzum's case, and then by *counterclaim* sued *quia timet*, standing on a full legal title, and *actual possession*, and, as his title set up, (with proper exhibits) three several *recorded tax-deeds*. Nuzum by reply joined issue on the case made by Douglass. On trial, Nuzum tendered his patent in evidence, and proof of land being vacant, Douglass objected that the petition did not state a case, and over his objection the evidence was received. Douglass then offered evidence in *support of his case*, and which covers 100 pages of record, and Nuzum in rebuttal offered evidence. The district court found for Nuzum, and decreed that his title be quieted.

The entire record makes a "case made," costing \$69 to copy, and was a trial of every question of title between the parties on *issue tendered* by Douglass on his *counterclaim*. This court holds *the petition bad*—that the admission of evidence in favor of Nuzum was error—and here stops with an order for a new trial. What was done by this court with *the issue joined* on the action set up in Douglass' counterclaim, and the decision of the district court thereon? Such issue *was* tried, decided, and *that case* is fully contained in the record, and necessarily a part of the case submitted to this court. Had the district court sustained objection to evidence under petition, such decision would not have terminated the case. Douglass had a case in that action which he was entitled to have tried, *and which was tried*, as he had demanded, (Civil Code, § 398,) and was decided adversely to him. Had plaintiff at trial dismissed under § 397, and the trial proceeded under

Defendant's Argument for Rehearing.

§ 898, would not the record present just the case now contained, within the law as now held by this court? Douglass, because sued, was not bound to sue in turn. His counterclaim was *his voluntary suit*, and he cannot complain of the decision made thereon, that he was not legally in court. On his case asking *affirmative relief* the decision complained of was rendered. How can this court, or why should it, avoid deciding *that case*? Did not Douglass ask to have the trial had? and can a more full trial ever be had? If sent back and re-tried, the district court must again decide the issue of trial as before decided, and again the same record will be returned here. As a question of practice, the district court may have erred in admitting evidence under plaintiff's petition; but such evidence was proper in opposition to the case made on Douglass' counterclaim. In such case, Douglass would have taken the affirmative; but would such step have prejudiced any right, substantial or otherwise? In this view of the case, does not that case of estoppel intimated in opinion filed, exist to fullest extent? (See *Wiley vs. Keokuk*, 6 Kas. 104.)

The three tax-deeds plead by Douglass as against him on his counterclaim, show a possession within § 118 of the tax law, and also an adverse claim to the premises set up by him. This obtains, not because such instruments either have or ever may have any virtue as *conveyances*, but because *they give color* under which a possession may be claimed. And this, however invalid. (9 Wis. 402, 410; 5 Kas. 145.)

The abolition made by our code embraces not alone "forms," but all "distinctions between actions at law and suits in equity." The office of § 594 is peculiarly "to try title to land," while under § 595 the rightful *possession* may alone be in issue. As the object of litigation should be to determine the rights of the litigants, the rule given in *O'Brien v. Creitz*, 10 Kas. 202, is in full harmony with the code in holding that legal title to vacant land will sustain action to quiet title.

But should the present decision be adhered to, only the costs in *that case reversed*, should be taxed against defendant in error. The long record presented here grew out of no *defense*

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made to the plaintiff's case, but out of a case which the defendant could have made just the same had plaintiff never sued.

The opinion of the court was delivered by

BREWER, J.: An opinion having been filed in this case, in which this court held that the petition of defendant in error, plaintiff below, was insufficient, and (proper objection having been made thereto in the district court) that that court erred in proceeding to receive evidence and try the case, and therefore that the judgment ought to be reversed, the defendant in error has filed his motion for rehearing, contending, first, that we erred in our conclusions as to the essentials of a petition, and that the petition herein ought to be held sufficient; second, that, as the case was really tried upon the different titles set up by plaintiff in error, and all adjudged bad, this court should also examine those various titles, and adjudicate upon their validity; and third, that at least all the costs should not be taxed up against defendant in error, as the bulk of the case made is composed of the evidence offered by defendant below in support of his answer.

Further examination and reflection have only strengthened our conviction of the correctness of the views heretofore expressed, and therefore the motion for a rehearing must be overruled; or rather, (as a rehearing was ordered, the judgment of this court set aside, and the mandate recalled, in order to give us full time for reexamination,) the same judgment will now be entered, reversing the judgment of the court below, and remanding the case for further proceedings.

As to the second matter, we find that the defendant rested his claim to the land upon mere tax-deeds. One of these the court admitted in evidence, and the other eight it rejected. As to the one admitted, it found that it was invalidated by matters *aliunde* the deed, and thus adjudicated defendant's entire claims void. If upon an examination of these various tax-deeds we should be of opinion that they were all void on their face, we might probably end the controversy between

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these parties by this opinion; but if on the other hand we should find some or all of them *prima facie* valid, that would not necessarily be conclusive of the controversy, for *non constat* that the deeds might not all be overthrown by other evidence. We shall not therefore attempt an examination of all, but content ourselves with noticing the last three offered, (those appearing on pages 108, 107, and 111, of the transcript.) These deeds appear to follow the statutory form so closely, that they must be held to be, in the language of the statute, "substantially" in that form, and therefore *prima facie* valid. At least, no departure from that form is suggested by counsel which seems to us substantial. In reference to them we remark further, that if all the proceedings up to the execution of a tax-deed are regular and legal, the holder of the certificate is entitled to a deed in legal form, and carrying that *prima facie* evidence of the regularity of all prior proceedings which belongs to a statutory deed; and if through mistake or inadvertence a different deed, and one substantially departing from the statutory form has been executed, the county clerk can be compelled by mandamus, and may without it, execute and deliver a deed in correct and statutory form. In other words, neither the power nor the duty of the county clerk is exhausted by the execution of an irregular and improper deed. The holder of the tax claims is entitled to have the various steps and processes by which these claims are matured into perfect titles, properly and legally taken and done by the various officers to whom under the law they are respectively assigned. We remark again, that, as decided in *Morrill v. Douglass*, 14 Kas. 293, 302, the payment of one year's taxes is sufficient consideration to sustain a tax-deed. Hence, when A. purchases a tract of land at the tax sale for one year, B. the succeeding year, and A. again the third year, the tax-deeds issued upon those respective sales may each and all be good as against the original owner of the land.

Other questions appear in the record, but most of them have received notice in one or another of the various tax cases re-

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cently considered in this court. We forbear therefore further notice of them at this time.

As to the remaining question, that of costs, we think the judgment of reversal should carry all the costs. We know of no reason why a party when sued may not resort to all the defenses he has to the action, or why he should be compelled to pay the costs incurred in presenting those defenses. He did not invite the litigation, and is not to be blamed for the number of his defenses, or charged with the cost of presenting them.

The judgment of reversal heretofore set aside, will be re-entered, and cause remanded for further proceedings.

All the Justices concurring.

JULY TERM, 1876.

PRESENT:

HON. SAMUEL A. KINGMAN, CHIEF JUSTICE.
HON. DANIEL M. VALENTINE, } ASSOCIATE JUSTICES.
HON. DAVID J. BREWER, }

EUGENE CUENDET V. JOHN LAHMER.

1. *ATTACHMENT; Grounds for Order; Sales by Debtor in Good Faith.* Where an attachment was issued on the charge of the disposal of property, with intent to hinder, delay and defraud creditors, and the facts appeared to be that, the defendant, a jeweler, sold certain property, in a common business manner, for \$150, which was a fair valuation, and the same subsequently placed upon it by the appraisers in the attachment proceedings; that he mortgaged certain other property for \$500, and that the entire proceeds of sale and mortgage, except about fifteen dollars, were used in the payment of debts, and there is no evidence that the mortgage covered an unreasonable amount of property, or was unreasonably oppressive and exacting in its terms, or in any manner different from ordinary mortgages, *held*, that the ruling of the district court, vacating and setting aside the attachment, must be sustained. [*Kayser v. Heinrich*, 5-338; *Case v. Ingersoll*, 7-387.]
2. ——— *Preferring Creditors, in Good Faith.* As a general rule, in the absence of special statutory restrictions, a debtor in failing circumstances, acting in good faith, may lawfully prefer one creditor, even to the total exclusion of all the others. [*Avery v. Eastes*, 18-505; *Campbell v. Warner*, 22-604; *Frankhouser v. Ellett*, 22-147.] He may also, in like good faith, in a reasonable business manner, use his property by mortgage, pledge, or otherwise, in raising money to pay such creditor. [*Arn v. Hoersemann*, 26-413; *Bishop v. Jones*, 28-680; *Randall v. Shaw*, 28-419; *Kelsey v. Harrison*, 29-143; *Foots v. Coldwell*, 30-125.]

Error from Shawnee District Court.

CUENDET brought suit against *Lahmer* on five promissory notes given by *L.* to plaintiff, on the 18th November 1873. Aggregate amount of notes, \$749. At the commencement of the action *Cuendet* sued out an order of attachment, which was levied on a stock of jeweler's merchandise, shelving, show-

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cases, safe, etc. The grounds for the attachment were, "that said defendant has property subject to execution which he conceals, and that he has assigned, removed, and disposed of his property with intent to hinder, delay and defraud his creditors." *Lahmer* moved to discharge the attachment, for the reason that the grounds therefor stated in plaintiff's affidavit were not true, but false in fact. The substance of the affidavits filed to sustain this motion, and counter affidavits to support the attachment, is sufficiently shown in the opinion. The district court, at the October Term 1874, discharged the attachment, and from this order the plaintiff appeals, and brings the case here on error.

John Guthrie, and *Geo. S. Brown*, for plaintiff, contended, that the statute distinguishes between an intent to defraud, and an intent to hinder and delay creditors: Laws of 1870, p. 172, §4. Any act, or any disposition by a debtor of his property, designed and intended to hinder and delay any creditor or creditors, although there be no intent, nor even desire, to get rid of paying the debt or debts, is within the statute. The showing made by defendant was itself sufficient to support the attachment. Honest intentions never relieve a party from the legal consequences of his wrongful acts. The law will presume him to have intended to hinder and delay his creditors, if the disposal actually made by him of his property has that effect—citing *Babcock v. Eckler*, 21 N. Y. 632; *Potter v. McDowell*, 31 Mo. 62; *Pilling v. Post*, 18 Wis. 555. Legal fraud is sufficient: *McKibben v. Martin*, 64 Penn. St. 352; *Wheeldon v. Wilson*, 44 Me. 1; *Enders v. Swayne*, 8 Dana, 103; *Custes v. Settle*, 7 Mo. 452; *Nicholson v. Leavitt*, 6 N. Y. 517; *Reed v. Noxon*, 48 Ill. 323.

D. C. Metsker, and *J. D. McFarland*, submitted, that the sales and mortgage made by *Lahmer* were open and public, and in the usual course of business, before suit brought, and that the proceeds thereof had been honestly applied to the payment of just debts, and that such sale and conveyance were therefore legal, and would not authorize or support an attach-

ment. *O'Riley v. Freel*, 37 How. Prac. R. 272; *Barney v. Scherling*, 40 Miss. 321; 6 N. Y. 517; *Dickinson v. Benham*, 12 Alb. N. Y. Pr. R. 158.

The opinion of the court was delivered by

BREWER, J.: This is a proceeding to review the action of the district court of Shawnee county in vacating an attachment. The principal ground in the affidavit for the attachment was the disposal of property with intent to hinder, delay, and defraud creditors. The truth of this was denied. Upon the affidavits presented there can be no reasonable doubts as to the correctness of the court's ruling in so far as the question of an actual intent to hinder and delay creditors is concerned. While property was disposed of, the proceeds thereof were, with the exception of an inconsiderable sum, all used in the payment of debts. Of the \$650 realized from the sale and mortgage, all that plaintiffs' counsel claim is, "that at least fifteen dollars of the money thus realized does not appear to have reached defendant's creditors." The payment of the residue to creditors is clearly traced. There was therefore a preference, rather than a delay or a defrauding of creditors. Indeed, we scarcely think from the argument of the learned counsel for plaintiffs that they expect this court to find from the testimony that there was an actual intent on the part of the defendant to delay or defraud creditors. It is fraud in law, rather than fraud in fact, to which they point, and upon which they rest their case. "The effect of the chattel mortgage was to hinder and delay creditors. The law will conclusively presume that he intended the natural consequences of his act. Therefore he intended to hinder and delay his creditors, and this supports the attachment." The proposition is too broad. The natural effect of an assignment for the benefit of creditors is hindrance and delay. Yet it is not therefore void, and the property subject to attachment. *Case v. Ingersoll*, 7 Kas. 367; *Kayser v. Heavenrich*, 5 Kas. 338. So that the mere fact that the tendency of the act is to work a hindrance or delay, is not absolutely decisive. The right of a debtor to prefer a

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creditor, and to appropriate a portion or all his property in good faith to the payment of a single debt, cannot be denied, unless there be, as in the U. S. Bankrupt Act, some special statutory restrictions. So also, the right of a debtor for the same purpose, and in like good faith, to burden his property by mortgage, or to use it by pledge or otherwise in raising money, cannot be questioned. And these propositions are all that are necessary to dispose of this case. The property sold was sold at a fair valuation—the same valuation afterward placed upon it by the appraisers when taken on the attachment. It does not appear that the mortgage was upon an unreasonably large amount of property, or was in any of its provisions out of the ordinary course of business, unreasonably exacting or oppressive. And the proceeds of both sale and mortgage were appropriated as heretofore indicated.

We see nothing to justify a reversal of the ruling of the district court, and it will be affirmed.

All the Justices concurring.

FRANCIS RAHM V. KING WROUGHT-IRON BRIDGE MANUFACTORY
OF TOPEKA.

1. **NEGOTIABLE PAPER; Indorsement; Presumption.** The third paragraph of the syllabus to the opinion originally filed in this case (*ante*, p. 277,) is erroneous, and the law is the reverse of the proposition there stated. Where there is no evidence of the date of an indorsement of negotiable paper, the presumption of law is, that it was made before the maturity of the paper, and that the holder is a *bona fide* holder for value. [*Eden v. Harlan*, 20-452; *Reynolds v. Thomas*, 28-813; *Lyon v. Martin*, 31-411.]
2. ——— **Consideration.** Proof that there was no consideration for the paper, as between the maker and payee, is not of itself alone sufficient to overthrow the presumption. [*Lyon v. Martin*, 31-411.]

Motion for Rehearing.

THIS case was decided at the January Term 1876 of this court, *ante*, p. 277, where a full statement of the facts will be

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found. A judgment of affirmance having been entered, *Rahm*, plaintiff below and plaintiff in error, filed a motion for a rehearing. Said motion was heard, and is now decided.

Thacher & Stephens, for plaintiff.

Alfred Ennis, for defendant.

The opinion of the court was delivered by

BREWER, J.: Since the filing of the opinion in this case the plaintiff has filed a motion for a rehearing, challenging the propositions laid down by this court in the third paragraph of the syllabus, (*ante*, p. 277,) and contending that in consequence of the errors therein the decision of the case was also erroneous. That paragraph is as follows:

“Where the indorsement of the note is in blank, and without date, and the allegation of the petition that it was endorsed before due is denied in the answer, and there is no evidence as to the date of the indorsement, any defense against the payer must also be held good against the indorser and holder.”

Upon a reëxamination of the question, and a review of the authorities, we are satisfied that we were in error, and that the proposition as stated is not the law. The rule is the reverse. Where there is no evidence as to the date of an indorsement, the presumption of law is, that it was made before maturity, and that the holder is a *bona fide* holder for value. We overlooked this proposition, and noticed simply the issues. That this presumption exists, is abundantly supported by the authorities. In 1 Daniels on Negotiable Instruments, p. 608, it is said, that, “The mere possession of a negotiable instrument, produced in evidence by the indorsee, or by the assignee where no indorsement is necessary, imports *prima facie* that he acquired it *bona fide* for full value in the usual course of business, before maturity, and without notice of any circumstances impeaching its validity, and that he is the owner thereof, entitled to recover the full amount against all prior parties. In other words, the production of the instrument, and proof

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that it is genuine, (where indeed such proof is necessary,) *prima facie* establishes his case; and he may there rest it." And again, on page 610: "Countervailing proof, that the instrument was executed without consideration as between the original parties—as, for instance, where it was executed for accommodation as between them, or that the consideration, originally valid, has subsequently failed—does not impair the holder's superiority of position, and he may still rest his case upon the instrument itself, from which it will still be presumed that he acquired it in a manner entitling him to stand upon the vantage-ground of a *bona fide* holder for value." Parsons, (2 Pars. Notes and Bills, 9,) is equally emphatic: "It is undoubtedly a general presumption of law, that indorsed paper was indorsed before maturity. *And a party who denies this*, and alleges it was indorsed when over-due, must prove it; nor without this proof can he avail himself of the equities of defense." The authorities cited in note *l*, by the author, fully sustain him. Take for example, *Pinkerton v. Bailey*, 8 Wend. 600, which holds: "When the time of indorsement becomes material to let in the defense of payment, etc., it is incumbent upon the defendant to show it, and rebut the legal presumption arising from the face of the transaction." Edwards on Bills and Notes, marg. page 278, points out the same result in the following words: "Nothing appearing to the contrary, the presumption of law is, that the indorsement is cotemporaneous with the making of the note, or, at all events, antecedent to its becoming due." See also, Story on Prom. Notes, 4th ed., §381; *James v. Chalmers*, 6 N. Y. 209; *Sperry v. Spalding*, 45 Cal. 544; *Walker v. Davis*, 33 Me. 516; *Hall v. Allen*, 87 Ind. 541; *Sloan v. Union Banking Co.*, 67 Penn. St. 470; *Pettis v. Westlake*, 3 Scam. 525; *Mobley v. Ryan*, 14 Ill. 51. In this last case it is said, "Where an indorsement is without date the presumption of law is, that it was made before the note became due. If the time of the indorsement becomes material for the purposes of defense, it is incumbent on the maker to show that it was made after the maturity of the instrument, and thereby destroy the legal presumption." In

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Byles on Bills, p. 181, the law is thus stated: "The law in the absence of any evidence on the subject presumes a transfer to have been made before the bill was due."

But it is scarcely necessary to multiply citations. The authorities are uniform. It follows therefore in this case, the notes and indorsements having been received in evidence without any proof of the date of the indorsements, that *prima facie* the plaintiff held them discharged of all equities between the original parties. To obviate this conclusion, counsel for the defendant say, that when it appears that paper was fraudulently issued, this presumption is overthrown, and the burden cast on the holder to show that he is a *bona fide* holder. *Smith v. Sac County*, 11 Wall. 139, is cited in support thereof. While the law may be as claimed, we do not think this a case where the rule applies. It does not appear to us that it can fairly be said that these notes were fraudulently issued. Coleman, Rahm & Co. had a just claim against the Iola company. That company sold the major part of its assets to the defendant. This was known. The managing men of the two companies were the same. Coleman, Rahm & Co. gave up their claim against the Iola company, and received the paper of the defendant. Part of this paper was assumed by the defendant as a payment for the assets purchased. The balance, including the notes in suit, was not. It does not appear that Coleman, Rahm & Co. knew of any distinction, or that they acted otherwise than in the best of faith. The case then as it now seems to us, stands in this condition: The plaintiff holds notes of the defendant discharged of all equities against the original parties. They were issued by the managing officers of defendant, though in excess of their actual authority, and for a debt for which the defendant was not responsible. They were therefore without consideration. This defense, though good against the original parties, is not good against a *bona fide* holder for value receiving the paper before maturity. It seems to us therefore that the district court erred in finding against the plaintiff, and that the judgment, instead of being affirmed, as was first or-

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dered, should be *reversed*, and the case remanded for a new trial.

We are under obligations to the learned counsel for plaintiff for calling our attention to the error into which we had fallen, and enabling us to correct it before it had passed into the reports,* and thus through its general circulation possibly resulted in serious wrong. We are of course liable to make mistakes, especially under the pressure of so much business, and so many cases; and it is a source of pleasure, a satisfaction, to know that our proceedings are closely watched by able counsel, for it leads us to indulge the hope that we shall make no serious blunders without having our attention called to them.

The judgment will be reversed, and cause remanded for further proceedings.

All the Justices concurring.

MARTIN L. READ V. NATHAN K. JEFFRIES.

1. *Set-Off; Judgment.* A judgment can be pleaded as a set-off in an action founded upon contract, and although such action be for unliquidated damages. [*Levenson v. Lafontain*, 3-523; *Turner v. Crawford*, 14-499; *Stevens v. Able*, 15-584; *Herman v. Miller*, 17-323; *Carner v. Shelby*, 17-474.]
2. ——— A personal judgment against two parties is a joint and several obligation, and an action can be maintained upon it against either of the judgment-debtors separately, and it can in like manner be used as a set-off against either. [*Turner v. Crawford*, 14-499.]

Error from Cowley District Court.

ACTION by *Jeffries* to recover a balance of \$59.37 and interest, alleged to be due for work and labor. On appeal to the district court the case was referred to T. H. S. for trial. The referee found the plaintiff's claim was just, and that *Read* had a legal set-off amounting to \$22.60. The record shows that on

[* THIS opinion did not come to the hands of the Reporter until the former decision (see, pp. 277, 282.) was printed.—REPORTER.]

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the trial *Read* offered in evidence the docket of a justice of the peace showing a legal and unsatisfied judgment in *Read's* favor against *Jeffries* and another, which judgment was so offered by *Read* as a further set-off against plaintiff's claim, and that the referee refused to admit the docket, or to allow said judgment in stating the account between the parties. Exceptions to the referee's report were duly filed. Other facts are stated in the opinion. The district court at the October Term 1874 overruled all the exceptions, and confirmed the referee's report, giving judgment in favor of *Jeffries* for \$29.48, and costs; and *Read* brings the case here on error.

Pryor & Kager, for plaintiff in error.

L. J. Webb, and *D. A. Millington*, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: During the year 1878 *Read* was the owner of a lot in Winfield, upon which he was putting up a bank building. The carpenter work was let by contract to one *Tansey*. *Jeffries* was employed by *Tansey*, and did work under him upon the building. When the building was completed there was a balance still due *Jeffries* for his work. For this balance he was proposing to file a lien, but desisted upon the statement of *Read* that another party had filed a lien, and his promise that he would make that a test suit, and if compelled to pay that claim would pay *Jeffries* his. *Read* adjusted that claim without suit, and paid a reduced amount in settlement of it. Thereupon, the time to file a lien having expired, *Jeffries* brought this action to recover the amount due for his work.

We see no error prejudicial to the plaintiff in error in the various rulings complained of except in the one matter of a set-off. *Read* proposed to set off against the plaintiff's claim a judgment in his favor and against plaintiff and *Tansey*. This was disallowed, and in this we think was error. The judgment was a proper matter of set-off. An action can be maintained on a judgment, and *e converso*, it can be set up in

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an answer and used as a defense. *Burnes v. Simpson*, 9 Kas. 658. Though the judgment was against two parties an action could be maintained upon it against either of the judgment-debtors, and in like manner it could be used as a set-off against either. Gen. Stat., p. 183, §§ 1 and 4. Counsel contends that the action was one for unliquidated damages for breach of a contract, and that therefore no judgment could be made a set-off. But the contrary has already been decided by this court. *Stevens v. Able*, 15 Kas. 584; *Pomeroy on Remedies*, §§ 798, 799. For this error the judgment must be reversed, and the case remanded for a new trial.

All the Justices concurring.

SCHOOL DISTRICT NO. 57 V. BOARD OF EDUCATION OF CITY OF
EMPORIA, *et al.*

1. CONSTITUTIONAL LAW; *Powers of Boards of Education; School Districts.* Section 99 of chapter 100 of the laws of 1872, which empowers the board of education of cities of the second class to attach to such cities for school purposes adjacent territory upon the application of a majority of the electors of such territory, is constitutional and valid. [*Division Howard Co.*, 15-194; *Comm'rs v. Bunker*, ante, 498; *Voss v. School District*, 18-467; *School District v. State*, 29-57; *A. T. & S. F. R. R. Co. v. Wilson*, 33-223.]
2. ——— *Notice to School Districts.* Notices in such cases to the school district to which such territory belonged, is not a condition of valid action.

Error from Lyon District Court.

SOME time prior to 1872, *School District No. 57, of Lyon county*, was duly organized, comprising 21 eighty-acre tracts of contiguous territory, adjoining the city of Emporia, on the east. In 1872 said district voted and issued bonds to the amount of \$1,500, and erected a substantial school-house. In July 1873, on the petition of *J. J. Wright* and eight others, a majority of the electors residing upon the five eighty-acre

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tracts immediately adjacent to said city, the *Board of Education* of said city of Emporia attached said last-mentioned tracts to said city for school purposes. An appeal (or what was intended as an appeal—but *quære*, is such an appeal allowed by law?) was taken by E. B., one of the resident electors on the detached territory, to the board of county commissioners, the proceedings whereon sufficiently appear in the opinion. In June 1874, this action was commenced in the district court by said *School District No 57*, as plaintiff, against said *Board of Education*, the board of county commissioners, and said petitioners, *Wright* and others, as defendants. Said district, in its petition, alleged its due organization as a school district—the issuing of district bonds—the location and erection of a school-house—claimed that said bonds were outstanding and unpaid, and were a “valid lien upon all real property contained in said school district, and all the inhabitants residing therein were and still are bound by law to assist in the discharge of said indebtedness.” And said petition contained also the following averments:

“And your petitioner further represents, that a certain number of evil-disposed persons, hereinafter named, for the purpose of breaking up and destroying said school district, and to avoid the payment of their share of the bonds so issued by said school district, presented to the board of education of the city of Emporia the following petition, to-wit, [*setting forth the petition in full—and then proceeding as follows:*] “And afterward, on the 7th of July 1873, the following action was had by said Board of Education as shown by the records of said board:

“On receipt of the petition from the majority of electors living on the following described territory, such territory was attached to the city of Emporia for school purposes, to-wit: the S.E. $\frac{1}{4}$ of section 9, the N. E. $\frac{1}{4}$ of section 16, (except 20 acres in northwest corner of said quarter-section belonging to Marsh and Crowell;) also, the N.E. $\frac{1}{4}$ and S.E. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$ of said section 16, all in township 19, range 11 east. And the clerk of the school board was instructed to notify the county clerk of such action.’

“Which action of said Board of Education of the city of Emporia your petitioner states was in violation of law, and contrary to equity and good conscience, and therefore absolutely void.” [*Then follows a statement of the appeal taken by E. B. to the county board, and the action thereon of said board,*

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after which is the following:] "The plaintiff avers that the portion of territory that the county commissioners attempted to detach from said school district was the most densely populated portion of said district, and contained more wealth than any other portion; that the total taxable personal property in the whole district for the year 1873 was \$50,726.40, of which the sum of \$47,401, by such division of said district, is taken from said district, and released from its proportion of the necessary taxes to pay off and discharge said bonded indebtedness; that by reason of said attempted detaching of said territory and property, school-district taxation for school purposes, has become burdensome, and the balance of the inhabitants residing in said school district have been compelled to dispense with school for a great portion of the year, and are compelled to raise a sinking fund toward the extinguishment of said school bonds, and it has had a tendency toward the breaking-up and destroying the entire school district. Wherefore, and in consideration of the premises, and the reasons hereinafter named, the plaintiff asks that the order of the board of county commissioners, and the order of the board of education made as hereinafter set forth, and all the acts and doings of said board of education and board of county commissioners in the premises be set aside, canceled, and rescinded, and declared to be absolutely null and void, and henceforth held for naught, for the following reasons, to-wit:

"1st, That School District No. 57, being a corporation, acting under and by virtue of the laws of the state of Kansas, the board of education or no other corporate body has the right to detach any portion of its territory.

"2d, The bonds voted and the indebtedness incurred by said school district became a lien on all the real property of said district.

"3d, No person or corporation can absolve themselves from their indebtedness by their own acts except by payment thereof.

"4th, No portion of the corporation can withdraw from the main body except by a majority of said body, or the judgment of a judicial tribunal.

"5th, No portion of a corporation can shift its obligations to another portion thereof without the consent of the whole body.

"6th, School District No. 57 was not made a party during any of the proceedings before either the board of education of the city of Emporia, or before the board of county commissioners.

"7th, Said board of education had not, nor had the county board of commissioners any jurisdiction of the persons residing

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on said territory attempted to be detached from said district who were not petitioners asking to be detached, nor jurisdiction over the property of said non-petitioners."

The defendants demurred to the petition, for that it did not state facts sufficient to constitute a cause of action. The district court, at the September Term 1874, sustained the demurrer, dismissed the petition, and gave judgment in favor of the defendants for costs. The *School District* appeals, and brings the case here on error.

F. E. Smith, for plaintiff, contended, that the school district not being made a party to the proceedings, the action of the board of education and county board, were void, and cited 5 Kas. 225; 7 Kas. 432; 11 Kas. 128; 8 Mich. 100; 12 Mich. 390. As no notice was given to the persons whose rights were to be affected, the proceedings of both said boards were void. 8 Kas. 138, 143; 1 Douglas, 390. The board of education of the city of Emporia has not any legal or constitutional power to reach beyond the corporate limits of the city and take territory of a duly-organized school district and attach such territory to the city for school purposes. Sec. 99 of ch. 100, laws of 1872, under which defendants claim the power to act, is clearly unconstitutional. But if a city board of education can exercise such powers in any case, it cannot be done without notice to the district. If such should be held to be the law, notice, and the writ of subpoena, and summons may as well be abolished; and the people left to such marauders as the board of education of the city of Emporia have shown themselves to be in this case.

E. W. Cunningham, for defendants, contended that the school board of the city of Emporia had a right to detach the territory mentioned in its order and attach it the city for school purposes, and to levy and collect taxes on property therein for the support of the schools of that city. (Sec. 99, ch. 100, Laws 1872.) That the legislature has undoubted power to pass such acts, see Cooley's Const. Lim. 192, 193. The only jurisdictional fact required by this section is, that application be made to the

board by a majority of the electors of territory sought to be attached; and such an application the petition shows the board had.

The opinion of the court was delivered by

BREWER, J.: Is § 99 of chap. 100 of the laws of 1872 constitutional? If so, and adjacent territory is sought to be attached to a city for school purposes, by the board of education, is notice to the school district to which the territory belonged, a condition of valid action? These are the only questions in this case.

The section empowers the board of education of a city of the second class to attach to it for school purposes adjacent territory upon the application of a majority of the electors of such territory. What provision of the constitution does this violate? Counsel refer us to none, and we fail to perceive any. He seems to rest his claim upon the proposition that the legislature cannot take A.'s property and give it to B. But we do not see how that proposition, correct as it may be, applies to this case. No man's, no corporation's property, is disturbed. The school district from which this territory was detached, does not own it. Neither does such territory become the property of the city when attached to it. The property remains the property of the same individuals after as before the change. All that is done is, to change the territory from one school district to another. Power to change school-district boundaries seems to be as full in the legislature, as the power to change county boundaries; and as to that, see the recently decided cases of *Division of Howard Co.*, 15 Kas. 194, and *Comm'rs of Sedgwick County v. Bunker*, ante, p. 498. The county superintendent is given power to create new school districts, or change the boundaries of old. No provision is made for notice. (Gen. Stat., p. 915, § 10.) Yet can there be any question of the validity of his acts in these matters? It may be that at times grievous wrong is done by the legislature in changing the boundaries of counties, or school districts, but that is a matter beyond the power of the courts to control. Application must

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be made to the tribunal that decreed or authorized the change. Neither can the courts annul the change because the burden of taxation is largely increased upon the undetached territory. Given, power in the legislature to do an act, and the wisdom of the act, as well as the hardships which may result therefrom, are solely for the consideration of that body.

Nor is it necessary that notice be given to the school district. It has no such vested rights as to prevent the change of its boundaries without notice and a hearing before some tribunal. In this case it appears that one of the electors upon this territory appealed to the county commissioners from the order of the board of education, and they in consultation with the county superintendent modified somewhat the order of the board of education. But still it does not appear that the school district participated in or had any notice of any of the orders or proceedings, nor was notice as we think necessary.

It is unnecessary to consider the ruling of the court upon the motion to strike out parts of the petition, for upon the whole petition we do not see any reason to hold the proceedings of the board of education void, or the section cited unconstitutional.

The judgment will be affirmed.

All the Justices concurring.

B. SNYDER, *et al.*, v. BOARD OF EDUCATION OF CITY OF PAOLA.

TREASURER OF BOARD OF EDUCATION; *Authority to Pay Moneys.* The treasurer of the board of education of a city is authorized to pay out money *only* upon a warrant duly signed, etc. When therefore, he and his bondsmen are sued by the board for failing to pay over money in his hands to his successor in office, it is no defense to the action, that the board was indebted to a third party on a contract for building a school house, that the treasurer had without the knowledge or authority of the board loaned money to such contractor, and tendered an unaccepted order from such contractor on the board for the amount of the loan. [*McCubbin v. City of Atchison*, 12-166.]

Error from Miami District Court.

ACTION by the *Board of Education of the City of Paola* against *Snyder* as principal, and nine others as sureties, to recover moneys alleged to belong to said *Board of Education*, and which came to *Snyder's* hands as treasurer of said board, and which he neglected and refused to pay over to his successor in office. The defense interposed, and the proceedings at the trial, are sufficiently stated in the opinion. Trial at the September Term 1878 of the district court, J. B. S., judge *pro tem.*, presiding. Verdict and judgment in favor of the plaintiff for \$3,519.32. *Snyder* and others bring the case here on error.

W. R. Wagstaff, and *W. B. Brayman*, for plaintiffs in error.

B. F. Simpson, for defendant in error.

The opinion of the court was delivered by

BREWER., J.: Two questions are presented by plaintiffs in error. First, an alleged error in the modification of an instruction; and second, that the verdict is contrary to the evidence. Of these in their order.

The action was against an ex-treasurer of the school district of Paola, and the sureties on his bond, for not paying over to

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his successor in office the funds claimed to be in his hands. Among other defenses the treasurer tendered an order drawn by one L. E. Post on the board of education and in his favor for \$2,040, and claimed that the board owed said Post at least that amount on a contract for building the school-house. Post had been the contractor for a large school-building just built for the plaintiff. Snyder, as treasurer, had loaned money of the school fund to some sub-contractors under Post, and had received this order from Post in payment of the loan. There was a conflict in the testimony as to whether this loan had been made by the treasurer on his own responsibility, or with the knowledge and approval of the board of education. The order was not accepted. Upon this, counsel asked the instruction, "If the jury find from the evidence that the plaintiff on the 7th of May 1873 owed L. E. Post the amount of said order, then it was the duty of the board to accept said order and credit his account for the amount." This was modified by the court by adding, "provided they should find said order was in payment of a loan made by authority of the board, or subsequently ratified by said board." Ought the court to have given the instruction as offered? and was there error in the modification? We think not. At least, we see nothing of which the plaintiffs in error can complain. That no action can be maintained upon an unaccepted order, is clear. *McCubbin v. City of Atchison*, 12 Kas. 166. True, it is sometimes treated as an equitable assignment of a claim for money due, and sustained upon that ground. But it is not the duty of the board of education, or the common council of a city, or the board of commissioners of a county, to permit their respective treasurers to pay out money on their own responsibility, and to whomsoever they see fit, and then accept in lieu of said money orders drawn on them by their respective creditors. The treasurer was at liberty to "pay moneys only upon a warrant signed by the president," etc. Laws 1872, p. 223, § 111. Whatever moneys he received it was his duty to hold until such a warrant was presented; and upon settlement he must return either the money or the warrant. Any other rule would be fraught

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with great danger. It would open the door to speculation on the part of treasurers, to unjust preferences of creditors, and consequent litigation. It would tend to prevent that orderly arrangement of the financial affairs which results in regular and not excessive taxation. The treasurer is not the financial agent of the board. He is simply the custodian of the funds. The board determines its own financial matters—settles what debts shall be contracted, and when paid—what taxes shall be levied, and which of matured obligations shall be first paid. It makes its own contracts, and settles with its contractors. To permit the mere custodian of its funds to interfere in these matters, would be to introduce inexplicable confusion. If he may advance to one creditor of the board, and compel the latter to accept an order for the debt in lieu of the money in his hands, he may to another, and so become himself the financial agent and manager of the board. How easy the way, and how strong the temptation to personal profit, if such a rule could be sustained! How many of the municipalities of this state find their obligations depreciated in value, and passing in the market for less than their face! Give the treasurers the power implied by this instruction, and how speedily would all the funds pass out of the treasurers' hands, not as the official boards might deem best, but as the friendships or the interest of the treasurers should dictate. But it is needless to pursue this line of thought further. The evils attendant upon such practices have been too often and too clearly explained to need argument or illustration here. The statute forbids the treasurer to pay out money except upon a duly-authenticated warrant, and neither law nor equity will help him to disobey the statute with impunity. The instruction as asked was not the law, and as modified contained no error of which the plaintiffs in error can complain.

The second matter of error claimed is, that the verdict is against the evidence. The point here is this: The treasurer served two terms. The bond sued on was given for his second term, commencing in May 1872. It is claimed that the misappropriation of funds was in December 1871, and therefore

not covered by this bond. Of course, if the misappropriation was in 1871, the sureties on this bond were not responsible. An examination of the testimony fails to leave in our minds a conviction as to when the misappropriation took place. The order is dated May 7th 1873. It refers to a note given by the sub-contractors, and purports to be on account of that note. The note, which is both a receipt and note, bears date December 1st 1871. But the note is for \$2,000, and calls for six per cent. interest. The order is for \$2,040. Snyder, the treasurer, testifies that the order was given for the note. Why did it not include all the interest? He says that the accrued interest was included in a settlement made in May 1872; but still there was a year's interest subsequent to that settlement. Again, in reference to the loan itself the testimony is not clear. It would seem that a loan of \$10,000 to H. M. Holden of Kansas City First National Bank, was made in December 1871, and tacitly authorized and approved by the board. Snyder testifies that a part of this \$10,000 supposed to have been loaned to Holden was really the loan to the sub-contractors, and that the note was given at the time the loan was made. But he never presented the note until the final settlement in May 1873, though he says some of the board knew of its existence prior thereto. Again, he testifies that he informed the school board of loaning Holden the \$10,000 about the time of making the loan, and that he made the loan December 10th 1871. This would make the note dated ten days before the loan. Again, it appears from his testimony that he had some private transactions with the sub-contractors, and that they owed him some money. Still again, the attention of the learned counsel does not seem to have been called to the time of this misappropriation until the filing of the motion for a new trial. At least, no reference is made to the matter in either the instructions given or those refused. The district court which heard the testimony overruled the motion for a new trial based upon this ground. Under these circumstances we are unwilling to hold that it is clear that the misappropriation which unquestionably was not disclosed to or known by the board until during the life of the

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bond sued on was actually made prior to its execution. The custody of the funds during both the year covered by this bond, and that immediately prior, was in one of the defendants, the treasurer. The board prove a defalcation made manifest toward the close of the last year. The settlement made at the close of the first year was satisfactory, and showed nothing wrong. While now the assertion of the treasurer, unsupported by other testimony, (for neither the contractors nor the sub-contractors are witnesses, and no other witness testified to any knowledge of the transaction,) is, that the misappropriation was during the first year, yet there are many circumstances tending to discredit this assertion, and we cannot say that those circumstances are not sufficient to warrant the verdict.

We are compelled therefore to order an affirmance of the judgment.

All the Justices concurring.

N. P. GREGG v. J. M. GEORGE & Co.

1. **PRESENTATION OF BANK CHECK; Demand and Refusal of Payment.** In presenting a check for payment to the bank upon which it is drawn, no particular form of expression is necessary to make a legal demand and refusal. It is sufficient if it clearly appears that the bank, after demand, declines to honor the check; and refusing to pass the check to the credit of the holder, is a dishonor of it.
2. **INSTRUCTIONS — When Inapplicable, not Error to Refuse.** It is not error to refuse instructions which, however correct as propositions of law, do not seem applicable to the facts in evidence, or likely to assist the jury in coming to a correct conclusion. [*Burton v. Shoemaker*, 7-17; *Tullman v. Jones*, 13-438; *Raper v. Blair*, 24-374; *R. R. Co. v. Hay*, 31-177.]
3. **DRAWER OF CHECK; Liability; Diligence of Drawee.** In order to charge the drawer of a check, the same strict rule of diligence in making demand and giving notice of nonpayment, does not obtain as in cases of

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ordinary bills of exchange. As a general rule, he is not discharged unless he suffers some loss in consequence of the delay of the holder.

Error from Miami District Court.

ACTION brought by *George & Co.* against *Gregg*, on a bank check which reads as follows:

PAOLA, KANSAS, Nov. 1st, 1869.

PAOLA BANK, A. THOMAS & Co., *Bankers*:

Pay J. M. George & Co. one hundred and twenty dollars,
(\$120.00.) N. P. GREGG & Co.

On said check was the following indorsement: "This is correct, and should be deducted from my account to date of suspension.—N. P. GREGG & Co." The answer admits the execution of check and indorsement; denies that the check was presented to the bank for payment; denies that payment thereof was refused by the bank; avers that on said Nov. 1st 1869, and for a long time thereafter, Gregg had on deposit with Paola Bank (A. Thomas & Co.,) and to his credit in said bank \$700, and had George in a reasonable time after the receipt of said check presented the same to said bank and demanded payment, the money would have been paid; denies that on Nov. 10th 1869, or at any time thereafter, that George notified Gregg of the suspension of said bank, or that the bank had refused payment of said check on presentation; and denies that George at any time thereafter ever demanded payment of said check from the said Gregg; and avers that said Paola Bank was open and doing a banking-business on the 1st, 2d, 3d and 4th days of November 1869, and that George accepted said check in payment of said \$120. The answer further avers, that a long time afterward, on December 1st 1869, George came to Gregg and told him that A. Thomas & Co., Bankers, Paola Bank, had failed, and he still held the \$120 check unpaid, and had never presented it to said bank for payment, and that George did not then claim the same from Gregg, but said that he desired to present his claim for said check against the assignee in bankruptcy of A. Thomas & Co. for allowance, and then and there requested Gregg to

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relinquish his claim in writing to said check, and in compliance with said request Gregg then wrote and signed the memorandum on said check. Trial at the September Term 1872 of the district court. Verdict and judgment in favor of plaintiffs for \$144.35, and *Gregg* brings the case here on error.

W. R. Wagstaff, and *O. A. Tousley*, for plaintiff in error.

B. F. Simpson, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: This was an action on a check. It was a check drawn by Gregg on November 1st, on A. Thomas & Co., bankers of Paola, and on the same day given to George & Co. On the 2d it was presented to the bank. It is not disputed by counsel that this was in due time. But it is claimed that no demand was made for money on the check, that the party simply sought to use it in buying exchange. We quote the plaintiff's testimony on cross-examination on this point, and there is no contradictory testimony:

"November 1st 1869, Gregg gave me that check at our store-room, near the door. Don't know time. At an early hour next day, I presented the check to Mr. Edwards in Paola bank, who then said to me they were not selling exchange, that day, on St. Louis. I did not demand exchange on any particular bank. I wanted exchange on St. Louis. I demanded no other exchange. Edwards slipped my order back, and said they were not selling exchange. I kept the check. I went into the bank with money and this check, and asked for exchange on St. Louis. I asked the bank to give me credit on account; it refused. *I took my money and check and left the bank; I did not ask the bank to give me money on that check; I did not want the money.* Never after presented the check."

On his direct examination plaintiff had testified in general terms, that he "presented the check for payment—the bank did not pay it—the bank refused to pay it." This seems to us clearly sufficient. Waiving all question as to the matter of exchange on St. Louis, it appears that he asked the bank to

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credit the check to his account, and it refused. This was a dishonor of the check. It was unnecessary after that to go through the form of specifically demanding its payment in cash over the counter. Demand and refusal may be necessary; but no particular form or expression is essential to either. It is sufficient if it clearly appears that the bank, after a demand, refuses to accept the check as of the value its face indicates.

The learned counsel for plaintiff in error criticise the instructions asked by the defendant and refused, as also the single instruction given at the instance of the plaintiff. The last sentence in the latter is in these words: "And the holder of a check is not required to present it to the bank to which it is directed for payment more than once, *when on the first presentation the bank has refused to pay the same.*" Counsel contend that "this carries upon its face to the jury the assumption by the court that George had once presented this check to the bank and demanded payment which was refused, and it was unnecessary to present it a second time." We fail to see any such assumption. The whole instruction is a statement of an abstract proposition of law. There is in terms no reference to the parties or facts in the case. And any assumption which it carries, grows out of the fact that, though an abstract proposition, it is applicable to the facts as they appeared in evidence.

Counsel insists that the court erred in refusing the first and second instructions asked by defendant. Those instructions refer to the relations of banker and customer, and the effect of drawing a check upon the money in the hands of the banker. It may be that they state the rules of law correctly, but we fail to see how they would have assisted the jury in this case, which is a controversy between the drawer and holder of the check. At any rate they are not so pertinent to the issue as to make the refusal to give them an error calling for a reversal.

An instruction was asked and refused, which stated the law in respect to the failure to give notice of the non-payment,

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and stated the law correctly as applied to ordinary bills of exchange. The law is not so rigid in respect to checks. The failure to make demand within a reasonable time, and to give notice of non-payment by the succeeding day, does not absolutely discharge the drawer. It is sometimes said that the drawer is the principal party, the one primarily liable on the check; perhaps this is not strictly correct; and yet, unless the drawer has suffered some loss by a failure to make demand and give notice, he is not ordinarily discharged from liability. In 8 Kent, p. 104, note "a," it is said, "The drawer of a check is not a surety, but a principal debtor, as much as the maker of a promissory note. It is an absolute appropriation of so much money in the hands of the banker to the holder of the check, and there it ought to remain until called for; and the drawer has no reason to complain of delay unless upon the immediate failure of his banker. By unreasonable delay in such a case, the holder takes the risk of the failure of person or bank on which the check is drawn. This is quite distinct from the strict rule of diligence applicable to a surety, in which light stands the endorser." Story on Prom. Notes, §§ 490-498, and notes; *Little v. Phoenix Bank*, 2 Hill, 425; *Lester v. Jones*, 8 Bush. (Ky.) 357; *Pack v. Thomas*, 13 Smedes & Mar. 11; *Kemblen v. Mills*, 1 Manning & Granger, 757; Byles on Bills, p. 14. We think the court did not err in refusing the instruction.

These are all the questions it seems necessary to notice, and in them appearing no error the judgment will be affirmed.

All the Justices concurring.

TORRETT ENTREKEN V. MORRIS HOWARD, *Adm'r*, &c.

1. **TAX-DEED** — *When Void on its Face.* A tax-deed showing upon its face that it is based upon a sale made to the county in 1862, for the taxes of 1861, and an assignment of the sale-certificate by the county clerk in December 1865, is void. [*Shoat v. Walker*, 6-65; *Sapp v. Morrill*, 8-677; *Hubbard v. Johnson*, 18-632.]
2. **ACTION TO QUIET TITLE; Under Sec. 594 of the Code; Petition.** A petition to quiet title, filed under § 569 of the code of 1862, the same as § 594 of the code of 1868, which alleges in general terms that the plaintiff is the owner and in peaceable possession of the land, describing it, and that defendant sets up and claims an estate and interest therein adverse to to the estate and interest of the plaintiff, but without disclosing the nature or source of that adverse estate, and praying that defendant be compelled to show his title, and that it be adjudged null and void as against the plaintiff, is sufficient to sustain a decree quieting title, as against any objections at least made in a collateral attack. [*Eaton v. Giles*, 5-24; *Douglass v. Nuzum*, 16-515; *Cartwright v. McFadden*, 24-662.]
3. ——— *Seal, Authenticating Affidavit.* As against a like attack, a decree is not invalidated by the mere omission of the clerk of the court in which the action was pending to attach the seal of the court to the affidavit for publication taken before him, and authenticated by his signature, when it appeared that such affidavit was, prior to the decree, presented to the court for its consideration, and by it approved.

Error from Miami District Court.

In July 1868, one Joel Abbott commenced an action against Horace B. Smith, to quiet his title to the S.E. $\frac{1}{4}$ of section 9, township 17, range 24 east, 160 acres of land in Miami county. The action was brought under § 569 of the code of 1859, (same as § 594, code of 1868.) Smith resided in Indiana. An affidavit for publication was made by S. S. C. before the clerk of the district court. Publication was made, and proof of such publication was duly made and filed. On the 9th of December 1868, said cause of "Abbott against Smith," was tried—the journal entry thereof being as follows:

(*Title.*) "And now comes the said Joel Abbott by his attorney W. R. Wagstaff, and the said Horace B. Smith still failing to plead, answer or demur to the said petition, and thereupon this cause came on for hearing on the petition and testimony offered in this cause; and the court having heard the evidence

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and arguments of counsel, and being fully advised in the premises does find that the defendant Horace B. Smith has been duly notified of the pendency and prayer of said petition by six weeks' publication in the *Miami County Advertiser*, a newspaper published at Paola, and of general circulation in said county of Miami in the state of Kansas, as required by law; and the court further finds that the said Joel Abbott has the legal title to, and is in the peaceable possession of, the premises described in said petition to-wit, the S.E. $\frac{1}{4}$ section 9, township 17, range 24 E. of sixth principal meridian in Kansas. It is therefore considered by the court that Joel Abbott, plaintiff, has the legal title to and possession of the premises in said plaintiff's petition described; and it is further considered and adjudged by the court, that the claim of the said Horace B. Smith to title in and to said described premises is null and void as against the title of the plaintiff."

In April 1869 said Abbott sold and conveyed said land to *Torbett Entreken*. In November 1870 said *Horace B. Smith* commenced an action of ejectment against said *Entreken*, to recover possession of said land, claiming that he (Smith) was seized in fee simple of said land, and was entitled to the immediate possession thereof. *Entreken* denied Smith's title, and set up title in himself. A second trial of such action was had at the December term 1871. *Smith*, to maintain the issue on his part, produced and gave in evidence a patent from the government to himself of said land dated October 1st 1858. *Entreken* offered, first, a tax-deed of said land, executed by the county clerk of Miami county, to Joel Abbott, dated December 5th 1868; second, the record of the proceedings and judgment in the action of "*Abbott v. Smith*," above mentioned; third, a warranty deed from said Abbott to *Entreken*, for said land, dated April 14th 1869. This evidence was all objected to by *Smith*, and all excluded by the court—the tax-deed, as being void on its face; the judgment in "*Abbott v. Smith*," as being *coram non judice*, and void, for want of legal and proper service upon *Smith*; and the warranty deed, because no title was shown in the grantor. *Entreken* duly excepted, and made a case for this court, subsequently to which said *Horace B. Smith* died. *Morris Howard* was appointed admin-

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istrator; and said action is now brought here by *Entreken*, and prosecuted against *Howard*, as administrator, and the heirs of said Smith, as defendants in error.

W. B. Wagstaff, and *R. W. Massey*, for plaintiff in error.

B. F. Simpson, and *W. B. Brayman*, for defendants in error.

The opinion of the court was delivered by

BREWER, J.: This was an action of ejectment. Defendant rested his title upon a tax-deed, and a decree quieting title. Both were held void. The ruling upon the tax-deed was unquestionably correct. It upon its face disclosed a sale made in 1862 for the taxes of 1861, to the county, and an assignment of the sale-certificate on the 19th of December 1865 by the county clerk, and was based upon that sale; and the assignment, and the deed based thereon, were both void. *Sapp v. Morrill*, 8 Kas. 677.

Two objections are made to the decree—one that the petition was not sufficient to sustain the decree, and the other that the records show no affidavit for publication, the only service pretended having been made by publication. The action was brought under § 569 of the code of 1862, (Comp. Laws, p. 224,) and the petition alleged in general terms that plaintiff was the owner and in peaceable possession of the land, describing it, and that defendant set up and claimed an estate and interest therein adverse to the estate and interest of the plaintiff, and prayed that he be compelled to show his title, and that it be adjudged null and void as against the plaintiff. We think as against any objection that can be raised in this collateral way the plaintiff's petition must be held sufficient. This was not an action outside of the statute, and based upon the old equity rules, in reference to which actions, and the allegations necessary to sustain them, see the case of *Douglass v. Nazum*, recently decided by this court, (*ante*, pp. 515, 521,) but is an action under the statute, and alleges all the matters named therein. It may be that the allegations are general, and partake something of

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the nature of mere statements of conclusions of law. But objections on such grounds must be raised in the action, and not out of it. They are not good when a judgment is sought to be collaterally attacked. Nor do we in this case mean to intimate that the objections to this petition would be sufficient for a reversal, even in a direct proceeding therefor. All that we decide is, that they are clearly unavailable for this collateral attack.

The other objection grows out of these facts: The affidavit for publication seems to have been sworn to before the clerk of the court in which the action was brought, and the same court in which the present action was pending. It is signed by the party making the affidavit. The jurat is in proper form, and attested by the signature of the clerk, but without the seal of the court. The defendant offered to prove the genuineness of the clerk's signature, and the fact that the party did take the affidavit as stated in the jurat, and also asked leave to have the clerk attach the seal to the jurat, but the court refused to admit the testimony, or grant the leave. Was the omission of the seal a fatal defect? We are disposed to think not. It must be remembered that this judgment was attacked collaterally. The question presented is not, whether there was such an error as to justify a reversal, but whether there was such an omission as to wholly invalidate the record. Of course, if it would not compel a reversal, *a fortiori* it would not destroy the judgment. And it seems to us matter of grave doubt whether on proceedings in error, when it was shown that the affidavit was made as attested by the clerk, whether this court would be justified under §140 of the code, which provides that, "The court in every stage of action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party, and *no judgment shall be reversed or affected by reason of such error or defect,*" in reversing the judgment. Would we not be compelled to consider that a mere clerical omission, which did not affect the substantial rights of the adverse party? It must be borne in mind that the omission is not the act of

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the party, but of the officer of the court in which the proceedings were had. And in the performance of his duties, the clerk is under the direction of the court. (Gen. Stat., p. 770, code, § 716.) So that the party having done all that the law required him to do, and having submitted to the court, a court of general jurisdiction, the evidence of what he had done, and that court having passed upon the evidence and found that the service by publication was in all respects legally made, and rendering judgment in his favor for the rights he claimed, is now told that everything is void because the officer of the court, acting under the direction of the court, failed to complete the authentication of an affidavit. Again, the purpose of the signature and seal is, authentication, evidence. Where the evidence comes from a stranger to the tribunal, and the authentication is by an officer in no way connected with the court, it may well be that the authentication should be complete, the evidence perfect. But where the affidavit is taken before the clerk, it is before an officer whose signature is judicially known to the judge, one who is in fact a part of the court. The authentication is not made stronger by the attachment of the seal, for that of which the courts take judicial knowledge is not made more certain by mere testimony. An affidavit before the clerk, to be used before the court, is very like swearing a witness by the clerk to be examined on a trial before the court. The clerk is simply the instrument by which the court has acted. As a matter of fact, we think the general practice throughout the state has been for clerks authenticating affidavits for use in their own courts to omit the seal, and simply attest with their signatures. Now if all these affidavits, and the judgments and rights founded on them, are absolutely void, or if depending for their validity upon the discretion of the judge before whom for the time the question may be pending, we fear the uncertainty of judicial titles would be greatly enhanced. Counsel do not seem to question the power of the court to allow amendments, but contend that under the rules laid down in *Foreman v. Carter*, 9 Kas. 674, an amendment was properly refused. In that case indeed, one of the defects sought

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to be amended was the same as that existing here. The other defect was one caused by the party himself, and involved really the principal question. We however drew no distinction between them in the opinion, and spoke of the rights of amendment generally, with reference to such defects. It may be that this case comes within the principles there suggested as forbidding amendments—though that we do not so decide—and if an amendment was necessary to give validity to the record it may be that the ruling of the court below was correct. But after a careful consideration of the case, without however finding much of authority directly in point, we are constrained to hold that, as against any collateral attack, a judgment is not invalidated by the mere omission of the clerk of the court in which the action was pending to attach the seal to an affidavit taken before him, and authenticated by his signature, when it appears that such affidavit has been presented to the court for its consideration, and by it approved. The case apparently nearest in point, cited by counsel, is that of *Tunis v. Withrow*, 10 Iowa, 305, in which an affidavit taken before a notary public, and unattested by his official seal, was held insufficient to sustain a service based upon it. But there is this vital difference: the party there taking the affidavit was not an officer of the court, but a stranger to the tribunal.

The judgment will be reversed, and the case remanded with instructions to grant a new trial.

All the Justices concurring.

R. R. McCANDLISS V. CHARLES E. KELSEY.

1. FINDINGS—*Limited to Issues.* While when a case is tried by court without a jury, and special findings are demanded, it is generally the duty of the court to find upon all the issuable facts, yet this rule does not require it to make a finding upon any matter, though alleged in the petition and denied in the answer, which is foreign to the controversy between the parties, anything which upon motion would have been stricken out as irrelevant and redundant.
2. ERROR, *Without Prejudice.* An omission to find upon all the issuable facts, will not always be an error compelling a reversal. If the facts found, and by the evidence rightfully found, compel the judgment that is rendered, whatever may be the truth concerning the matters not passed upon by the court in its findings, and whichever way they might be found, then the omission, if error, is without prejudice.

Error from Lyon District Court.

ACTION by *McCandliss* to compel *Kelsey* to "specifically carry out and perform his part of a certain agreement made and entered into by and between said plaintiff and said defendant, in this, that said defendant grant by proper instrument to plaintiff, his heirs and assigns forever, the free use and enjoyment of the right-of-way in, to, over, and about the landing-place, stairway, and entrance in defendant's building situate on part of lot 175, on Commercial street, in the city of Emporia; and that pending this action, said defendant, and all persons claiming by, through, or under him, be enjoined from in anywise interfering, hindering or preventing plaintiff from the free use and enjoyment of the right-of-way in, to, over, and about said landing-place, stairway, and entrance in defendant's said building," etc. The material portions of plaintiff's petition are quoted in the opinion, *infra*. Answer, general denial. Trial at the September Term 1874. Finding and judgment for defendant, and *McCandliss* brings the case here on error.

Ruggles & Sterry, for plaintiff.

Gillett & Forde, for defendant.

The opinion of the court was delivered by

BREWER, J.: Counsel for plaintiff in error present two questions for the consideration of this court. They insist that the district court erred in that it did not find specifically upon all the issues presented by the pleadings, and that therefore they are entitled to a reversal; and second, that one finding which was made, and which was of vital importance, was not direct, definite and positive. Of these in their order.

The case was tried by the court without a jury, and special findings were demanded. In such a case, is it the duty of the court to find specifically upon all the matters put in issue by the allegations in the petition and denials in the answer? and will a failure to discharge this duty compel in all cases a reversal? It may be stated as a general proposition, that it is the duty of the court to find upon all the issues in the case. But because a matter is stated in the petition, and denied in the answer, it does not necessarily follow that this allegation and denial present one of the issues in the case. It may be a matter wholly foreign to the case, something which the court would be compelled upon motion to strike out as impertinent or irrelevant. And because the defendant has not seen fit by motion to shape his adversary's pleading into technical accuracy, it does not follow that a larger burden is cast upon the court in the weighing of testimony and the finding of facts. It is enough, if the court has found upon all the facts put in issue by the pleadings, material to the controversy. Again, there may be some pivotal fact upon which the case turns. If the court finds upon that, ignoring all else, while it may be, strictly, an omission, an error, on the part of the court, yet it may also be an error without prejudice. If for instance, to a petition setting forth in different counts various causes of action, as, on a note, for goods sold and delivered, money had and received, work and labor done, etc., an answer is filed containing a general denial, and a plea of payment, and on the trial the court should find generally that all the claims of plaintiff upon the defendant had been fully paid

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and discharged before the commencement of the action, and this finding should appear to be supported by the evidence, how would the plaintiff be prejudiced by the court's failing to find specifically as to the several causes of action alleged in the petition and denied in the answer? What matter whether each count stated a cause of action which in fact did once exist, if before suit all had been paid? Or again, suppose a plaintiff sues as administrator, alleging the death of the decedent and his own appointment as administrator, and then alleges several causes of action in favor of the estate, and this petition is met by a verified denial; and upon the trial the court should find that plaintiff was not the administrator of the decedent, and that no letters of administration or other authority had ever been issued to him by any court: how would he be prejudiced by a failure to find as to the existence of the various causes of action in favor of the estate? These are illustrations, but they serve to show that, not every omission of the court to find specifically upon all the matters stated in one pleading and denied in the other, or even upon all the strictly issuable facts, is sufficient for reversal. Indeed, it would seem that before a reversal should be ordered, it should appear not merely that the court had failed to find upon all the issuable facts, but that a finding one way or the other as to some of those not found would have compelled a judgment different from that entered upon those found. If the facts found, and by the evidence rightfully found, compel the judgment that is rendered, no matter what may be the truth concerning the issues not passed upon by the court in its findings, and whichever way they might be found, then it would be but an idle and useless ceremony to remand the case for findings which when found would only result in the same judgment. Nor does this infringe upon the rights of either party. It is doubtless true, as counsel claim, that a party has his theory as to the legal effect of the facts in the case, and so shapes his pleadings accordingly; and the district court may have a very different judgment as to such legal effect, and may make its findings accordingly. But still the party is not with-

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out redress. He can bring the pleadings and the findings here, and if it should appear that any of the facts alleged and not found, and in support of which there was any testimony, would, if true, have changed the result, and compelled a different judgment, it would be the duty of this court to remand the case for a new trial. While we are compelled to hold that not every omission of the district court to find specifically upon all the issuable facts will compel a reversal, we think the better practice is, for the district court to so find. And such our observation shows us to be the general custom. And for this reason, if all the facts are found, and this court holds that the judgment is erroneous, it may often dispose of the case by a final judgment, while if the facts are only partially found, it will be compelled to remand the case for a new trial. In this case, (and this leads us to the second question,) we think the finding complained of is sufficiently direct, definite and positive, and is also pivotal and decisive. That finding is as follows:

“That said defendant never at any time agreed to give said plaintiff a continued, free, and unrestricted use of said entrance, stairway, and landing in his said building, or any other right or interest that he could not ignore at any time.”

The petition states substantially as follows:

“In March 1871, McCandliss, plaintiff, purchased of one Eskridge, who was the owner thereof, a part of lot 175 on Commercial street, in the city of Emporia. After the purchase, contemplating the erection of a permanent brick building on that portion of the lot he had purchased, he made an arrangement with Eskridge (who was the owner of the balance of the lot adjoining plaintiff's on the north) to the effect that he might build the north wall of his contemplated building upon the line between them so that 6½ inches of the wall would rest upon the plaintiff's land, and 6½ inches upon the land owned by E. The plaintiff immediately commenced the erection of a permanent brick building, 70 feet in length, 22 feet in width, and two stories high, with the north wall resting partially upon his land and partially upon the land belonging to E., in accordance with the arrangement made with E. About the 22d of July 1871, plaintiff had completed the walls of said building, but no part of the second story of the build-

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ing was completed except the walls. The north wall had cost plaintiff the sum of \$530, and was reasonably worth that amount. At that time Kelsey, defendant, with full knowledge of the arrangement between plaintiff and E., purchased of E. the remainder of lot 175 adjoining the plaintiff on the north, including that portion of it on which the north-half of plaintiff's north wall rested. Defendant immediately commenced the erection of a permanent brick building upon that portion of said lot which he had purchased of E., which building adjoined on the north the building of plaintiff. Plaintiff and defendant then entered into a parol agreement, whereby defendant was to make an entrance, doorway, and stairway in the front of his building next to and adjoining the north wall of plaintiff's building, and was to make a landing-place at the head of the stairway, opposite to a doorway to be cut by plaintiff through his north wall; and when the buildings were completed, the plaintiff, his heirs and assigns, should forever have, use and enjoy the free use of a right of way in, to, over and about the landing-place, stairway, doorway and entrance so to be made by defendant in his building; and in consideration of this agreement on the part of defendant, plaintiff was to make the defendant a good and sufficient deed for the north-half of plaintiff's north wall, and the defendant was to use said partition-wall as the south wall of his (defendant's) building. And it was further agreed that plaintiff should cut a doorway in his north wall opposite to the landing-place at the head of the stairway to be made in defendant's building, and that plaintiff should arrange the second story of his said building with reference to obtaining ingress and egress thereto and therefrom by means of the landing-place, stairway and doorway in defendant's building. Plaintiff further alleges, that he, relying on this parol agreement, with a full knowledge on the part of defendant that he was relying on it, at great expense cut a doorway through his north wall opposite to the landing-place at the head of the stairway in defendant's building, and also at great expense arranged the second story of his building with direct reference to obtaining ingress and egress thereto and therefrom by means of the doorway, stairway and landing-place in defendant's building; that about the 11th of August, the plaintiff, for the purpose of carrying out his part of the parol agreement with defendant, made defendant a good and sufficient deed for the north-half of his said north wall; that while the consideration mentioned in this deed was the sum of one dollar, yet that in truth and in fact there

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was no money consideration for it, but that the only consideration therefor was the agreement made by the defendant to the plaintiff as to his (the plaintiff's) free use of the stairway, etc., in defendant's building; that both buildings have been completed, and are permanent structures, built of brick, stone, iron, and wood, and that the north wall of plaintiff's building is the south wall of defendant's building; that the defendant has failed to perform his part of the contract, except, only, that he built in his building the doorway, stairway and landing-place that he agreed to; that the plaintiff, relying upon the promises of the defendant, upon the completion of his building moved with his family into the second story of his building, and has used and occupied the same ever since as his residence; that for the purpose of ingress and egress to and from his second story, it is necessary to use the stairway, etc., in defendant's building; that plaintiff has faithfully carried out his part of the parol agreement entered into between him and defendant, but defendant, for a long time prior to the commencement of this action, has, in direct violation of his said agreement, forbidden and refused to allow plaintiff or his family to use said landing-place, stairway, and doorway in his building; that the reasonable worth and value of half the plaintiff's north wall, that was deeded to defendant by plaintiff, was the sum of \$580; that the expense of cutting a doorway through his north wall was the sum of \$25; that plaintiff will be damaged if not permitted to use the stairway, etc., in defendant's building according to agreement, in at least the sum of \$500; that unless the defendant be restrained from interfering with the plaintiff's free use of the stairway, etc., plaintiff will be without remedy. Wherefore," etc., closing the petition with a prayer for appropriate relief.

Now can there be any question but that this finding negatives the existence of any such parol agreement as is alleged in the petition, and in so negating it completely disposes of plaintiff's claim for relief? If defendant not only never agreed to give plaintiff the continued, free, and unrestricted use of said stairway, but also never agreed to give him any other right or interest that he could not ignore at any time, he has certainly done no legal wrong to the plaintiff in preventing the further use of the stairway; and the courts cannot interfere to adjust and enforce the obligations of mere neighborly courtesy and kindness. If we turn to the testimony, we find that there

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was enough to sustain the finding, and such also as to justify the form in which it was made. The defendant testified, that while the work was progressing a written agreement was presented to him for his signature, which would give the plaintiff the rights he now claims; that he refused to sign it, and told the plaintiff that he would not sign anything that would interfere with his rights to sell, and would not give him any rights whatever in his building. At another time he said he had no objections to plaintiff's using the stairs so long as their respective families occupied the second stories, and could agree, but he would not give him any rights that he could not ignore, and that he did not believe any house or any stairway was ever built big enough for two families, but he had no objections to the plaintiff's trying to see how it would work. Evidently the court found in accord with this testimony. That finding is conclusive upon us, and we think decisive of the case adversely to the plaintiff.

There being no other matter presented for our consideration, the judgment will be affirmed.

All the Justices concurring.

ROBERT O. RIZER, *Adm'r, &c.*, v. J. H. GILLPATRICK, *Adm'r, &c.*

1. PARTIES; *Administrators; Refusal to Join as Plaintiff.* When an estate has a right of action, and one of the administrators refuses to join as plaintiff in bringing the suit, the other may, under §37 of the code, bring the action, making his co-administrator a defendant, and giving in the petition the reason therefor.
2. ABATEMENT; *Subsequent Action.* A personal action will not be abated on motion of the defendant, because of a subsequent suit, although between the same parties, and upon the same cause of action. *A fortiori*, it will not when the parties and cause of action are both different.

Error from Davis District Court.

ALL the necessary facts in the case are stated in the opinion. *Gillpatrick*, plaintiff, had judgment at the May Term 1875, and *Rizer* brings the case here on error.

McClure & Humphrey, for plaintiff in error.

J. H. Gillpatrick, and *J. W. Taylor*, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: The facts of this case are briefly as follows: Gillpatrick and Rizer were the administrators of the estate of Samuel S. Caswell deceased, appointed in 1871. Rizer, into whose hands the funds of the estate seem to have passed, deposited them with the banking firm of James Streeter & Co., of which firm he was a member. When the three years for closing estates had passed, Gillpatrick desired to make a final settlement, draw out the funds from the bank, and pay them over to the heir. Rizer was unwilling. After some delay, Gillpatrick, as one of the administrators, brings this action against Streeter & Co. to recover from them the amount deposited, and makes his co-administrator a party defendant, alleging that he refused to join in any settlement of the estate, and to join in bringing this or any action to recover the funds.

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Demurrers by Streeter & Co., and by the co-administrator, to the petition were overruled, and this is the first question presented. Subsequently the sole heir of the deceased brought an action against the two administrators and the surety on their official bond, alleging a final settlement had, since the commencement of the suit by Gillpatrick, a balance due on said settlement, and praying judgment for such balance. Upon this defendants herein filed a motion setting up said proceedings, and asking a dismissal of this action. This motion was also overruled, and this is the only other question presented. The case then proceeded to judgment in favor of Gillpatrick. The judgment however directed that the amount found due from Streeter & Co. be paid to the clerk of the court, to be applied under its order to the satisfaction of the demand of the heir for the balance due from the estate.

Was there any error in these rulings? We think not. The learned counsel for plaintiff in error contend, that one administrator cannot sue his co-administrator, nor sue alone for a debt due the estate; that under the executors-and-administrators act, if one administrator neglects his duty, he can be removed by the probate court, and the remaining administrator can then proceed to close up the estate alone, and that this remedy is to the exclusion of any other. It is undoubtedly true, as a general proposition, that one administrator, there being more than one, cannot sue alone for a debt due the estate. There is a unity of interest which requires that all should join as plaintiffs. The debt is due to the estate, and neither partially nor wholly to either administrator. The estate, is the party in interest, and the legal representatives of that party must be the nominal plaintiffs. This is true in all cases where there is a unity of interest in several parties. The code so provides, (Gen. Stat. 686, § 87:) "Of the parties to the action, those who are united in interest must be joined as plaintiffs, or defendants." But it also provides for a contingency like the present, in which one of those united in interest refuses to join as plaintiff. The latter part of the same section reads, "But if the consent of one who should

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have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason being stated in the petition." Language could not be more apt for a case like the present. The time for closing an estate having arrived, one of the administrators desires to collect from the bank the money of the estate there deposited, make a final settlement, and pay over to the heir the balance found due. The bank refuses to pay, and the other administrator refuses to join in a suit to compel payment. It is exactly the condition named in the statute. This was allowable under the old practice in equitable actions. Now there is but one form of actions, and the language of the statute is general, applying to all actions. In Pomeroy on Remedies and Remedial Rights, a late work, and one which is the most philosophical treatise on the code yet published, and one of the few text-books among the many flooding the press and the profession to-day having permanent value, and destined to rank among the legal classics, on page 309, § 261, the author says: "It is not indispensable, however, that all the executors or administrators should be plaintiffs; for it is enough, in equity, if all the parties are before the court, so that one executor or administrator may sue as plaintiff, if he make his co-executor or co-administrator a defendant"—citing *Wilkins v. Fry*, 1 Meriv. 244, 262; *Blount v. Burrow*, 3 Bro. C. C. 90; *Dare v. Allen*, 1 Green Ch. 288. And again, on page 288, § 195, he adds, after quoting § 87, code of Kansas, and the like provision from other states: "Referring to these provisions, it is plain that their language is general, inclusive, without exception, and applying alike to all kinds and classes of actions." And further, "No exception being made, nor even suggested, the courts cannot, unless by an act of positive legislation, by an act of direct usurpation, create an exception, and say that these general terms were intended to apply to equitable suits alone, while legal actions were intended to be left outside of their scope and effect." See also *Decker v. Miller*, 2 Paige, 150; *Smith v. Lawrence*, 11 Paige, 206; *M'Gregor v. M'Gregor*, 85 N. Y. 218. It is true, that Rizer had an equal right with Gillpatrick, pending the administration, to the pos-

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session and control of the funds, and under ordinary circumstances neither could maintain an action to recover these funds from the other. But here, the duty of closing the estate, and paying over the balance to the heir, existed. Rizer refused to discharge this duty. One step of the duty was the collection from the bank of the funds there deposited. The bank owed the estate so much. Both administrators should have united in collecting this debt. Rizer's refusal justified Gillpatrick in proceeding alone. That any remedy the one administrator might have by proceedings in the probate court does not exclude the jurisdiction of the district court in this case, seems clear. *Shoemaker v. Brown*, 10 Kas. 383.

Nor do we see upon what principle it can be held that this action is abated by the subsequent suit of the heir upon the bond. Payment to the heir might prevent a judgment for anything but the costs accrued prior to the payment. It happens in this case, that one of the bankers is surety on the administrator's bond, and therefore defendant in both suits. But that accidental fact cannot change the rule of law applicable to all cases of this kind. And to guard against any possible danger of the surety's being compelled to pay twice, through any misappropriation by the administrator, the court has provided in the judgment in this action that the money be paid to the clerk, to be applied under its own order in satisfaction of the claim of the heir. *M'Gregor v. M'Gregor*, 85 N. Y. 218. There is between the two cases no identity of parties, or in the cause of action; and if there were, the second would abate rather than the first. "The pendency of an action will make a second action, for the same cause, and in which the same judgment can be rendered, abatable; but not *vice versa*." *Buffin v. Tilton*, 17 Pick. 510; *Webster v. Randall*, 19 Pick. 18. A subsequent suit may be abated by an allegation of the pendency of a prior suit, but the converse of the proposition is, in personal actions, never true. *Renner v. Marshall*, 1 Wheat. 215; Bacon's Abr., Tit. *Abatement* M.

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Upon the whole case we see no error, and the judgment will be affirmed.

All the Justices concurring.

KANSAS PACIFIC RLY. CO. v. LYDIA H. CUTTER, *Adm'r, &c.*

- 1. FOREIGN ADMINISTRATOR—*May Sue in this State.* An administrator appointed in another state or territory can maintain an action in this state under § 422 of the code of civil procedure. [*McCarthy v. R. R.*, 18-51; *Cady v. Bard*, 21-667; *Administrator v. Lehr*, 20-509; *Denny v. Faulkner*, 22-89; *Ravenscraft v. Pratt*, 22-25; *Dunlap v. McFarland*, 25-488; *Limekiller v. R. R.*, 33-83.]
2. LAWS OF FOREIGN STATE; *Presumption; Marriage of Administratrix.* Where the petition alleges the appointment, in the territory of Colorado, of the plaintiff as administratrix, and her subsequent marriage, and does not show what effect by the laws of Colorado such marriage has upon her authority as administratrix, it will be presumed, upon demurrer, in accordance with the laws of this state, that it has no effect thereon. [*Geing v. Orns*, 8-85; *French v. Pease*, 10-54; *Furrow v. Chapin*, 13-113.]

Error from Riley District Court.

ACTION by Mrs. Cutter as administratrix, to recover damages sustained by the next of kin of one Joseph Stewart, deceased. The petition alleged the death of said Stewart by the wrongful acts, negligence and mismanagement of the *Railway Company* while he was a passenger in the cars of said company between Manhattan and Ogden, in Riley county, in this state, in August 1872. It named the heirs and next of kin of said Stewart, and alleged that in September 1872, "letters of administration upon the estate of the said Joseph Stewart were duly issued by the probate court of Arrapahoe county, Territory of Colorado, to *Lydia H. Harvey*, who since the issuance of said letters of administration, has intermarried with Benjamin P. Cutter, by which the said *Lydia H. Harvey*, (now *Lydia H. Cutter*,) was appointed administratrix of all the goods and credits belonging to the said Joseph Stewart at the time of his

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death, and that she thereupon qualified and entered upon the duties of said administration." The *Railway Company* demurred, assigning the following grounds: "1st, The plaintiff has no capacity to sue, not having been appointed administratrix of the estate of Joseph Stewart within the state of Kansas; 2d, There is a defect of parties plaintiff, inasmuch as Benjamin P. Cutter, husband of the plaintiff in the petition mentioned, is not joined as plaintiff in the action; 3d, The petition does not state facts sufficient to constitute a cause of action." The district court, at the September Term 1874, overruled the demurrer, and the *Railway Company* brings the case here on error.

J. P. Usher, for plaintiff in error.

Green & Hessin, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: The first question in this case is, whether a foreign administrator can maintain an action under § 422 of the code of civil procedure. We think he can. The section provides that, "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury, for the same act or omission." Now the language is general, purports to give the cause of action in every such case happening within this state, whether the deceased be a resident or nonresident, whether death ensues here, or elsewhere. All that it nominates as the condition of a right of recovery is, the wrongful act, and the resulting death. Nor do the proceeds of the recovery become assets in the hand of the administrator for the payment of the debts of the intestate. They are appropriated by the same section which gives the right of action, to the "exclusive benefit of the widow and children, if any, or next of kin," and the recovery of a foreign administrator does not at all conflict with those provisions of our law which attempt to secure the

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appropriation of the property of the decedent within this state to the payment of his debts due here, in preference to those due elsewhere. It, so to speak, creates a fund for the exclusive use of certain relatives of the deceased, and names the personal representatives as the trustees of that fund, and authorizes suit in their names. Any one else might have been named as the proper party plaintiff. Authority might have been given to the widow, and for the benefit of herself and children. This question has been before the supreme court of Indiana in the case of *J. M. & I. Rld. Co. v. Hendricks*, 41 Ind. 49, and the right of action sustained. This is the only authority counsel have cited that is apparently exactly in point, and to that we refer for a fuller discussion of the question. There is a slight difference between the section of the Indiana statute and ours concerning the right of foreign administrators to sue, but we do not think it affects the question materially. See also, *Hartford Rld. Co. v. Andrews*, 36 Conn. 218.

The second objection to the petition is, that it appears that since the granting of letters of administration to the plaintiff she has intermarried with one B. P. Cutter. Letters of administration were issued in Colorado. It is not alleged what, by the law of Colorado, is the effect of such marriage upon the letters of administration. Counsel contends that, in the absence of any allegation, the common law must be presumed to be in force there, and that by that the husband upon marriage became a joint administrator and should have been united with her as party plaintiff. We do not understand that we are bound to presume, as counsel contends. The petition shows an appointment which gives an authority to sue. It does not allege any revocation of that authority by the power that granted it. It alleges a fact which by our present law would have no effect upon the authority, (though as to the law prior to 1868, see Comp. Laws, page 516, § 29.) And if we are to rest upon presumptions, we should presume that the laws of Colorado in this respect are like our own, and hence, that the authority granted still continued, and remained solely

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in the plaintiff, notwithstanding her marriage. *Furrow v. Chapin*, 18 Kas. 118; *French v. Pease*, 10 Kas. 54.

There being no other question in the case, the judgment will be affirmed.

All the Justices concurring.

M. C. GILL v. S. KAUFMAN & Co.

1. PURCHASES BY SAMPLE; *Right of Purchaser*. A purchaser by sample has the right, independent of any express agreement, to refuse to receive the goods offered if they fail to correspond with the sample. [*Ante*, 37.]
2. ——— Hence, when liquors are sold by a wholesale liquor-dealer in Ohio, through his agent, to a party in Kansas, the fact that such right is by express agreement reserved to the purchaser, does not change what otherwise was an Ohio into a Kansas contract. [*Dolson v. Hope*, 7-161; see cases cited 17-446; *Feineman v. Sachs*, 33-621.]

Error from Cherokee District Court.

ACTION on a note given by *Gill to Kaufman & Co.* Answer, "that said note was given for intoxicating liquors sold within the state of Kansas, in violation of the dramshop act, (ch. 35 of Gen. Stat. of 1868,) and hence said note is void." Trial at the January Term 1875, and judgment in favor of plaintiffs for \$133.50, and *Gill* brings the case here on error."

Hallowell & Anderson, for plaintiff in error, contended that the contract of sale was a Kansas contract. So long as the vendee continues to have the right, either to object to the quantum or quality of the goods, there is no executed sale or contract. 1 Chitty on Contr. 392; Story on Contr. 376; 10 Bing. 376; 3 B. & A. 321; 20 Geo. 574; 23 Iowa, 194. And being a Kansas contract, it was illegal and void, as Kaufman & Co. had no license to sell in this state.

W. H. Whiteman, for defendants in error, contended that there was nothing in this case to take it out of the rule laid down by this court in *Haug v. Gillett*, 14 Kas. 140, and that the defense interposed was not good.

The opinion of the court was delivered by

BREWER, J.: This was an action on a note. The defense was, that the note was given for liquors sold in this state without license. Kaufman & Co. were wholesale liquor-merchants in Cincinnati, Ohio. The evidence shows that the goods were sold by sample, through the agent of defendants in error, and a portion of the samples left with Gill to compare when the liquors arrived. Also, that Gill was to pay freight, and if liquors did not come up to standard that defendants in error were to refund freight money and take liquors away. Did these facts change the place of the contract, which otherwise was clearly an Ohio contract? We think not. The express agreement was no more than the one the law would imply, if nothing had been said. A purchaser by sample always has the right to refuse to receive the goods if they fail to correspond with the sample. This question has already been before us, and so decided. *McCarty v. Gordon*, ante, p. 35. See also, *Boothby v. Plaisted*, 51 New Hamp. 436.

The judgment will be affirmed.

All the Justices concurring.

KANSAS PACIFIC RLY. CO. V. JEROME MOWER.

1. **STOCK KILLED BY RAILROADS; Act of 1874 is Valid.** Chapter 94 of the Laws of 1874, relating to the killing or wounding of stock by railroads, is constitutional and valid. [*R. R. v. Taylor*, 17-587; *Hopkins v. R. R.*, 18-462; *R. R. v. Miller*, 18-212; *R. R. v. Harper*, 19-529; *R. R. v. Yates*, 21-613; *R. R. Hegwir*, 21-622; *Hadley v. R. R.*, 22-359; *R. R. v. Butman*, 22-689; *R. R. v. Ewing*, 23-273; *R. R. v. Byron*, 24-350; *R. R. v. McReynolds*, 24-368; *R. R. v. Landis*, 24-406; *R. R. v. McHenry*, 24-501; *R. R. v. Wiggins*, 24-588; *R. R. Co. v. Weichselbaum*, 24-619; *R. R. v. Leggett*, 27-323; *R. R. v. Cash*, 27-587; *R. R. v. Dyche*, 28-200; *R. R. v. Harris*, 28-206; *R. R. v. Dudgeon*, 28-283; *R. R. v. Griffs*, 28-539; *R. R. v. Wilson*, 28-637; *R. R. v. Hays*, 29-193; *R. R. v. Abney*, 30-41; *Gooding v. R. R.*, 32-150; *R. R. v. Shaft*, 33-521; *R. R. v. Bradshaw*, 33-533; *R. R. v. Roads*, 33-640; *Prickett v. R. R.*, 33-748.]
2. **POLICE POWER OF STATE; Fencing Railroad Tracks; Legislative Exercise of Power.** Under the general police power of the state, the legislature has the power to require railroads to fence their tracks, and to make them liable for the value of all stock killed by their trains in consequence of a failure to so fence.
3. ——— The police power of a state, properly exercised, aims to regulate the intercourse of citizen with citizen, to prescribe the manner of using one's property, and pursuing one's occupation, so as not to trespass on the property or rights of others. Police is, in general, a system of precaution, either for the prevention of crimes, or of calamities.
4. **RAILROAD CHARTERS; Claim of Vested Rights.** A charter granted to a railroad corporation by the territorial legislature does not confer nor secure rights beyond the reach of the police power of the state. The chartered rights of the corporation are not more sacred than the individual's rights of person and property, and all must give way to any legitimate exercise of the police power of the state.
5. **ATTORNEY'S FEES; Actions for Killing Stock.** Section 2 of said chapter 94 of the laws of 1874, giving a "reasonable attorney-fee" to the plaintiff, in case of a recovery, for the prosecution of his suit against a railroad corporation for the value of stock killed or injured, is constitutional. Such provision may seem harsh or rigorous; but it is in the nature of a penalty, and is not beyond the power of the legislature. [*R. R. v. Shirley*, 20-660; *R. R. v. Miller*, 18-212; *R. R. v. Byron*, 24-350; *R. R. v. Weichselbaum*, 24-619; *R. R. v. Armstrong*, 25-581; *R. R. v. Piper*, 26-58; *R. R. v. Abney*, 30-41.]

Error from Shawnee District Court.

ACTION by *Mower* to recover from the *K. P. Railway Company* the value of a steer and a heifer killed by defendant's cars. The action was tried by the court, without a jury, at the

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December Term 1874. The facts were agreed to by the parties, as follows: "In May 1874, a locomotive drawing a train of defendant's cars, and run by the employes of said company, struck and killed a steer and heifer mentioned in plaintiff's petition, near Silver Lake station, said animals then being the property of *Mower*. The railroad was not fenced at the place where said animals were killed. The defendant is not chargeable with negligence other than such as the law implies from the facts herein stated. More than thirty days before the commencement of this suit, plaintiff demanded of the ticket agent of defendant at said Silver Lake station, that the defendant pay him the full value of said animals, to-wit, \$45. The value of said animals at the time of the killing was \$39, and a reasonable attorney-fee for the prosecution of said action for plaintiff is \$25." From these facts, the court, as conclusions of law, found that the plaintiff was entitled to recover from the defendant the sum of \$39 damages and \$25 attorney-fee, in all \$64, and costs, and rendered judgment accordingly. The *Railway Co.* brings the case here on error.

E. W. Dennis, and *Charles B. Smith*, for plaintiff in error.

N. C. McFarland, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: In this case the constitutionality of the following act is challenged, and this is the only question presented for our consideration:

CH. 94, LAWS OF 1874.—An act relating to killing or wounding stock by railroads.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Every railway company or corporation in this state, and every assignee or lessee of such company or corporation, shall be liable to pay the owner the full value of each and every animal killed, and all damages to each and every animal wounded, by the engine or cars on such railway, or in any other manner whatever in operating such railway, irrespective of the fact as to whether such killing or wounding was caused by the negligence of such railway company or corporation, or the assignee or lessee thereof, or not.

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SEC. 2. In case such railway company or corporation, or the assignee or lessee thereof, shall fail for thirty days after demand made therefor by the owner of such animal, or his agent or attorney, to pay such owner, or his agent or attorney, the full value of such animal if killed, or damages thereto if wounded, such owner may sue and recover from such railway company or corporation, or the assignee or lessee thereof, the full value of such animal, or damages thereto, together with a reasonable attorney-fee for the prosecution of the suit, and all costs in any court of competent jurisdiction in the county in which such animal was killed or wounded.

SEC. 3. The demand mentioned in section two of this act may be made of any ticket-agent or station-agent of such railway company or corporation, or the assignee or lessee thereof.

SEC. 4. In all actions prosecuted under this act, it shall be the duty of the court, if tried by the court, or jury if tried by a jury, if the judgment or verdict be for the plaintiff, to find in addition to their general finding for plaintiff the amount if anything allowed for an attorney-fee in the case.

SEC. 5. This act shall not apply to any railway company or corporation, or the assignee or lessee thereof, whose road is inclosed with a good and lawful fence to prevent such animals from being on such road.—Approved, February 27, 1874.

We have been favored with several briefs upon this question, both from counsel for plaintiff in error, and counsel representing other railroads. There are quite a number of cases in this court in which various roads are interested, turning upon this question, and we are informed that there are many more in the several district courts waiting for the decision in this. While the amount in controversy in each of these cases is small, yet the number of cases already in suit, and the still greater number which in the ordinary experience of the management of railroad trains may be expected to arise in the future, render the question one of considerable moment. It is generally conceded by the counsel, and we think is both settled by the authorities and resting in sound reason, that the legislature has the power to require railroad corporations to fence their tracks, and to make them liable for the value of all stock killed by their trains in consequence of a failure to so fence. See as authorities: *Fawcett v. The Y. & N. M. Rly. Co.*, 2 Eng.

L. & E. 289, and the adjudications of eleven American states, as follows: CONNECTICUT: *Bulkley v. N. Y. & N. H. Rld. Co.*, 27 Conn. 479; NEW HAMPSHIRE: *Dean v. Sullivan Rld.*, 2 Foster, 316; *Cornwall v. Sullivan Rld.*, 8 Foster, 161; *Smith v. Eastern Rld. Co.*, 35 N. Hamp. 356; VERMONT: *Thorpe v. Rutland & Burlington Rld. Co.*, 27 Vt. 140; *Nelson v. Vt. & C. Rld.*, 26 Vt. 717; NEW YORK: *Corwin v. N. Y. & Erie Rld. Co.*, 18 N. Y. 42; *Statts v. Hudson River Rld. Co.*, 3 Keyes, 196; *Waldron v. Rensselaer & Saratoga Rld. Co.*, 8 Barb. 390; *Bruce v. N. Y. Cent. Rld. Co.*, 27 N. Y. 269; PENNSYLVANIA: *Pennsylvania Rld. Co. v. Riblet*, 66 Penn. St. 164; ILLINOIS: *Ohio & Miss. Rld. Co. v. McClelland*, 25 Ill. 140; *Same v. Brubaker*, 47 Ill. 462; INDIANA: *M. & I. Rld. Co. v. Whiteneck*, 8 Ind. 217; *Indianapolis Rld. Co. v. Kercheval*, 16 Ind. 84; *Indianapolis Rld. Co. v. Marshall*, 27 Ind. 300; *Same v. Townsend*, 10 Ind. 88; *New Albany Railroad Co. v. Tilton*, 12 Ind. 8; IOWA: *Jones v. Galena Railroad Co.*, 16 Iowa, 6; WISCONSIN: *Blair v. Milwaukee Railroad Co.*, 20 Wis. 254; MISSOURI: *Gorman v. Pacific Rld. Co.*, 26 Mo. 441; *Trice v. Hannibal & St. Jos. Rld. Co.*, 49 Mo. 438; MAINE: *Norris v. Androscoggin Rld. Co.*, 39 Me. 273. This power is sustained as a part of the police power of the state, a power whose limits are perhaps as illy defined as any power claimed or exercised by the state. "It is much easier," says Ch. J. Shaw, in *Com'lh v. Alger*, 7 Cush. 84, "to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise." It aims to regulate the intercourse of citizen with citizen, to prescribe the manner of using one's property, and pursuing one's occupation, so as not to trespass on the property or rights of others; and as such, is a power whose necessities and uses grow with the increasing complexities of our civilization, and the increasing diversities in the industries and modes of life. The sphere therefore of its operations is ever widening. Every new use to which the forces of nature are put, calls for a new interference of this power, that such use may not operate to the injury of others. Probably no single agency has made so large a demand for the exercise of this power as the agency of steam in locomotion. It is by

virtue of this power that the state has assumed to regulate the speed of trains, to require flagmen at crossings of streets in populous cities, the blowing of a whistle or the ringing of a bell at places of supposed extra danger, and the erection of conspicuous sign-boards at all crossings of highways, and indeed all the other various measures to secure safety in the necessarily dangerous matter of running railroad trains. In the exercise of the same power the legislature can require railroad corporations to fence their tracks. As police is, according to Jeremy Bentham, "in general a system of precaution, either for the prevention of crimes, or of calamities," so, to prevent the injuries which might result to a train full of passengers thrown from the track by a stray animal upon it, a calamity of not infrequent occurrence, the general judgment of the public has declared that the track should be fenced, and the state has cast the duty of fencing solely on the corporation, the running of whose trains gives rise to the danger. It is said by Cooley in his work on Constitutional Limitations, p. 579, that this power "has been sustained on two grounds: first, as regarding the division fence between adjoining proprietors, and in that view being but a reasonable provision for the protection of domestic animals; and second, and chiefly, as essential to the protection of persons being transported in the railway carriages." So, in *Trice v. Hannibal & St. Jo. Rld. Co.*, 49 Mo. 488, it is said, "While the protection of property of adjacent proprietors is an incidental object of the statute, its main and leading one is the protection of the traveling public. To insure such protection, *railroads are imperatively required to fence their tracks*, and the penal liability deemed necessary to enforce this requirement, is a matter of legislative discretion." In *Ohio & Miss. Rld. Co. v. McClelland*, 25 Ill. 140: "When the safety of persons and property both demand the fencing of these roads, it is no more than the exercise of a reasonable police regulation to require it, and to impose adequate penalties to secure a compliance." In *Blair v. Milwaukee, &c., Rld. Co.*, 20 Wis. 254: Experience had shown that it was entirely insufficient for the protection of the public to leave the building and



maintaining of these fences, so as to prevent such intrusion upon the track, to the sense of duty or interest of the multitudes of proprietors of lands adjoining our long lines of railroads. To remedy this evil, and insure the safety of the traveling public so far as possible in this respect, the act in question was passed making it *the sole and absolute* duty of all railroads companies to fence and provide their roads with suitable cattle-guards."

But say counsel, this law does not come within the scope of those decisions—is not the exercise of that power. That power may impose the duty of fencing the road upon the company, and punish a failure to perform this duty by liability for all injuries resulting therefrom. But here no duty of any kind is imposed. Fencing is not declared a duty; it is only held up as a means of escaping liability, and only the single liability for animals killed. "As long," say counsel, "as the railroad companies pay for the cattle they are guilty of no breach of their obligations. They can fence or not, just as they please, and the traveling public is in no way benefited." And again, "A law that lays down no rule of conduct, that neither commands nor forbids, cannot be a police regulation." While doubtless there is weight to the suggestion of counsel in this respect, we are disposed to think they overestimate its importance. We think they place too much stress on the form of the enactment, and regard it as unconstitutional legislation to do that by indirection which it is clearly constitutional to do directly. The difference between the concession of counsel, and the law, is about this: The concession is, that it is lawful to say to the railroads, you must fence, or pay for stock killed. The law is, you must pay for stock killed, unless you fence. In each case, payment for stock killed is the result; non-fencing, the condition. In each case the liability is the same, and the manner of avoiding liability the same. For, though where the command to fence is in terms expressed, a failure to fence *may* carry the liability of the company to a further reach, and a wider extent, yet it is almost the unvarying rule in such legislation to follow the command with but one ex-

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pressed penalty, that of payment for stock killed. And conceding the larger results, if the legislature has power indirectly to subject the company to more extended liabilities, has it not the power directly to impose the lesser and included liabilities? While it seems to us that that form of legislation, which counsel contends is essential to the validity of such an enactment, is the better, and approaches the subject in the more correct way, because stating first and in mandatory words what the company must or at least ought to do in respect to the manner of its carrying on its dangerous business, and afterward the penalty for non-compliance, yet we are not prepared to hold a disregard of that form fatal. While generally the protection of the train and its passengers is considered the main ground upon which to sustain this railroad-fence legislation, and rightly that should be the paramount consideration, yet the protection of domestic animals, the property of adjoining proprietors, is also laid down as one of the grounds for upholding it. (See the citations heretofore made.) It seems as though our legislature had specially in thought the minor consideration. If so, it may have been because the past experience of railroad matters in this state had called more special attention thereto. Either was a proper subject for its consideration, and within its powers. Looking to the legislation of other states, we find much that is kindred in form, and yet has received the approval of the courts. In New Hampshire, at one time, there was a law in force in terms requiring railroads to fence. A commission to revise the statutes included this in their report, but the legislature struck it out, and in lieu thereof enacted that if any railroad should neglect to keep a sufficient fence, the adjoining landowner might give notice, and then, if not built, build it himself, and recover of the company double the cost thereof. Here it will be seen that there is in terms no duty of fencing cast upon the company, and the argument is strong, from the change in the law, that the duty has been removed. Still, the court held it the duty of the company to fence, and that it was liable for the stock killed if it did not. *Dean v. Sullivan Railroad*, 2 Foster, 316.

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In Vermont, Gen. Stat., ch. 28, § 78, railroad companies are declared liable for all property adjacent to their roads destroyed by fire from their engines, "unless they shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury;" and this is approved in *G. T. Rly. Co. v. Richardson*, U. S. Sup. Ct., 3 Cent. Law J. 358. In Massachusetts is a much stronger statute: "Every (railroad) corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, and shall have an insurable interest in the property upon its route for which it may be so held responsible, and may procure insurance thereon in its own behalf." Gen. Stat., ch. 68, § 101. This has been sustained in *Hart v. Western Rld.*, 13 Metc. 99; *Lyman v. B. & W. Rld.*, 4 Cush. 288; *Ross v. B. & W. Rld.*, 6 Allen, 87; *Ingersoll v. S. & P. Rld.*, 8 Allen, 438; *Perley v. Eastern Railroad*, 98 Mass. 414; *Safford v. B. & M. Rld.*, 103 Mass. 388; *Pierce v. W. & N. Rld.*, 105 Mass. 199. In the case in 98 Mass. the court say, that "The liability of this railroad is not at common law, nor dependent upon the defendant's want of care." In that in 8 Allen, "The legislature has chosen to make it a condition of the right to run carriages impelled by the agency of fire, that the corporation employing them shall be responsible for all injuries which the fire may cause." And again, in the case in 4 Cushing, "The right to use the parcel of land appropriated to a railroad does not deprive the legislature of the power to enact such regulations, and impose such liability for injuries suffered from the mode of using the road, as the occasion and circumstances may reasonably justify." A similar statute was recognized as valid in *Adden v. White Mts. Rld.*, 55 New Hamp. 413. And another was sustained in *Chapman v. A. & St. L. Rld.*, 37 Maine, 92; *Pratt v. A. & St. L. Rld.*, 42 Maine, 579. These cases are in principle very strongly in point. An additional liability is in terms directly and absolutely imposed upon the company, a liability which they cannot, as in the case before us, by any means avoid, but to compensate for which they are

given an additional privilege. If in lieu of the privileges given by the 5th section of our statute, the companies were given an insurable interest in the cattle along the line of their road, the parallelism would be very close. And this insurable interest is granted to the companies as the only equivalent for the added burden, and it is something which they may or may not avail themselves of. The burden they may not avoid; the insurance they may use or not, as they choose. So here, the burden is absolute; the stock must be paid for; the fencing is discretionary, though unlike the law in Massachusetts, the privilege if used will avoid the burden. But in Indiana we find authority still more closely in point. Their stock-law is, so far as any question here is involved, precisely like ours. It imposes the liability directly, and then declares that the liability shall not rest upon any company that securely fences its road. The supreme court of that state have frequently passed upon that statute, and uniformly sustained it. See the cases heretofore cited from Indiana. We conclude, therefore, upon both reason and authority, that the act before us is, as to its essential elements at least, within the scope of the legislative power. And that is, in this direction, the limit of judicial inquiry. All further questions must be considered and passed upon elsewhere.

Some minor matters are also presented which require brief notice. It is insisted first that this act cannot apply to the plaintiff in error, because it holds under a charter granted by the territorial legislature, and therefore now incapable of change without its consent. But the chartered rights of a corporation are not more sacred than the individual's rights of person and property, and all must give way to any legislative exercise of the police power of the state. In *Nelson v. Vt. & C. Rld.*, 26 Vt. 717, it is said, "It is certain, we think, that the legislature cannot impose new burdens upon corporations under such circumstances, which are merely and exclusively of private interest and concern, and which have nothing to do with the general security, quiet and good order. But there can be no doubt they have the same right by general legisla-

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tion over these corporations, which they have over natural persons. By general laws they may require them to conform to such regulations of a police character as they may deem for the security of the rights of citizens generally, and most conducive to quiet and good order, and the security of property, and even the life of animals." See also, *Thorpe v. R. & B. Rld. Co.*, 27 Vt. 140; *Lyman v. B. & W. Rld. Co.*, 4 Cush. 288; *Pratt v. A. & St. L. Rld.*, 42 Maine, 579; *Norris v. Androscoggin Rld.*, 39 Maine, 273; *Bulky v. N. Y. & N. H. Rld.*, 27 Conn. 479.

Again, it is said that that portion of § 2 giving to the stock-owner the right to recover attorney-fees is unconstitutional. The proposition is thus stated by the learned counsel for plaintiff in error:

"Our state constitution, (Bill of Rights, §§1, 18,) guarantees to all equity of rights, and remedies for injuries by course of law. We contend that a law which gives a successful plaintiff in a civil action his attorney's fees, and denies them to defendant, is a most gross violation of these constitutional provisions."

We do not think the contention of counsel can be sustained. While the law may be harsh and rigorous, (and yet its rigor may have seemed to the legislature as essential to its value, for, if a claimant for stock killed was compelled to pay his own attorney's fees, it might well happen that in all cases the amount of his claim—such amounts being uniformly small—would be consumed by attorney's fees, and so leave the claimant in no better condition than before,) we see no reason to hold it beyond the power of the legislature. It is no uncommon thing for legislatures to provide, in cases where failure to pay seems to imply more than ordinary wrong, that such failure should carry with it something in the nature of a penalty. Sometimes double or treble damages are given. The Iowa stock-law gave double damages. Our trespass act provides for both double and treble damages; (Gen. Stat., p. 1095. §§1 and 2.) Ten per cent. may sometimes be added in the discretion of the court. Other illustrations might be suggested.

Some other matters are suggested, but it is unnecessary to

prolong this opinion. We are of opinion that the act is constitutional, and applicable to the plaintiff in error.

The judgment will therefore be affirmed.

It is understood that the cases of the same plaintiff in error against *Israel M. Tolls*, and same against *E. J. Hopper*, and the case of the *L. L. & G. Rld. Co. v. H. M. Waters*, involve only the same question, and the judgment in those cases will be affirmed.

All the Justices concurring.

KANSAS PACIFIC RAILWAY CO. v. JOHN YANZ.

RAILROADS; KILLING CATTLE; ATTORNEY-FEES; *Bill of Particulars*; *Sufficiency*;

Findings—Waiver. In an action against a railway company in a justice's court under ch. 94 of the laws of 1874, for killing plaintiff's cow, where plaintiff does not allege in his bill of particulars that the company's road was not fenced, and says nothing about attorney-fees except in the prayer for judgment, and the only prayer for judgment is "for said sum of \$30, together with costs of suit, and a reasonable attorney-fee for the prosecution of this suit," and the case is tried both in the justice's court and in the district court upon this bill of particulars without any objection being made as to its sufficiency, and the district court finds specially, among other things, that the road was not fenced, that the cow was worth \$30, that a reasonable attorney-fee for prosecuting the suit in the justice's court was \$10, and in the district court \$25, for which sums judgment is rendered against the defendant, with costs, and the defendant then brings the case to the supreme court, and assigns for error merely that "the decision of said judge was contrary to law," and the question of the sufficiency of the plaintiff's bill of particulars is raised for the first time in the supreme court, and then by brief only; *held*, that the judgment of the district court will not be disturbed merely because of any supposed insufficiency in the plaintiff's bill of particulars, nor will it be disturbed because of any supposed insufficiency in the findings of the court below with respect to attorney-fee. [See *ante*, 573.]

Error from Pottawatomie District Court.

THE pleadings and proceedings in the court below are fully stated in the opinion. Yanz recovered judgment, at the February Term 1875, for \$30 for a cow killed by defendant's cars, and \$85 attorney-fees, and costs of suit; and the *Railway Company* brings the case here on error.

J. P. Usher, and *C. E. Bretherton*, for plaintiff in error.

Merritt & Merritt, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.: This was an action brought by John Yanz against the Kansas Pacific Railway Company for killing one of the plaintiff's cows. The act of 1874, (Laws of 1874, pp. 143, 144,) authorizing the recovery of damages and the recovery of attorney-fees in such cases, has already been held by this court to be constitutional and valid. (*K. P. Rly. Co. v. Mower*, ante, p. 573.) The only question then for us now to consider is, whether under said act, and under the facts of this case, the plaintiff is entitled to recover. The action was commenced in a justice's court, and the plaintiff filed a bill of particulars therein, which reads as follows:

(*Title.*) "The said John Yanz, plaintiff, complains of the said Kansas Pacific Railway Company, a corporation operating a railway through the county of Pottawatomie in the state of Kansas, defendant, for that the said plaintiff was, on the 5th of August 1874, the owner of a milch cow of the value of \$30, and that the said defendant in operating its railway, and by the engine and cars on the said railway, did kill the said cow of the said plaintiff, to the damage of the said plaintiff \$30. And said plaintiff further says, that on the 29th of August 1874 he demanded of said Kansas Pacific Railway Company payment of the damages aforesaid, for said cow killed as aforesaid, which said defendant refused and still refuses to pay.

"Wherefore plaintiff prays judgment for said sum of \$30, together with costs of suit, and a reasonable attorney-fee for the prosecution of this suit."

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The defendant, for its bill of particulars, filed a general denial. The case was then tried on these pleadings, and judgment was rendered in favor of the plaintiff for \$80 for the cow, \$10 for attorney-fees, and for costs. The defendant appealed to the district court, where the case was again tried by the court, without a jury. None of the evidence introduced on the trial was preserved, but the court, at the request of the defendant, made special findings of fact and of law. Among the findings of fact were the following, to-wit:

"The railroad of the defendant, at the time and place where said cow was killed, was not fenced.

"On the 28th of September 1874, the plaintiff commenced his suit before Justice Baker, in Wamego township, for the recovery of said damages. A reasonable attorney-fee for the prosecution of said suit by Messrs. Merritt, his attorneys, was \$10; and a reasonable attorney-fee for prosecuting the suit on this appeal by said attorneys, is \$25."

"The defendant objected to any evidence being given of the value of attorney-fees for prosecuting said suit, or to any finding concerning the same, which objection the court overruled, and the defendant excepted." The court, after making said special findings of fact and law, rendered judgment in favor of the plaintiff for \$80 for the cow, \$10 for attorney-fees in the justice's court, \$25 for attorney-fees in the district court, and for costs. The defendant now brings the case to this court, and assigns for error that, "The decision of said judge was contrary to law." This is the only assignment of error. The defendant however, now, as plaintiff in error, claims in its brief that the bill of particulars of the plaintiff below was not sufficient: *First*, because it did not allege that the company's road was not fenced; *second*, because it did not claim as damages as much as the judgment was rendered for. And plaintiff in error also now claims in its brief, that the findings of the court do not support the judgment for attorney-fees. If these questions can or ought to be considered under said assignment of error, which is at least doubtful, we would have to decide upon all of them against the plaintiff in error. No objection was made in the court below to the plaintiff's bill of particulars.

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the treasurer of the tax, protesting its illegality, declaring that payment is made solely to avoid the issue of process, and asserting an intention to sue for the sum illegally paid, should be considered an involuntary payment—one made to prevent an immediate seizure of the taxpayer's property, although such payment was made seventeen days before the time fixed for the treasurer to issue his warrant.

Error from Wyandotte District Court.

INJUNCTION, brought by the *K. P. Railway Company*, against the *Board of County Commissioners*, and *E. W. S. Drought*, as sheriff, of Wyandotte county, to restrain the collection of alleged illegal taxes. The plaintiff's petition stated, that on the first day of May 1874, plaintiff duly listed for taxation, all its rolling-stock and other personal property, as required by ch. 96, Laws of 1874, p. 147, and returned the same, with a sworn schedule thereof, to the county clerk of said county; that the total length of the main track of plaintiff's railroad in said county was 21 55-100ths miles, and the proportion of value of said rolling-stock, listed as aforesaid, amounted to \$1,076.68 per mile; that the aggregate value of plaintiff's personal property so returned for taxation to said county clerk for said year 1874 was \$72,653.04; that neither the county clerk nor the board of county commissioners of said county proceeded to correct such statement as false or erroneous, nor did said county clerk notify the plaintiff that he or said county board considered such sworn statement as false, incomplete or erroneous, so that plaintiff might have an opportunity of showing that its statement was correct; nor is there in the office of said county clerk any statement of facts or evidence on which he or said county board have made any correction of plaintiff's sworn statement; that said county clerk illegally entered said property on the tax-roll at the value of \$1,555.64 per mile, and so apportioned the same for the purpose of taxation among the different cities, township, school and road districts of his county, thus making an arbitrary and oppressive increase of \$479.01 per mile on the value thereof, thus increasing the aggregate value of said property to \$82,897.90—being \$10,244.86 more than the valu-

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ation returned by plaintiff; that the amount of taxes legally imposed on the property so valued and returned by plaintiff was \$3,608.02; that the amount actually and arbitrarily assessed was \$4,562.16, of which the sum of \$954.14 was and is illegal, being levied on said illegally-increased valuation made as aforesaid; that, as provided in and by ch. 181, laws of 1874, one-half of said legal taxes was due and payable 20th December 1874, and the other half 20th June 1875; that on the 14th of said December plaintiff tendered to the treasurer of said Wyandotte county \$1,804.01, being one-half the legal taxes assessed on plaintiff's personal property, which said treasurer refused; that then, under protest, and to prevent the issuance of a tax-warrant, plaintiff paid said treasurer the sum of \$2,281.08, (accompanying such payment with a written protest and notice, which are quoted in full in the opinion;) that on the 20th of said June, plaintiff tendered to said treasurer the further sum of \$1,326.94, being the balance of personal tax legally and properly due after credit being given for said sum of \$2,281.08 paid on 14th December 1874, but said treasurer refused to so receive the same, and demanded instead the further sum of \$2,281.08, in addition to the like sum previously paid, which latter sum the plaintiff declined to pay; and that on August 18th 1875, said treasurer issued his precept to said sheriff, one of the defendants, to collect said sum of \$2,281.08, and the penalty alleged to have accrued thereon, and said sheriff is about to execute said precept by seizure and sale of the property of said plaintiff, etc. Upon this petition, which was duly verified, plaintiff applied to the district judge, at chambers, for a temporary injunction. Notice of such application was given to defendants. Said application was heard on the 21st of August 1875. The district judge refused the injunction, and plaintiff appeals, and brings the case here on error.

J. P. Usher, and C. E. Bretherton, for plaintiff

H. L. Alden, county-attorney, for defendants,

The opinion of the court was delivered by

BREWER, J.: The first question in this case is, upon the construction to be given to the railroad tax-law of 1874. By the plaintiff in error it is claimed, that the valuation returned by the company is to be accepted as the proper valuation, subject to correction after notice, as provided in §65 of the general tax-law, (Gen. Stat., p. 1041.) On the other hand it is claimed that the valuation is to be made by the city and township assessors. The question hinges in the first instance on the construction to be given to §7, which reads as follows:

"SEC. 7. The county clerk shall return to the assessor of the county or city a copy of the schedule or list of the railroad-track, and other real estate, and of the rolling-stock and other personal property pertaining to the railroad; and such railroad-track and other real estate, rolling-stock and other personal property, shall be assessed by the city and township assessors. *Such property shall be treated in all respects in regard to assessment and equalization the same as other property belonging to individuals,* except that it shall be treated as property belonging to railroads, under terms "lands," "railroad-track," "lots," and "personal property."—(Laws of 1874, p. 149.*)"

Now if the sentence which declares that the rolling-stock, etc., shall be assessed by the city and township assessors, controls, and refers specifically to the *valuation* of the property, then the contention of the defendant in error must be sustained. If on the other hand the clause in italics controls, we must turn to the general tax-law, and if under it the valuations placed upon their personal property by individual owners are conclusive unless corrected by proper proceedings, then in like manner the valuation made by the company must be taken as conclusive. The question is one of difficulty. Indeed, it seems impossible to adopt any construction which will give full force to every clause in the section. Perhaps it will throw some light on the matter if we examine the general tax-law, and see what rule obtains in it, and what are the provisions for securing to the state a correct tax-list, and at the same time protect-

[*THIS section, and §§ 2, 3, 4, 5, 6, and 11, of the same act, were amended by chapter 122, Laws of 1875.—Laws of 1875, pp. 186, 187.]

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ing the property owners against excessive valuation. As to real estate, the law is plain. Sec. 81 declares that it shall be the duty of the county assessor to list and value all the real property in his county. By §43, the county board is ordered to meet on the first Monday in July to equalize the valuation of the real estate. By §44, notice of this meeting is to be given, so that "all persons feeling themselves aggrieved can appear and have all errors in the return corrected, as justice and equity may demand." Here then, is what seems a fair and reasonable provision for protecting both the state and the taxpayer. In the first place, the state, through its officer, and without consultation with the taxpayer, determines the value of the property, and then provides a tribunal, public notices of whose meetings must be given, before which any property-holder may appear and make such showing as he desires, to have any error in the valuation of his property corrected. As to personal property, the law is not so plain—at least it is not stated so directly and positively as in the case of real estate. Still, an examination of the various sections will, we think, make clear the rule as to personal property. In the first place, there is no board of equalization of personal property, no tribunal before which the injured property-holder may come and have his assessment reduced. But on the other hand, we find provision made for the state to correct any errors made by the individual. Section 65 reads as follows:

"Sec. 65. The county clerk or board of county commissioners, if he or they shall have reason to believe, or be informed, that any person has given to the assessor a false statement of his personal property, moneys, or credits, investments in bonds, stocks, joint-stock companies or otherwise, or that the assessor has not returned the full amount required to be listed in his ward or township, or has omitted or made an erroneous return of any personal property, moneys or credits, investments in bonds, stocks, joint-stock companies or otherwise, which are by law subject to taxation, shall proceed, at any time before the final settlement with the county treasurer to correct the return of the assessor, and to charge such person on the duplicate with the proper amount of taxes; to enable him to do which, he is hereby authorized and empowered to issue com-

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pulsory process, and require the attendance of any person or persons whom he may suppose to have a knowledge of the value of such articles of personal property, moneys or credits, investments in bonds, stocks, or joint-stock companies, or otherwise, and examine such persons on oath or affirmation in relation such statement or return; *and it shall be the duty of the clerk in all such cases, to notify such person, before making entry on the duplicate, that he may have an opportunity of showing that his statement or return to the assessor was correct;* and the county clerk shall in all cases, file in his office a statement of the facts or evidence on which he made such correction; but he shall in no case reduce the amount returned by the assessor, without the written consent of the state auditor, given on a statement of facts submitted by the county clerk."

Here it is the false statement of the individual, or the omission of the assessor, that it is to be corrected, matters almost necessarily prejudicial to the state, and beneficial to the individual. And that this is not for the benefit of the individual, is made more clear by the provision that there shall be no reduction without the written consent of the state auditor, given on a statement of facts submitted by the county clerk—a proceeding too cumbersome to be of any practical value to the individual. Referring to the earlier portions of the tax-law, we find that the individual is required to return under oath a statement of his personal property and its value. Sec. 10 is as follows:

"SEC. 10. Every person required by this act to list property, shall make out and verify by his oath, and, at any time after ten days from the time of receiving notice to that effect from the assessor, shall deliver to said assessor, on demand, a statement of all personal property, *and the value thereof*, which by this act he is required to list." * * *

Section 15 gives the rules for the valuation of property. In speaking of real estate, it refers to the "assessor" as the party fixing the value. But as to personal property, it says in one place, "the person required to fix the value thereon;" and in another, "at such prices as the person listing believes them to be worth." Sections 17, 18 and 21, define merchants and manufacturers, and how the value of their property shall be ascertained for taxation; and in them it is provided, that "he

(the merchant or manufacturer) shall estimate" the value, etc. Sec. 29, which in terms applies to most corporations, provides that certain officers thereof shall under oath return to the county clerk the various items of their property, and the value thereof; and this value stands unless the county clerk believes that false or incorrect returns have been made, when he can correct the return as in § 65. The assessor has apparently nothing to do with these returns. By § 53, a blank for his statement of taxable property is required to be left with every taxpayer. By § 57, wherever the taxpayer fails to make return, or refuses to swear to his return, the assessor may proceed to ascertain the property, and its value, and may call witnesses and examine them, and from such examination determine the amount and value of his property. By § 60, if the taxpayer was absent when the assessor was collecting his returns he may thereafter go before the county clerk and make his statement under oath, and the county clerk is to correct the returns by that statement, thus making the valuation of the individual to correct the valuation of the officer. The assessor is required to make oath that he has returned the value given by the taxpayer, as appears from § 63 as follows:

"Sec. 63. The assessor, when making his returns of personal property, shall take and subscribe an oath, which shall be certified by the officer administering the same, and attached to the return which he is required to make, which shall be in the following form: 'I, ———, assessor for ——— township, in the county of ———, do solemnly swear that the value of all personal property, * * * for which a statement has been made to me, by the person required by this act, for the assessment and taxation of all property in this state, according to the true value, to list the same, is hereby returned as set forth in such statement.'"

And by § 64 it is made the duty of the county clerk to add to the valuation returned, when the owner refused to swear to the value, fifty per centum on the value returned. Other sections might be cited, all pointing in the same direction. But these are sufficient. They make it clear, that the rule as to personal property differs from that as to real. In the former,

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the individual fixes the value, and that value controls, unless the state, dissatisfied therewith, takes measures to correct it; and these measures, as already decided by this court, require notice to the individual. *Leavenworth Co. v. Lang*, 8 Kas. 284. In this way are the rights of the individual and the state both secured. The individual giving the value, of course does himself no injustice; and the state is given the right to inquire into that value, summon the individual before a tribunal, present testimony, and have any errors corrected. It may be well, before passing from this subject, to notice the change made by the law of 1876, (Laws of 1876, p. 59, § 14; p. 71, § 59; p. 77, § 74,) by which it would seem that the owner's valuation is no longer conclusive, and that the board of equalization has jurisdiction as to personal as well as real property.

With this consideration of the general tax-law, let us now return to the railroad tax-law. And first, we remark that if there be no way of reconciling the conflicting clauses, force ought to be given to those which would place this law in harmony with the general tax-law, and would secure the rights of both the state and the railroads, rather than to those which would make this incongruous and out of harmony with other legislation, and would expose the railroads to arbitrary and excessive assessments, without adequate means of investigation and redress. Now, § 7 heretofore quoted, reads, that a schedule of all the property real and personal, naming the classes as they are described in the act, shall be returned by the clerk to the assessor, and that he shall assess all, and then, that all proceedings respecting assessment and equalization shall be in harmony with the general tax-law. Counsel for the county would harmonize these two seemingly conflicting provisions by adding to the last some expression like this—"except as heretofore provided." Counsel for the company would harmonize them by construing the two together to mean, that the assessor shall assess railroad property as he assesses individual property—that is, placing his own judgment upon the value of the real, and accepting the owner's as to the value of the personal. And this, we are constrained to

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hold, is the true construction. The assessor is spoken of as such, even in reference to personal property, though as to that, as we have seen, he is to accept the owner's statement as to the value; and there is no greater impropriety in the use of language to say, that he shall assess the real and personal property, when it is intended that he shall as to the latter property accept as conclusive the statement of the owner as to value. A somewhat similar use of language is found in the amendment of 1869, vesting the duties of the county assessor in the township assessors. (Laws 1869, p. 241.) It reads:

"SEC. 31. It shall be the duty of the *township* assessor in each year to list and value all the real *and personal* property in his *township* not expressly exempted from taxation.

"SEC. 33. The assessor shall from actual view, and from the best sources of information within his reach, determine as nearly as practicable the true value of all taxable property within his *township*, according to the rules prescribed by this act for valuing property."

Unless this be the true construction, the legislature must be held to have excepted railroads from the ordinary rules of taxation, and while making, as to all other property, reasonable provision for protecting the rights of both the state and the individual, and providing a tribunal before which the party likely to suffer injustice may produce his evidence, and establish his rights, it has placed it in the power of one man, arbitrarily, and without consultation, to place a value for taxation upon the personal property of railroads from which there is no appeal, and against which there is, except in cases of fraud, no remedy. It secures a tribunal of revision as to real, but not to personal property; for while the state board may equalize the railroad assessments, it cannot reduce the total assessment. (Laws of 1874, p. 150, § 10.) It carves out an exception not merely as to railroads, but as to certain kinds of railroad property. Again, as further evidence of the intention to harmonize railroad assessments with those of other property, it is provided in § 9 of this act—

"If any person, company or corporation * * * shall neglect to return to the county clerk the statements or schedules,

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* * * the property so to be returned shall be listed and assessed as other property by the city and township assessors."

Without pursuing the argument further, we hold that under the law of 1874, the same rule obtains in reference to railroad as in reference to other property, and no proceedings having been had in this case under § 65 of the general tax-law to correct the valuation made by the company, that valuation will control.

We pass now to the second question, the effect of a payment of taxes under protest. The facts in respect thereto appear in this extract from the petition and the exhibit thereto attached:

"One-half of said taxes became due on the 20th of December 1874; and on the 14th of December 1874, John P. Devereux, as agent for the plaintiff, tendered the treasurer of the said county the sum of \$1,804.01, being one-half of said personal tax legally and properly payable by plaintiff, which sum said treasurer refused to receive. Thereupon, to avoid the issue of legal process for collection of such excessive tax, and under protest, said John P. Devereux paid the full amount of said tax as it appears on the tax-roll as then due, namely, \$2,281.08, and filed the protest of the plaintiff against the illegality thereof with said treasurer, a copy whereof is hereto annexed, marked 'A.'

"**PROTEST 'A.'**—*To the Treasurer of the County of Wyandotte, State of Kansas:* The Kansas Pacific Railway Company hereby notify you that the amount legally due by said company as one-half tax on the personal property in your county, due December 20th 1874, does not exceed the sum of \$1,804.01, which sum you have refused to receive; and that said company pay the sum of \$2,281.08, demanded by you, protesting against the illegality thereof, and solely to avoid the issue of legal process for its collection; and said company further notify you that they will hold you and your county liable for the excess above the amount legally due. That you are not to disburse or part with such excess, and that said company will sue you and said county for its recovery.

Dated 14th December, 1874.

THE KANSAS PACIFIC RAILWAY COMPANY,
John P. Devereux, Agent, Duly Authorized."

Under § 4 of chapter 131, laws of 1874, the county treasurer was directed to issue a warrant for all taxes on personal property due and unpaid on the first day of January. So that if the company had not paid before that time, it would have been the duty of the county treasurer to have issued his warrant against it, which warrant would have had all the force and effect of an execution. Was the payment voluntary? In the case of *Wabaunsee County v. Walker*, 8 Kas. 436, which was a case involving the question of voluntary or involuntary payment, this court says: "A correct statement of the rule governing such cases as this would be as follows: Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed to be voluntary, and cannot be recovered back. And the fact that the party at the time of making the payment filed a written protest, does not make the payment involuntary." We see no reason to doubt the correctness of the rule as thus stated. Was this a payment to prevent an immediate seizure of the property of plaintiff in error? If the warrant had actually been issued by the treasurer, and in the hands of the sheriff, who was demanding payment and threatening seizure, there would be no question, for in the language of the supreme court of Massachusetts, *Boston Glass Co. v. Boston*, 4 Metc. 181, the warrant "is in the nature of an execution running against the property of the party, upon which he has no day in court, no opportunity to plead and offer proof, and have a judicial decision of the question of his liability." But here no warrant had issued. None could legally issue for seventeen days, nor could the company's property be in any manner disturbed before that time—so that there was no danger of instantaneous seizure. On the other hand, there was no further inquiry to be made by any officer or tribunal. The amount of the tax was fixed beyond any opportunity for review. There

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was no discretion with any one, as to whether a warrant should or should not issue, a levy should or should not be made. The machinery for adjusting the amount of the tax had completed its work, and was at rest; only the machinery for collecting was in motion, and it moved with the certainty of fate, and the rapidity of time to the finality of seizure and sale. Where the law is imperative, and, giving no discretion, commands the issue of the warrant at a definite time, and the levy under that warrant within a fixed time thereafter, must an individual wait until the last moment, and pay only just as the officer is seizing his property, or may he assume that the officers of the law will obey its precepts, and when all opportunity for consideration, correction, and change has passed, all discretion ended, and the tax-roll is in the treasurer's hands, waiting only the lapse of a few days to ripen into a warrant and seizure, may he not then pay to the treasurer, protesting against the legality, and asserting his intention to contest? Does he not then pay to prevent an immediate seizure, one that is certainly and presently impending? Wherein does the state suffer wrong, or what advantage does it lose by holding that to be an involuntary payment? It is not a case "where a party can only be reached by a proceeding at law," as suggested in *Mays v. Cincinnati*, 1 Ohio St. 268, in which "he is bound to make his defense in the first instance, and he cannot postpone the litigation by paying the demand in silence and afterward suing to recover back." In New York, the case of *Bailey v. Buell*, 59 Barb. 158, is in point. In that case the assessor obtained an order from the county judge that plaintiff should pay the amount of tax in dispute, or execution would issue against him. On being served with a copy of the order, but without any execution being issued, plaintiff paid the amount. It was held an involuntary payment, and the tax being illegal the party could recover. In *Union Bank v. New York*, 51 Barb. 159, the trial court held that payment of an illegal tax, under a notice from the receiver of taxes that unless paid a penalty would be imposed by way of interest, and a warrant would be

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issued, was a voluntary payment. The commission of appeals, 51 N. Y. 638, held that such payment was *not* voluntary, and reversed the decision, following *Bank of Commonwealth v. The Mayor*, 43 N. Y. 188. In that case Grover, J., said, "While that [the assessment] remained in force, the tax founded thereon had the force of a judgment, requiring the plaintiff to pay the tax as required by statute. The plaintiff was legally bound so to pay, and had no lawful mode of resisting such payment. In such a case, the only resistance to the requirement of the officer charged with the collection for payment, if that could have been made, would only subject the plaintiff to further expense, and would have been entirely abortive. Under such circumstances the plaintiff had the right to pay, without affecting its right to recover back the money, should the tax thereafter be determined illegal by a revisal of the assessment on which it was founded. The payment was not voluntarily made, but coerced by the law, which obliged the plaintiff to make it." In *Massachusetts, in Boston Glass Co. v. Boston*, 4 Metc. 181, (cited in *Wabaunsee Co. v. Walker*, supra,) it is held that "payment of taxes to a collector who has a tax-bill and warrant in the form prescribed by law, is to be regarded as compulsory payment, and if such taxes were assessed without authority, they may be recovered back in an action for money had and received, although the party made no protest before payment." An examination of the facts in that case will show that no execution or final process for collection had been issued, but that payment was made on the tax-bills, a species of formal demand for payment. This case follows *Preston v. Boston*, 12 Pick. 7, where it is held, "if a person pay an illegal tax *in order to prevent the issuing of a warrant of distress with which he is threatened, and which must issue of course unless the tax is paid*, the payment is to be deemed compulsory, and not voluntary." In *Grim v. School District*, 57 Penn. St. 434, it is said to be settled law, that "A party who, when threatened with a distress, pays an illegal tax under protest and notice of suit, may maintain an action to re-

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cover it back." See also, *Henry v. Horstick*, 9 Watta, 414. In *Allen v. Burlington*, 45 Vermont, 202, the court says: "If the plaintiff was constrained to pay the tax to save his property from distress and to avoid a penalty and costs, it was not a voluntary payment. (*Babcock v. Granville*, 44 Vt. 326; *Henry v. Chester*, 15 Vt. 469.) It is not necessary that the warrant should have been issued, and the levy instant. If he expected and had a right to expect that in due course the warrant would issue, and the collection be enforced with costs, and that unless he complied with the one alternative he must submit to the other, and he paid, because otherwise the other alternative would be upon him, with protest that he paid because thus constrained, it is not such voluntary payment that he would be precluded from recovering back the taxes so paid, if they were illegally imposed."

It seems to us, then, that according to a fair and reasonable interpretation of the rule, the railway company paid this first half of the tax under such circumstances that it should be considered an involuntary payment. It was to prevent a seizure as certainly impending as the law could make it, and one also presently impending. It may be remarked that the entire personal tax was levied and assessed as one tax. The law simply divided the time of payment, requiring one-half to be paid in December, and permitting the other to remain until the June following, so that if more than the one-half was paid in December, there would be some show of reason in holding that it might be corrected when the last half of the same tax was to be paid.

We see no other question in the case necessary for consideration. The ruling of the district judge will be reversed, and the case remanded with instructions to grant a temporary restraining order, upon the giving of a proper and sufficient bond.

KINGMAN, C. J., concurring.

VALENTINE, J.: I concur in what is stated in the first four

propositions of the syllabus, and in what is stated in the corresponding portions of the opinion. But I express no opinion with reference to the rest of the syllabus, or the opinion. And I express no opinion as to what judgment should be rendered, or order made in this case.

MARY P. WRIGHT V. JULIUS H. NOELL.

1. COUNTY SUPERINTENDENT OF PUBLIC INSTRUCTION; *Women are Eligible to Office.* In this state a woman is eligible to the office of county superintendent of public instruction. There is not only no express constitutional disqualification of females, and no affirmative statement of qualifications which would exclude them, but there is nothing in the language of the section creating the office, nor in the duties imposed by law upon the officer, which would imply the necessary or intended exclusion of either sex. [*Winans v. Williams*, 5-227; *Wheeler v. Brady*, 15-26.]
2. ——— As the people, with respect to certain offices, have seen fit by express constitutional provisions to restrict their freedom of choice, it is a fair inference that, where the constitution is silent, they intended no restriction.
3. ——— The question, whether a woman can legally hold a public office, is not like the question whether an unnaturalized alien may vote or hold office. The inclinations, interests, and duties of aliens are presumptively with the nation of which they are citizens, and antagonistic everywhere else. But the men and women of our own nation are alike citizens. There is no antagonism. And whether females shall vote or hold office, is merely a question of internal public policy, and not a matter affecting the life and integrity of the nation.

Error from Coffey District Court.

At the general election held in Coffey county on the 3d of November 1874, Miss *Mary P. Wright* received the highest

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number of legal votes cast for any person for the office of county superintendent of public instruction, and *Julius H. Noell* received the next highest number of legal votes cast for any person for the same office. The board of county canvassers declared *Miss Wright* elected to the said office, and granted her the certificate of election, whereupon she took the oath of office and filed her official bond. Afterward, *Noell* filed with the probate judge of the county, the statement contemplated by § 89 of ch. 36 of Gen. Stat. 1868, alleging that "Mary P. Wright, at the time of said election, was not eligible to the said office of county superintendent of public instruction for said county, being a woman,"—and asking that her certificate of election be annulled, and that he be declared elected to the said office. The contest court was organized pursuant to the statute, and the case came on to be heard December 4th 1874. *Miss Wright*, the contestee, demurred to the statement of the contestor, upon the ground that said statement did not contain facts sufficient to constitute a cause of action. The contest court overruled the demurrer, and found that no person was elected to said office at the said election, and adjudged that the election as to said office be set aside, and that the contestee pay the costs. *Miss Wright* removed the case by petition in error to the district court, where a hearing was had at the December Term 1874, and the finding and judgment of the contest court were affirmed, and from such judgment of the district court *Miss Wright* now brings the case to this court by petition in error for review.

Wm. B. Parsons, for plaintiff in error.

W. L. McConnell, for defendant in error.

The opinion of the court was delivered by

BREWER, J.: Is a woman eligible to the office of county superintendent? In favor of it is the fact that the constitution contains no express disqualification of her, and no affirmative statement of the qualifications therefor, leaving, as is

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claimed, the people free to choose whomsoever they will. Against it, is the fact that the right to vote is limited to males, implying, as is said, that *a fortiori* the right to hold office is likewise so restricted, and also the fact that at the time of the adoption of the constitution there was no serious thought of woman's holding the office, so that the framers thereof could not have intended by that instrument to authorize it. As between these two lines of argument, we yield our assent to the former. "All political power is inherent in the people," and all powers not delegated by the constitution remain with them. These truths, which lie at the foundation of all republican governments, are distinctly asserted in our own bill of rights, §§ 2 and 20. By the constitution the people have granted certain powers, and to that extent have restricted and limited their own action. But beyond those restrictions, and except as to matters guarded by absolute justice, and the inherent rights of the individual, the power of the people is unlimited. There is clearly no question of absolute justice, or individual rights, involved, so that we must look alone to the constitution to ascertain what restrictions the people have placed upon their power of choice of this officer. These restrictions may be as to the persons to make the choice, or as to the persons who may be chosen. Both of these restrictions were presented to the attention of the framers of the constitution in reference to the various offices created by that instrument, and both imposed as to some offices. Thus, generally, the power to choose officers was committed to the male adults—at first to the white male adults. And as to some officers the power to choose was still further restricted. Thus, as to some, such as district judges, locality was an added restriction; (art. 8, § 5.) The reporter and clerk of this court, are chosen by the justices; (art. 8, § 4.) The state printer is chosen by the legislature; (art. 15, § 4, as amended in 1868.) And in all these cases where the people have restricted their power by prescribing the qualifications of those to make the choice of officers, they cannot, except by an amendment of the same instrument, add to or take from those restrictions. They

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have also prescribed certain qualifications for and imposed certain restrictions as to those who may be chosen. Thus, one who gives or accepts a challenge to fight a duel, or who knowingly carries a challenge, is ineligible to any office; (art. 5, § 5.) Any one who bribes an elector to procure his election, may not hold the office to which he was elected; (art. 5, § 6.) An essential to the holding of a judicial office is, residence in the county, township, or district for which the officer was elected; (art. 3, § 11.) To be a member of the legislature, one must be at the time of his election a qualified voter of and resident in the county or district for which he is chosen; (art. 2, § 4.) Hence, by this, only male adults can be elected to the legislature. None of these qualifications prescribed by the constitution may be disregarded. They are restrictions self-imposed by the people upon their otherwise unlimited freedom of choice. If they have as to certain offices seen fit to restrict their freedom of choice by express words, is it not a fair inference that, where the constitution is silent, they intended no restriction? In reference to county superintendent the constitution says this, and no more:

“A superintendent of public instruction shall be elected in each county, whose term of office shall be two years, and whose duty and compensation shall be prescribed by law.” (Art. 6, § 1.)

There is here not only no express disqualification of females, and no affirmative statement of qualifications which would exclude them, but also nothing in the shape of pronoun, or in the terminology, or in the duties imposed, which would imply the necessary or intended exclusion of either sex. But it is said, that there is such a connection between voting and office-holding, that excluding females from the former, is by implication an exclusion of them from the latter; and that in the language of Ch. J. Dixon of Wisconsin, it is “an enormous absurdity that a person who by the organic law of the state has not one voice among thousands in designating by whom an office shall be filled, may himself be elected to such office, and enjoy its franchises and perform its duties.” In reference to

the authority quoted, it may be remarked, that the case, that of *The State, ex rel., v. Smith*, 14 Wis. 497, presented the question of the right of an *alien* to hold an office to which he had been elected, there being no express statutory or constitutional disqualification therefor; and the argument from which an adverse conclusion was reached was not the mere relationship of voting to office-holding, but that, underlying statutes and constitution, and as the basis of all governmental organization, was the natural idea, or as the learned Justice expressed it, "As to all such governments (independent popular governments,) it is an acknowledged principle, which lies at the very foundation, and the enforcement of which needs neither the aid of statutory nor constitutional enactments or restrictions, that the government is instituted by the citizens for their liberty and protection, and that it is to be administered, and its powers and functions exercised, only by them, and through their agency." And he quotes approvingly from the reply of the Justices of the Supreme Court of Massachusetts to the question of the house of representatives, whether an alien could be a legal voter for senators and representatives—"Now we assume as an unquestionable principle of sound national policy in this state, that as the supreme power rests wholly in the citizens, so the exercise of it, or of any branch of it, ought not to be delegated by any but citizens, and only to citizens. It is therefore to be presumed, that the people in making the constitution intended that the supreme power of legislation should not be delegated but by citizens." But the cases and questions are not alike. It may well be, that the idea of an independent popular government implies that all its functions are to be exercised by citizens, and that it needs no express words to exclude aliens, because the inclinations, interests, and duties of the latter are presumptively with the nation of which they are citizens, and antagonistic everywhere else. But in the case at bar, the inclinations, interests, and duties of both the sexes are in the same direction. Both are alike citizens. There is no antagonism. Whether females shall vote or hold

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office, is merely a question of internal public policy, and not a matter affecting the life and integrity of the nation, or its relations with other states. It is a very common thing for offices to be filled outside of the electoral body, and in many cases it is imperatively so required by statute or custom. Officers of a legislature are a ready illustration. Our own constitution clearly recognizes the absence of any necessary connection between office-holding, and voting. In § 2 of art. 5, as amended, it is provided that "No person under guardianship * * * shall be qualified to vote or hold office in this state." If as is claimed, one of these is the larger, and includes or implies the other, a part of the section quoted is manifestly surplusage.

In reference to the argument that at the time of the adoption of the constitution there was no serious thought of woman's holding the office, and therefore that the framers thereof could not have intended by that instrument to authorize it, we cannot do better than to quote from the dissenting opinion of Justices Walton and Barrows of the supreme court of Maine, in reply to the question whether in that state a woman could under the constitution hold the office of justice of the peace:

"It may be true, that the framers of the constitution did not contemplate, did not affirmatively intend, that women should hold office. But it by no means follows that they intended the contrary. The truth probably is, that they had no intention one way or the other; that the matter was not even thought of. And it will be noticed that the unconstitutionality of such a law is made to rest, not on any expressed intention of the framers of the constitution that women should not hold office, but upon a presumed absence of intention that they should. This seems to us a dangerous doctrine. It is nothing less than holding that the legislature cannot enact a law unless it appears affirmatively that the framers of the constitution intended that such a law should be enacted. We cannot concur in such a doctrine. It would put a stop to all progress. We understand the correct rule to be the reverse of that, namely, that the legislature may enact any law that they may think proper, unless it appears affirmatively that the framers of the constitution intended that such a law should not be passed.

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And the best and only safe rule for ascertaining the intention of the makers of any written law, is to abide by the language they have used; and this is especially true of written constitutions, for in preparing such instruments it is but reasonable to presume that every word has been carefully weighed, and that none are inserted, and none omitted without a design for so doing."

There is but little of authority to be cited upon this question. In the state of Maine five of the eight Justices were of the opinion that under the constitution a woman could not hold the office of justice of the peace, but could be authorized to administer oaths, take acknowledgement of deeds, and solemnize marriages. (Chicago Legal News, vol. 7, p. 10; 62 Maine, 596.) To a question of the legislature, whether under the constitution women could act as members of a school committee, the supreme court of Massachusetts replied as follows:

"The question is limited to the effect of the constitution upon the capacity of a woman to hold this office, and involves no interpretation of statutes. If the constitution prevents a woman from being a member of a school committee, it must be by force of some express provision thereof, or else by necessary implication, arising either from the nature of the office itself, or from the law of Massachusetts as existing when the constitution was adopted, and in the light of which it must be read. But the constitution contains nothing relating to school committees; the office is created and regulated by statute; and the constitution confers upon the general court full power and authority to name and settle annually, or provide by fixed laws for naming and settling all civil officers within the commonwealth, the election and qualification of whom are not in the constitution otherwise provided for. The common law of England, which was our law upon the subject, permitted a woman to fill any local office of an administrative character, the duties attached to which were such that a woman was competent to perform them. The duties of a school committee relate exclusively to the education of children and youth in the town or city for which it is elected. They consist of the general charge and superintendence of the schools, including the employment of teachers, the selection of school-books, the regulation of the attendance of scholars, and the preparation

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of school registers and returns; and they are in no respect of such a nature that they cannot be well and efficiently performed by women. The necessary conclusion is, that there is nothing in the constitution of the commonwealth to prevent a woman from being a member of a school committee, and the proposed question must be respectfully answered in the affirmative." (115 Mass. 602.)

Without pursuing this matter further, our conclusion is, that women are in this state eligible to the office of county superintendent. The judgment therefore will be reversed, and the case remanded with instructions to proceed in accordance with the views herein expressed.

All the Justices concurring.

THE STATE OF KANSAS V. WM. W. JONES.

1. **PRELIMINARY EXAMINATION, No Bar to Further Prosecution.** One preliminary examination for a criminal offense is no bar to another preliminary examination for the same offense; nor is it any bar to a full prosecution for such offense, although the defendant may have been discharged on the first preliminary examination. A mere preliminary examination does not put the accused in jeopardy, within the meaning of § 10 of the Bill of Rights.
2. **INFORMATION; Carnal Knowledge of Female.** An information charging the defendant with "willfully, unlawfully and feloniously defiling a female under eighteen years of age, by carnally knowing her while she was confided to his care and protection by her parents," is sufficient, although it may not allege in terms that the girl's parents are her natural guardians, or that the defendant knew that the girl was under eighteen years of age.
3. ——— **Character, and Consent of Female.** The offense prohibited by § 233 of the crimes-and-punishment act, of defiling a female under eighteen years of age, by carnally knowing her while she was confided to defendant's care and protection, may be committed, although the female may be a person of unchaste character, and may consent to the unlawful embraces of the defendant.
4. ——— **What is "Care and Protection."** Where the parents of a girl under eighteen years of age permit a man to take her to his own home, for the purpose that she may be hired by his wife to work in his own

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family, such girl is so confided to his care and protection, that, if he defile her in the meantime by carnally knowing her, he is guilty of the offense defined by said § 233 of the crimes-and-punishment act.

Appeal from McPherson District Court.

INFORMATION, charging *Jones* with "willfully, unlawfully, and feloniously" defiling a female under eighteen years of age, she "being then and there confided to the care and protection" of said *Jones* by her parents. A plea in abatement was filed, in support of which defendant gave in evidence the record of an examination had and held on the 27th of January 1876, by and before J. W. H. and W. L. F., two justices of the peace, on a complaint made by R. B. Holbrook charging *Jones* with said offense, on which examination said justices found "that no offense was committed," and *Jones* was thereupon discharged by them. The record also shows that on the 29th of January said Holbrook made and filed a new complaint before G. M. S., another justice of the peace of said county, making the same charge against *Jones*, on which said justice held an examination, and for which offense he required *Jones* to enter into a recognizance to appear and answer before the district court. The information was filed April 27th 1876. The plea in abatement was overruled. Trial at the May Term 1876. Verdict, guilty—and *Jones* was sentenced to imprisonment in the county jail for the term of nine months, and to pay a fine of five hundred dollars, and cost of suit. From this judgment and sentence, *Jones* appeals.

J. G. Mohler, for appellant.

M. P. Simpson, county-attorney, for The State.

The opinion of the court was delivered by

VALENTINE, J.: This was a criminal prosecution under § 233 of the crimes-and-punishment act, (Gen. Stat. 369,) charging the defendant with defiling a female under eighteen years of age by carnally knowing her while she was confided to his care and protection. As we understand, the defendant waives

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all objections to the proceedings of the court below, which if sustained would merely require a new trial, and asks that we shall decide the case upon such questions only as go to the very foundation of the present prosecution. This we shall do.

I. The defendant objects to the jurisdiction of the court below, and this he does upon the ground that on the first and original preliminary examination in the case he was discharged. It seems that the defendant had two preliminary examinations. On the first, he was discharged—on the second, he was held to answer in the district court. The question now is, whether the first preliminary examination was a bar to all further and subsequent proceedings for the same offense. We think it was not. One preliminary examination for a criminal offense is no bar to another preliminary examination for the same offense; nor is it any bar to a full prosecution for such offense, although, as in this case, the defendant may have been discharged on the first preliminary examination. A mere preliminary examination does not put the accused in jeopardy within the meaning of the constitution. (Const., Bill of Rights, § 10.)

II. The defendant claims that the information upon which he was tried does not state facts sufficient to constitute any offense. The information among other things states as follows: "That one William W. Jones, late of said county of McPherson, at the county of McPherson, in the state of Kansas, and within the jurisdiction of this [the district] court, on the 28th day of December 1875, did willfully, unlawfully and feloniously defile one Louisa Antoinette Holbrook, by carnally knowing her, she, the said Louisa Antoinette Holbrook then and there being a female under the age of eighteen years confided to the care and protection of the said William W. Jones by Rufus B. Holbrook and Adaline Holbrook, the father and mother of the said Louisa Antoinette Holbrook." The objections urged against said information are as follows: 1st, The information does not allege that the said father and mother of the said Louisa Antoinette were her natural guardians, or had authority to confide her to the care and custody of said defendant Jones.

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2d, Nor does the information allege that Jones knew that said Louisa Antoinette was under eighteen years of age.

We think the information is sufficient in these respects. A female person under eighteen years of age is a minor, (Gen. Stat. 580, § 1,) and the father and mother are by law the natural guardians of the persons of their minor children, and each parent equally so with the other. (Gen. Stat. 512, § 1; Const., art. 15, § 6.) And except in rare cases, the parents have the actual care and control of their minor children. And such would seem to have been the case in this very case, for the information itself states that said Louisa Antoinette was confided to defendant Jones by her parents.

It is probably not necessary that the information should allege in any form that the defendant *knew* that the person whom he defiled was under eighteen years of age; and it is probably not necessary in any case that the state should prove that the defendant had any such knowledge. And it is very doubtful even whether the defendant would be allowed in any such case to prove as a defense that he had no such knowledge. When a man commits what he knows to be an immoral act, he ought to be required to take the entire consequences of such act, although he may not have been fully advised as to all the circumstances connected with the act. In fact, when a man sets out willfully to do an immoral act, he ought to be bound to know all the circumstances connected with such act. Such a person is in no proper condition to plead ignorance. (In connection with this subject, see Bishop's Statutory Crimes, §§ 632, 644; Train & Heard, Precedents of Indictments, 444, Ch. 41, Form 3.) We think that all that is necessary in a case like this is, for the state to allege and prove the fact that the girl defiled was under eighteen years of age, without alleging or proving that the defendant had knowledge of such fact. But the state did allege in this case that the defendant "did willfully, unlawfully, and feloniously defile" said girl, etc., which comes very near alleging knowledge on the part of the defendant. And the state also proved that the defend-

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ant had full knowledge that the girl was under eighteen years of age.

III. The defendant claims that the court below erred in excluding certain evidence tending to show that the girl was not a person of chaste character. He claims that if she was unchaste she could not be defiled—that none but the chaste and virtuous can be defiled. There is perhaps some reason for this claim, and yet we can hardly think that the law was intended for the protection of those only who are absolutely pure. It can scarcely be possible that a girl who has lost her virtue by a single act of unchastity, by a single illicit amour, must forever afterward be wholly abandoned to the insidious wiles of every designing libertine in whose care and custody she may unfortunately be confided. Of course, such a girl is weak; but the protecting care of the law is generally designed for the weak, and not merely for the strong. Of course, such a girl has already been defiled; but may she not be further defiled? Is it possible that a girl of less than eighteen years of age can reach such a depth of sin and pollution that there can be no lower deep into which she may be plunged by an unfaithful protector to whom she may have been confided? If not, then the protecting care of the law should be generously thrown around her. And the feelings of her friends and guardians, who undoubtedly desire her reformation, should be regarded, and not violated by the very man in whom they have reposed confidence. But the statute itself would seem to define how she may be defiled. She may be defiled “by” the offender “carnally knowing her.” We therefore think it makes no difference whether said Louisa Antoinette was chaste or unchaste. Nor do we think that it makes any difference whether she consented, or was forced to yield to the unlawful embraces of the defendant. The question is merely, whether he had carnal connection with her while she was under his care and protection. Even if she encouraged his unlawful desires, even if she was the moving spirit in their lascivious embraces, still, if he had carnal connection with her while she

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was under his care and protection, (she being under eighteen years of age,) we think he was guilty of the offense charged against him.

IV. The court below instructed the jury among other things, as follows: "If you shall find the said Louisa Antoinette was by her parents sent with, or allowed by her parents to go with, the defendant, upon his request to his house for the purpose of seeing defendant's wife to make a contract for work in his family, and for no other purpose, such facts would constitute the care and protection contemplated by the statute." The defendant excepted to this instruction. The defendant also raised this same question by asking the court below to give certain instructions, which the court refused to give; and also raised the same question by moving for a new trial because of misdirection of the jury, and because the verdict was not sustained by sufficient evidence, which motion was overruled. We do not think that the court erred in any of these respects. The evidence applicable to this question showed substantially as follows: On December 28th 1875, the defendant Jones went in a two-horse wagon to the house of Mr. Holbrook. Mr. Holbrook, Mrs. Holbrook, and their daughter Louisa Antoinette, who was then between the ages of fifteen and sixteen years, were all at home. The defendant then stated that his wife wanted to hire a girl to work for her; that he wanted "Nett," the daughter, to go home with him for his wife to make a bargain with; that he never made a bargain with a girl to work for his wife; that he always let his wife make such bargains. The Holbrooks all consented to such an arrangement, but upon condition that defendant would bring the girl back the next day, to which condition the defendant consented. The defendant resided about five miles from Holbrook's. He took the girl with him in his wagon to his home, but when they arrived there they found no one at home. The defendant then said that his wife had probably gone to Mr. Finan's, a neighbor who lived near by. He however soon produced a note in writing, purporting to be from his wife, but which was in fact written by himself, which stated that

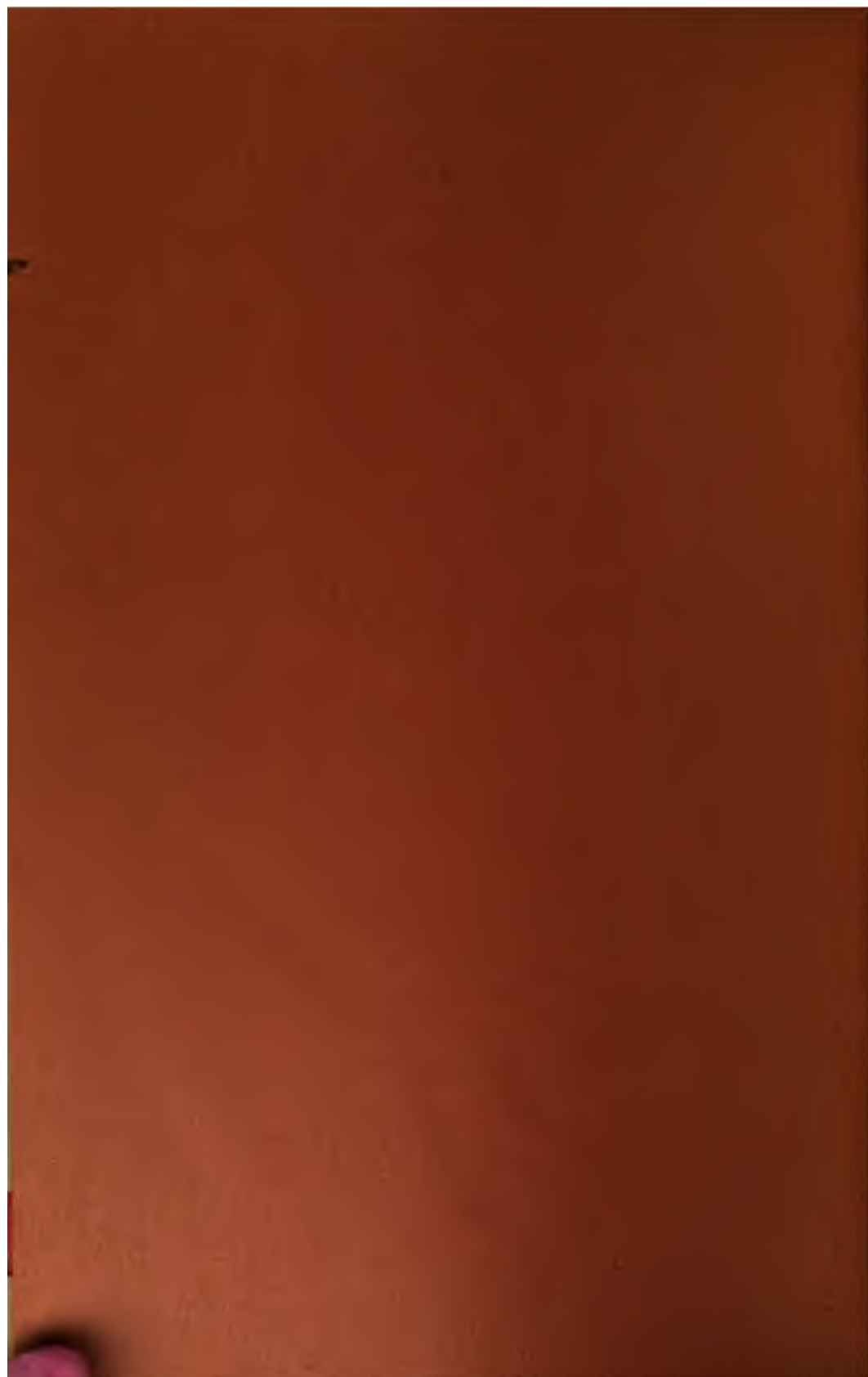
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his wife had gone to Mr. Hanna's, (a neighbor who lived about seven miles from the defendant's house,) and asking that the defendant would come after her the next day. The defendant himself however had on that very same day, and before he went to Holbrook's, taken his wife and his two children to Mr. Hanna's. It would seem to have been about night when the defendant and the girl arrived at the defendant's house. And on that night the defendant and the girl staid alone at the defendant's house, and slept together, and had sexual intercourse with each other. The next day the defendant took the girl back to her own home. We think that the trust reposed in the defendant by the father and mother of the girl, in confiding her to his care for the purpose that he might take her to his own home so that his wife could employ her as a hired girl in his own family, was such a trust as is fairly contemplated by the statute. It was very much like placing the girl in defendant's family as one of the family, and reposing the confidence for her care and protection in the defendant himself as the head of the family.

The judgment of the court below will be affirmed.

All the Justices concurring.

EXTRA ANNOTATION
TO
PRECEDING VOLUME



NOTES

ON THE

KANSAS REPORTS

CASES IN 16 KANSAS

16 KAN. 9, STATE v. FREELAND

Appeals in criminal cases—Decisions reviewable.—Cited in *State v. Horneman*, 16 Kan. 452, holding that a judgment sustaining a demurrer to a plea of autrefois acquit is not appealable; *State v. Edwards*, 35 Kan. 105, 10 Pac. 544, holding that intermediate orders can only be reviewed on appeal from a final judgment.

16 KAN. 11, HOOVER v. MEAR

Herd law—When effective.—Cited in *Reed v. Sexton's Adm'rs*, 20 Kan. 195; *Lipscomb v. Citizens' Bank of Galena*, 66 Kan. 243, 71 Pac. 583—holding that the herd law of 1872 (Laws 1872, c. 193) did not become effective until after publication.

16 KAN. 14, STATE v. INGRAM

Former jeopardy—Nolle prosequi.—Cited in *State v. Rust*, 31 Kan. 500, 3 Pac. 428, holding a nolle pros. after granting new trial does not bar another prosecution under a subsequent information.

Objections to evidence—General or specific.—Cited in *State v. Taylor*, 36 Kan. 329, 13 Pac. 550, holding that an "objection" and "exception" to the admission of evidence, without stating any reason therefor, is not sufficient.

Larceny—Evidence.—Cited in *State v. Buckles*, 26 Kan. 237, holding that proof of larceny of a stallion is essential to support an allegation of larceny of a "horse" in a prosecution under the statute.

Same—Possession of property as evidence of guilt.—Cited in *State v. McKinney*, 76 Kan. 419, 91 Pac. 1068 (dissenting opinion), holding that possession of recently stolen property is evidence authorizing an inference of guilt.

Cited in note in 70 Am. Dec. 447, on possession of stolen property as evidence of larceny.

Confessions.—Cited in *State v. Yordi*, 30 Kan. 221, 2 Pac. 161, holding that confessions are admissible in a criminal case when made under the circumstances referred to in the cited case.

Cited in note in 6 Am. St. Rep. 243, on admissibility of confessions.

Same—When voluntary.—Cited in *Territory v. Emilio*, 14 N. M. 147, 39 Pac. 239, holding that confessions made without fear of anything other than the

legal consequences of accused's act are voluntary and admissible; *Wilson v. United States*, 162 U. S. 613, 16 Sup. Ct. 895, 40 L. Ed. 1090; *State v. Washing*, 36 Wash. 485, 78 Pac. 1019—holding that the fact that accused is in custody and manacled does not necessarily make a confession involuntary.

Cited in note in 18 L. R. A. (N. S.) 804, 838, as to when confession is voluntary.

16 KAN. 20, WOOLLEY v. VAN VOLKENBURGH

Strict construction of guaranty.—Cited in *Lamm & Co. v. Colcord*, 22 Okl. 493, 98 Pac. 355, 19 L. R. A. (N. S.) 901, holding that a guarantor cannot be held beyond the strict terms of his contract, when the language of the guaranty is ascertained.

Appeal—Review dependent on exceptions and proceedings below.—Cited in *Dexter v. Cochran*, 17 Kan. 447; *McKinstry v. Carter*, 48 Kan. 428, 29 Pac. 597; *Westchester Fire Ins. Co. v. Coverdale*, 48 Kan. 446, 29 Pac. 682; *Oakland Home Ins. Co. v. Allen*, 1 Kan. App. 108, 40 Pac. 928—holding that error apparent in the final judgment in the district court may be corrected without exception, appearance, or motion to set aside the judgment by the adverse party.

16 KAN. 22, THOM v. DAVIS

Specification of error.—Cited in *State v. Coulter*, 40 Kan. 673, 20 Pac. 525, holding that, where counsel fail to specify error, judgment will be affirmed if the appellate court finds no error in the record.

16 KAN. 23, WILLIAMS v. HILL

Secondary evidence of deeds.—Cited in *West v. Cameron*, 39 Kan. 736, 18 Pac. 804; *Stratton v. Hawks*, 43 Kan. 538, 23 Pac. 591; *Bergman v. Bullitt*, 43 Kan. 709, 23 Pac. 938—holding that it is only necessary to show that an original deed is not in the possession or control of one offering it, so as to make a copy admissible under the statute without proving it was lost or destroyed.

Same.—Distinguished in *Meskimen v. Day*, 35 Kan. 46, 10 Pac. 14, relating to the admission in evidence of the record of a registered deed, but not authenticated by a notarial seal.

16 KAN. 24, STATE v. STILLWELL

Indictment for gambling.—Cited in *State v. Shewalter*, 16 Kan. 26, holding that an indictment was insufficient for not alleging that cards accused was alleged to have played for money were a gambling device, or that he bet on them.

Gaming devices.—Cited in note in 17 L. R. A. (N. S.) 1212, on card game paraphernalia as "gaming device."

16 KAN. 26, STATE v. SHEWALTER

16 KAN. 27, MINER v. PEARSON

Married women—Contracts.—Cited in *Burns v. Cooper*, 140 Fed. 273, 72 C. C. A. 25; *Harrington v. Lowe*, 73 Kan. 1, 84 Pac. 570, 4 L. R. A. (N. S.) 547—holding that married women may contract for themselves, to the extent of their separate property.

Same—Judgments.—Cited in note in 134 Am. St. Rep. 942, on validity of judgments against married women.

16 KAN. 29, PATTON v. FURTHMIER

16 KAN. 31, WARD v. BAKER

Presumptions in aid of judgments.—Cited in *Kitchen v. Bellefontaine Nat. Bank*, 53 Kan. 242, 36 Pac. 344, 42 Am. St. Rep. 282; *Westervelt v. Jones*,

5 Kan. App. 35, 47 Pac. 322—holding that it is presumed, in favor of the courts of general jurisdiction of a sister state, that they have the authority exercised by them, and that their modes of procedure are authorized by the law of such state.

16 KAN. 32, NICCOLLS v. ESTERLY

Witnesses—Transactions with deceased person.—Cited in *Plowman v. Nicholson*, 81 Kan. 210, 105 Pac. 692, 106 Pac. 279; *Hay v. Peterson*, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581—holding that an adverse surviving party, who is compelled by a representative of a decedent to testify, may afterwards testify for himself on the same subject.

16 KAN. 35, McCARTY v. GORDON

Cited in *Snider v. Koehler*, 17 Kan. 432; *Glass v. Alt*, 17 Kan. 444.

Sales—Place where made.—Cited in *City of Kinsley v. Dyerly*, 79 Kan. 1, 98 Pac. 228, 19 L. R. A. (N. S.) 405, on the question of the place of sale of goods; *Wadhams & Co. v. Balfour*, 82 Or. 313, 51 Pac. 642, holding that, under a contract to deliver goods corresponding with a sample, title passes at the time and place of delivery of goods of the required kind to the buyer without any further inspection.

Cited in note in 61 L. R. A. 422, on conflict of laws as to sales of liquor.

Same—Sale without payment or delivery.—Cited in *State v. Copp*, 34 Kan. 522, 9 Pac. 233, holding that a contract of sale becomes complete without delivery or payment only when the terms of sale are agreed upon and everything the parties have to do is done.

Same—Purchase by sample.—Cited in *Gill v. S. Kaufman & Co.*, 16 Kan. 571, holding that a purchaser of goods by sample may refuse to receive goods, if they do not correspond with the sample.

Cited in note in 70 L. R. A. 660, on warranty on sale of goods by sample.

16 KAN. 39, BOTKIN v. LIVINGSTON

Validity of note to aid railroad construction.—Cited in *Southard v. Arkansas Valley & W. Ry. Co.*, 24 Okl. 408, 103 Pac. 750, holding that a note given a railroad company to aid in its construction is valid as between the parties.

Consideration for contracts.—Cited in *Botkin v. Livingston*, 21 Kan. 232, holding that ceasing to oppose the building of a railroad across land owned by the railroad company was not a sufficient consideration for an agreement by third persons interested in the building of the road to pay to the persons withdrawing their opposition all damages resulting from building the road.

Objections to evidence—General or specific.—Cited in *Smith v. Leighton*, 38 Kan. 544, 17 Pac. 52, 5 Am. St. Rep. 778, holding that, where evidence is apparently admissible for any purpose, it is not error to admit it, unless reasons for its exclusion are given.

Same—Written instruments—Waiver.—Cited in *Kansas Pac. Ry. Co. v. Cutter*, 19 Kan. 83; *Edmondson v. Beals*, 27 Kan. 656—holding that an objection to the admission of a copy of a deed in evidence, because the original was not produced or its absence accounted for, cannot be first made on appeal; *Long Bell Lumber Co. v. Martin*, 11 Okl. 192, 66 Pac. 328, holding that an objection to the admission of a copy of a deed as incompetent, irrelevant, and immaterial did not raise the objection that a power of attorney to execute the deed was not shown.

Promise to pay another's debt—Demand.—Cited in note in 34 L. R. A. (N. S.) 155, on demand as condition precedent to action on promise to pay on demand another's debt.

16 KAN. 43, SHOEMAKER v. SIMPSON

Fixtures.—Cited in *Central Branch R. Co. v. Fritz*, 20 Kan. 430, 27 Am. Rep. 175, holding that the right to annex fixtures depends upon their actual or constructive annexation to the realty, the right of the parties to so use the article, and the intention of the owners of both the personalty and realty; *Traders' Bank of Kirwin v. First Nat. Bank of Kirwin*, 6 Kan. App. 400, 50 Pac. 1006, holding that the intent of the parties is material in determining whether personalty attached to the realty has become a part thereof; *Eisenhauer v. Quinn*, 36 Mont. 368, 93 Pac. 38, 14 L. R. A. (N. S.) 435, 122 Am. St. Rep. 370, holding that one cannot be deprived of title to personalty by another wrongfully taking possession thereof against his consent and attaching same to the realty of another, if it can be removed without great inconvenience or substantial injury to the realty.

Cited in note in 54 Am. Dec. 589 (par. 2), on title by accession; in 32 L. R. A. 425, on title by accession to crops, fruit, and timber wrongfully severed.

Demand as condition precedent to actions.—Cited in *Auld v. Butcher*, 22 Kan. 400, holding that the owner of a bond pledged to secure a note cannot, after paying off the note, sue for the value of the bond before first demanding its return; *Chicago, K. & W. R. Co. v. Board of Com'rs of Chase County*, 49 Kan. 399, 30 Pac. 456, holding that a demand is not necessary before bringing mandamus, where defendant has shown a purpose not to perform the official duty sought to be enforced.

Same—Wrongful possession by defendant.—Cited in *Dickson v. Randal*, 19 Kan. 212; *Sims v. Mead*, 29 Kan. 124; *Burchett v. Purdy*, 2 Okl. 391, 37 Pac. 1053—holding that the lawful owners of property might bring replevin therefor against one who wrongfully acquired possession of it, without first making a demand for it; *Surles v. Sweeney*, 11 Or. 21, 4 Pac. 469; *Velsian v. Lewis*, 15 Or. 539, 16 Pac. 631, 3 Am. St. Rep. 184—holding that the owner need not make a demand on suing for personal property obtained by defendant from one having no right or title thereto.

Same—Claim of title by defendant.—Cited in *Lamping v. Keenan*, 9 Colo. 390, 12 Pac. 434; *Stone v. Bird*, 16 Kan. 488; *Seip v. Tilghman*, 23 Kan. 283; *Chapin v. Jenkins*, 50 Kan. 385, 31 Pac. 1084; *Burchett v. Purdy*, 2 Okl. 391, 37 Pac. 1053; *Brown v. Truax*, 58 Or. 572, 115 Pac. 597—holding that, where defendant in replevin claims title to the property, a demand therefor is not necessary.

Replevin—Detention by defendant.—Cited in *Meixell v. Kirkpatrick*, 33 Kan. 282, 6 Pac. 241, holding that, where one claiming bonds sought to be recovered had such control over them that he could have caused them to be delivered, though they were actually in the possession of a third person, there was a sufficient detention of the bonds to enable plaintiff to maintain the action against defendant.

Cited in note in 80 Am. St. Rep. 755, as to when replevin or claim and delivery is sustainable.

16 KAN. 54, NICHOLS v. OVERACKER

Homestead—Purchase money and improvements—Consent of wife.—Cited in *Plumb v. Bay*, 18 Kan. 415, holding that a mortgage was for purchase money; *Greeno v. Barnard*, 18 Kan. 518, holding a purchase-money lien cannot be created on a homestead in any different manner than on other property; *Hurd v. G. C. Hixon & Co.*, 27 Kan. 722; *Tyler v. Johnson*, 47 Kan. 410, 26 Pac. 198; *Dreese v. Myers*, 52 Kan. 126, 34 Pac. 349, 39 Am. St. Rep. 836—holding that there is no homestead exemption as against obligations contracted in improving or purchasing the homestead; *Winter v. Ritchie*, 57 Kan. 212, 45 Pac. 595, 57 Am. St. Rep. 331; *Foster Lumber Co. v. Harlan County Bank*, 71 Kan.

158; 80 Pac. 49, 114 Am. St. Rep. 470, 6 Ann. Cas. 44—holding that an equitable purchase-money mortgage is valid without the wife's consent, though the property was a homestead; *Beckenheuser v. Ferrell*, 8 Kan. App. 365, 55 Pac. 499, holding that the homestead exemptions did not apply to obligations for the purchase money.

Cited in note in 45 Am. St. Rep. 385-387, on lien on homesteads for improvements; in 70 Am. Dec. 742 (par. 3); 99 Am. Dec. 574-576; 86 Am. St. Rep. 174, 176, 181—on vendor's lien on homestead for purchase money; in 68 Am. Dec. 323 (par. 1); 87 Am. Dec. 257—on purchase-money mortgage by husband alone.

Rights of mortgagee upon substitution of second mortgage.—Cited in *Farmers' Loan & Trust Co. v. Meridian Waterworks Co.*, 139 Fed. 661, on the rights of a mortgagee as against intervening liens upon the substitution of a second mortgage.

Revival of mortgage.—Cited in note in 5 Am. St. Rep. 706, on revival of mortgage satisfied by mistake.

16 KAN. 60, CROWELL v. WARD

Public or private interest as affecting right to sue.—Cited in *Center Tp. v. Hunt*, 16 Kan. 430; *Ludes v. Hood*; *Bonbright & Co.*, 29 Kan. 49—holding that it is the purpose of the Civil Code, so far as practicable, that every person shall prosecute his own actions in his own name, so that a private person cannot prosecute an action unless he have a special interest in the result; *Atchison, T. & S. F. R. Co. v. State ex rel. Sanders*, 22 Kan. 1, holding that a private citizen cannot, in the name of the state, sue to recover the statutory penalty for failure to ring the bell or blow the whistle at railroad crossings, the Constitution requiring such penalties to go to the common school fund; *Territory ex rel. Oklahoma Gas & Electric Co. v. De Wolfe*, 18 Okl. 454, 74 Pac. 98, holding that, where the public is interested and it is necessary to bring an action in the name of the territory, the action may only be brought by the public officer authorized by the state.

16 KAN. 63, KSHINKA v. CAWKER

Bill of exceptions—Necessity.—Cited in *Clune v. United States*, 159 U. S. 590, 16 Sup. Ct. 125, 40 L. Ed. 269, holding that, in absence of statute, instructions can only be brought into the record by a bill of exceptions; *Litsey v. Moffett*, 29 Kan. 507, holding that the evidence can only be made a part of the record by proper bill of exceptions; *Brush Electric Light & Power Co. v. Grosch*, 1 Kan. App. 110, 40 Pac. 933, holding that nothing can be made a part of the appellate record by act of the parties which is not made a part thereof in the manner provided by law.

Same—Necessity of signing by judge.—Cited in *Atchison & N. R. Co. v. Wagner*, 19 Kan. 335, holding that a purported bill of exceptions will not be considered on appeal, if not signed by the trial judge.

16 KAN. 65, HALLOWELL v. MILNE

Cited in *Lynds v. Winkler*, 23 Kan. 697.

Conditional sale—Payment of price.—Cited in *Standard Implement Co. v. Parlin & Orendorff Co.*, 51 Kan. 544, 33 Pac. 360; *Otto Gas-Engine Works v. Hare*, 64 Kan. 78, 67 Pac. 444—holding that the purchaser in a conditional sale cannot pass title as against the seller until the price is paid; *Heinbockel v. Zugbaum*, 5 Mont. 344, 5 Pac. 897, 51 Am. Rep. 59, holding that the purchaser under a conditional sale receives no title until performance of the condition.

Cited in note in 25 L. R. A. (N. S.) 767, on right of one leaving chattels in another's possession as against latter's vendees or creditors.

Suit on executory contract of sale.—Cited in *John Deere Plow Co. v. Gorman*, 9 Kan. App. 675, 59 Pac. 177, holding that the seller cannot sue on an executory contract of sale.

16 KAN. 68, MUGAN v. HALEY

16 KAN. 72, GEORGE v. OXFORD TP.

Elections—Notice.—Cited in *Rathbone v. Board of Com'rs of Kiowa County*, 73 Fed. 395; *Chicago, K. & W. R. Co. v. Ozark Tp.*, 46 Kan. 415, 28 Pac. 710—holding municipal bonds are invalid where the election authorizing their issuance is not taken according to statute by giving the full statutory period of notice; *Wood v. Bartling*, 16 Kan. 109, holding that want of notice of an election may avoid it; *State ex rel. Crocker v. Echols*, 41 Kan. 1, 20 Pac. 523; *Guernsey v. McHaley*, 52 Or. 555, 98 Pac. 158; *McClure v. Oxford Tp.*, 94 U. S. 429, 24 L. Ed. 129—holding that, where a special question is to be submitted to voters at a regular election, the law providing for notice of the election must be strictly followed; *State ex rel. Jackson v. Bentley*, 80 Kan. 227, 101 Pac. 1073; *City of Chanute v. Davis*, 85 Kan. 188, 116 Pac. 867—holding that statutory notice is essential to the validity of a special election.

Distinguished in *Town of Grove v. Haskell*, 24 Okl. 707, 104 Pac. 56, relating to county seat removal elections.

Same—Presumed knowledge of elections.—Cited in *Wood v. Bartling*, 16 Kan. 109, holding that all persons are presumed to know when a state officer is to be elected, though receiving no actual notice.

Cited in note in 90 Am. St. Rep. 69, on irregularities avoiding elections; in 120 Am. St. Rep. 795, 796, on necessity of notice or proclamation of election.

Municipal bonds.—Cited in note in 98 Am. Dec. 684, on municipal bonds and defenses thereto; in 51 Am. St. Rep. 832, on municipal bonds in hands of bona fide holders.

16 KAN. 80, STATE v. POTTER

Change of venue—Accused's consent.—Cited in *State v. Knapp*, 40 Kan. 148, 19 Pac. 728, holding that under Const. Bill of Rights, § 10, accused can only be tried out of the county and district in which the offense was committed with his own consent.

Same—Changing venue before plea.—Cited in *State v. Kindig*, 55 Kan. 113, 39 Pac. 1028, holding that there is no material error in transferring a case to another county before accused's plea was entered, where the venue was changed on accused's motion, and he had the benefit of an arraignment in the other county.

Correcting form of verdict.—Cited in *State v. Carrithers*, 79 Kan. 401, 89 Pac. 614, holding that the form of a criminal verdict may be corrected before the jury is discharged.

Cited in note in 23 L. R. A. 729, on correction of verdict in criminal cases.

Testimony willfully false in part.—Cited in *Rea v. State*, 3 Okl. Cr. 269, 105 Pac. 381, holding that it is error to instruct that the jury "should" disregard all of the testimony of a witness who willfully testified falsely to a material fact.

16 KAN. 102, LEWIS v. MARSHALL COUNTY COM'RS, 32 AM. REP. 275

Mandamus—Purpose.—Cited in *Rosenthal v. State Board of Canvassers*, 50 Kan. 129, 32 Pac. 129, 19 L. R. A. 157; *In re Gunn*, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519; *Board of Education of City of Topeka v. Welch*, 51 Kan. 792, 33 Pac. 654—holding mandamus only issues to compel the performance of an act enjoined by law as a duty.

Cited in note in 89 Am. Dec. 785, on law of mandamus.

Same—Canvass of election returns.—Cited in *Brown v. Board of Com'rs of Rush County*, 38 Kan. 436, 17 Pac. 304; *Brown v. Jeffries*, 42 Kan. 605, 22 Pac. 578; *State ex rel. Wilson v. Board of Com'rs of Kearny County*, 42 Kan. 739, 22 Pac. 735; *Shull v. Board of Com'rs of Gray County*, 54 Kan. 101, 37 Pac. 994; *Sharpless v. Buckles*, 65 Kan. 838, 70 Pac. 886—holding that the duty of election canvassers in counting and returning the votes is mainly ministerial, and they may be compelled by mandamus to canvass the returns, though it appear that illegal votes were received; *State ex rel. Leech v. Board of Canvassers of Choteau County*, 13 Mont. 23, 31 Pac. 879; *Territory ex rel. Lester v. Suddith*, 15 N. M. 728, 110 Pac. 1038; *Stearns v. State ex rel. Biggers*, 23 Okl. 462, 100 Pac. 906; *Heffner v. Board of Com'rs of Snohomish County*, 16 Wash. 273, 47 Pac. 430—holding that mandamus lies to compel election canvassers to meet and perform their duties, if they refuse or fail to canvass all or a part of the returns.

Same—Excuse for nonperformance of official duty.—Cited in *State ex rel. Taggart v. Holcomb*, 81 Kan. 879, 106 Pac. 1030, 28 L. R. A. (N. S.) 251, holding that an officer cannot set up as a defense in mandamus that the statutory time for performing the duty sought to be enforced is passed through his own failure to perform his duty.

Cited in note in 36 L. R. A. (N. S.) 1091, on mandamus to compel officer, after expiration of term, to perform official duty.

Powers and duties of election canvassers.—Cited in *State v. Board of Com'rs of Hodgeman County*, 23 Kan. 264, holding that election canvassers have no power to determine the term of office, and the existence of vacancies therein, it being their duty merely to canvass all of the returns; *State ex rel. Mitchell v. Stevens*, 23 Kan. 456, 33 Am. Rep. 175, as to the duties of a canvassing board.

16 KAN. 109, WOOD v. BARTLING

Elections—Notice of general election.—Cited in *Cook v. Mock*, 40 Kan. 472, 20 Pac. 259; *State ex rel. Crocker v. Echols*, 41 Kan. 1, 20 Pac. 523—holding that failure to give notice of the time of general elections or of the officers to be voted for thereat will not vitiate the election, as knowledge thereof by the voters is presumed, but failure to give such notice in case of a special election vitiates it.

Distinguished in *Jones v. Gridley*, 20 Kan. 584, holding that an election of justices of the peace was valid, though no notice was given that a justice's election would be held.

Same—Time of electing justices of the peace.—Cited in *Odell v. Dodge*, 16 Kan. 446, on the time for electing justices of the peace.

Same—Failure to elect a full number of justices.—Cited in *St. Louis & S. F. Ry. Co. v. Payne*, 29 Kan. 186, holding that the failure of the voters to elect two justices of the peace, who were to be elected, instead of one, did not invalidate the election of the one who was elected.

Same—Ineligibility of successful candidate.—Cited in *Privett v. Bickford*, 26 Kan. 52, 40 Am. Rep. 301, holding that one who, when elected to office, was disqualified under a statute disqualifying persons who had borne arms against the government until the disqualification is removed by law, may hold office if the disqualification is removed before his assumption of office; *In re Gunn*, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519, holding that a minority candidate, even if eligible, is not elected, where the majority vote for an ineligible candidate; *Hudson v. Conklin*, 77 Kan. 764, 93 Pac. 585, holding that the ineligibility of one elected to an office did not entitle the minority candidate to the office; *Hanson v. Grattan*, 84 Kan. 843, 115 Pac. 646, 34 L. R. A. (N. S.) 240, holding that the

disqualification to hold office of one elected by the electors must be clearly shown by the evidence.

Cited in note in 124 Am. St. Rep. 212, on effect of election where successful candidate is ineligible.

Judicial notice of irregular organization of county.—Cited in *State v. Ruth*, 21 Kan. 583, on the question of taking judicial notice that a county was regularly organized for judicial purposes and the officers duly qualified.

16 KAN. 115, **POLSTER v. RUCKER**

Sufficiency of petition not demurred to.—Cited in *Bank of Glasco v. Marshall*, 5 Kan. App. 252, 47 Pac. 561, holding that, in absence of a demurrer and motion, a petition will be held good, unless it fails to allege a material fact.

16 KAN. 117, **CHALLISS v. ATCHISON, T. & S. F. R. CO.**

Eminent domain—Exercise of power.—Cited in note in 22 Am. Dec. 692, on what uses justify exercise of power of eminent domain; in 88 Am. St. Rep. 941, on existence of public use as question for courts; in 22 L. R. A. (N. S.) 9, 10, 76, 77, on judicial power over eminent domain.

Name—Constructive notice of proceedings.—Cited in *Corwin v. St. Louis & S. F. Ry. Co.*, 51 Kan. 451, 33 Pac. 99, holding that any subsequent purchaser of property condemned for railroad purposes must take notice of the records in the office of the register of deeds and of the records of every other public office or tribunal having jurisdiction of such proceedings.

Same—Estoppel.—Cited in *Chicago, I. & K. R. Co. v. Knuffke*, 36 Kan. 367, 13 Pac. 582; *Dillon v. Kansas City, F. S. & M. R. Co.*, 67 Kan. 687, 74 Pac. 251—holding that neither one who collected from the county treasurer money awarded in condemnation proceedings, nor one claiming under him may afterwards claim that the condemnation proceedings were void.

Same—Title and rights acquired.—Cited in note in 93 Am. Dec. 729 (par. 3), on interest acquired by condemnation of right of way.

16 KAN. 130, **BEDELL v. BURLINGTON NAT. BANK**

Review of order granting new trial.—Cited in *Day v. Harris*, 23 Kan. 216; *Brown v. Atchison, T. & S. F. R. Co.*, 29 Kan. 186, as to review of order granting new trial; *Condell v. Burlingame Savings Bank*, 23 Kan. 596; *Hunt v. Haines*, 25 Kan. 210—holding that the appellate court requires a much stronger showing of error to set aside an order granting a new trial than one refusing a new trial; *Kansas City Belt Line R. Co. v. Cain*, 56 Kan. 786, 44 Pac. 995, holding that an order granting a new trial for misleading instructions will not be disturbed, if it is reasonably probable the instructions were misleading.

Cross-petition in error.—Overruled in *Stettauer Bros. v. Carney & Stevens*, 20 Kan. 474, holding that defendant in error may file a cross-petition in error.

Bona fide purchasers of negotiable instruments.—Cited in note in 29 L. R. A. (N. S.) 391, on circumstances sufficient to put purchaser of negotiable paper on inquiry.

16 KAN. 133, **SEITZ v. UNION PAC. RY. CO.**

Mechanic's lien—Estates or interests affected.—Cited in *Getto v. Friend*, 46 Kan. 24, 26 Pac. 473, holding that a materialman's lien on the interest of the owner under his executory contract to purchase is limited by the owner's equity in the land purchased; *Jarvis-Conklin Mortg. Trust Co. v. Sutton*, 46 Kan. 166, 26 Pac. 406; *Chicago Lumber Co. v. Fretz*, 51 Kan. 194, 32 Pac. 908—holding that persons furnishing materials for erecting buildings on lots purchased under an executory contract of purchase are entitled to a materialman's lien; *Badger*

Lumber Co. v. Malone, 8 Kan. App. 121, 54 Pac. 602; *Johnson v. Badger Lumber Co.*, 8 Kan. App. 580, 55 Pac. 517; *Block v. Pearson*, 19 Okl. 422, 91 Pac. 714—holding that a materialman's lien extends to all of the estate or interest which the owner has, whether his ownership be of the leasehold or freehold, etc., the term "owner" including the owner of a leasehold, etc.

Cited in note in 45 Am. Dec. 679, on estates and interests affected by mechanic's lien; in 23 L. R. A. (N. S.) 602, on power of lessee or vendee to subject owner's interest to mechanics' liens.

Same—Priority over mortgage.—Cited in *Missouri Valley Lumber Co. v. Reid*, 4 Kan. App. 4, 45 Pac. 722, holding that a mortgage is superior to a materialman's lien.

Vendor's lien.—Cited in *Greeno v. Barnard*, 18 Kan. 518, holding that there is no vendor's lien created by mere operation of law or rule of equity.

16 KAN. 143, CITY OF SALINA v. SEITZ

Cited in *City of Marion Centrè v. Toomy*, 21 Kan. 430.

Powers of municipalities.—Cited in *State v. Young*, 17 Kan. 414; *State v. Simmons*, 21 Kan. 685—holding that third-class cities may issue liquor licenses; *In re Dassler*, 35 Kan. 678, 12 Pac. 130, holding that a statute giving first-class cities control over their streets, and making them separate districts, controls over a prior statute, so far as it conflicts with it; *In re Jahn*, 55 Kan. 694, 41 Pac. 956, holding that the state may authorize a city to impose punishment for the illegal sale of intoxicants within the city limits.

Cited in note in 17 L. R. A. (N. S.) 50, on power of municipality to punish act also an offense under state law.

Sale of intoxicants without license for medicinal purposes.—Cited in *Chipman v. People*, 24 Colo. 520, 52 Pac. 677; *City of Oswego v. Belt*, 16 Kan. 480; *State v. Fleming*, 32 Kan. 588, 5 Pac. 19—holding that a physician or druggist cannot sell intoxicants for medicinal purposes without a permit.

Appealable judgments.—Cited in *City of Burlington v. James*, 17 Kan. 221, holding that a judgment of conviction for violating an ordinance, rendered on an amended complaint after the original was quashed for not charging a public offense, is reviewable by the Supreme Court.

16 KAN. 147, PAYNE v. FIRST NAT. BANK

Continuance—Discretion of court.—Cited in *Dawson v. Coston*, 18 Colo. 493, 33 Pac. 189; *Board of Regents of Kansas State Agricultural College v. Linscott*, 30 Kan. 240, 1 Pac. 81; *Clouston v. Gray*, 48 Kan. 31, 28 Pac. 983—holding that the granting of a continuance is largely within the trial court's discretion, which will not be interfered with in absence of abuse.

Cited in note in 74 Am. Dec. 141, 145, 148, on continuance of civil causes.

Dissolution of attachment.—Cited in note in 123 Am. St. Rep. 1054, on proceedings to dissolve attachments.

16 KAN. 156, ATCHISON & N. R. CO. v. HUBBARD

16 KAN. 157, COMMISSIONERS OF REPUBLIC COUNTY v. KINT

16 KAN. 158, MISSOURI VAL. LIFE INS. CO. v. DUNHLEE

16 KAN. 166, CLARK v. AKERS

Indian lands—Conveyance.—Cited in *United States v. Allen*, 171 Fed. 907; *Clark v. Libbey*, 17 Kan. 634; *McGannon v. Straightledge*, 32 Kan. 524, 4 Pac. 1042—holding that an attempted conveyance of restricted allotted Indian lands is void, and will not support an equitable or adverse title; *Baldwin v. Squires*,

20 Kan. 280, relating to the validity of the conveyance of Ottawa Indian lands: *Sheldon v. Donohoe*, 40 Kan. 348, 19 Pac. 901, holding that one who was prohibited by statute from taking title to Indian lands could not assert an indirect title by adverse possession, estoppel, or limitation.

Deeds—Evidence as to delivery.—Cited in *Cain v. Robinson*, 20 Kan. 456, holding that, in absence of contrary evidence, it is presumed that a deed is delivered as of its date; *Good v. Williams*, 81 Kan. 388, 105 Pac. 433, 135 Am. St. Rep. 392, holding that a deed will not be vitiated by a mere suspicion that it was not actually delivered before it was recorded; *Kitchener v. Jehlik*, 85 Kan. 684, 118 Pac. 1058, holding it is presumed a deed was not delivered before the date of its acknowledgment.

Cited in note in 86 Am. Dec. 64 (par. 1), on presumption as to time of delivery of deed.

16 KAN. 176, SIBERT v. WILDER, 22 AM. REP. 280

Statutes of limitation—Nature.—Cited in *Atchison, T. & S. F. R. Co. v. Burlingame Tp.*, 36 Kan. 628, 14 Pac. 271, 59 Am. Rep. 578; *Fuller v. Wells, Fargo & Co.*, 42 Kan. 551, 22 Pac. 561; *Freeman v. Hill*, 45 Kan. 435, 25 Pac. 870; *Bauserman v. Charlott*, 46 Kan. 480, 26 Pac. 1051; *Ament v. Lowenthal*, 52 Kan. 706, 35 Pac. 804; *McLane v. Allison*, 7 Kan. App. 263, 53 Pac. 781—holding that statutes of limitation are statutes of repose.

Same—Acknowledgment or part payment.—Cited in *President and Board of Trustees of California College v. Stephens*, 11 Cal. App. 523, 105 Pac. 614; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Clawson v. McCune's Adm'r*, 20 Kan. 337; *Ft. Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. 56, 28 L. Ed. 636—holding an acknowledgment of a debt, made to a stranger, and not to the creditor or his agent, will not stop the running of limitations; *Investment Securities Co. v. Berghold*, 60 Kan. 813, 58 Pac. 469, holding that payment of interest to a stranger will not stop the running of limitations; *Mulvane v. Sedgley*, 63 Kan. 105, 64 Pac. 1088, 55 L. R. A. 552, holding that an action to foreclose against a surety of a mortgagor is barred after the acknowledgment of the relation by the mortgagee when the action is also barred against the principal; *Miller v. McDowell*, 69 Kan. 453, 77 Pac. 101, holding that the acknowledgment of a debt to the agent of the creditor arrests the running of limitations; *King v. City of Frankfort*, 2 Kan. App. 530, 43 Pac. 983, holding, to arrest the running of limitations, the acknowledgment of the debt must be to the creditor or his agent.

Cited in notes in 10 Am. Dec. 573; 35 Am. Rep. 418—on acknowledgment of debt barred by limitations; in 25 L. R. A. (N. S.) 808, on person to whom acknowledgment or new promise must be made to toll statute or remove bar of limitations; in 57 Am. Rep. 334, on effect on running of limitations of acknowledgment to stranger; in 58 Am. Rep. 749; 102 Am. St. Rep. 756—on acknowledgment or new promise to suspend running or remove bar of statute of limitations.

16 KAN. 182, SHEPARD v. ALLEN

Cited in *Freeman v. Duncan*, 27 Kan. 784.

Payment of pre-existing debt by note or check.—Cited in *Medberry, Yetter & Co. v. Soper, Brainard & Co.*, 17 Kan. 369; *Topeka Capital Co. v. Merriam*, 60 Kan. 397, 56 Pac. 757; *Webb v. National Bank of the Republic*, 67 Kan. 62, 72 Pac. 520—holding that whether the execution of a note for pre-existing debt discharges the obligation or is merely additional security depends on the intention of the parties, to be shown by the evidence; *Mullins v. Brown*, 82 Kan. 812, 4 Pac. 805, holding that a check given to a creditor is not prima facie evidence that it was given in payment of a debt; *Hershfield v.*

Lowenthal, 35 Kan. 407, 11 Pac. 173, holding that a finding that a note was not taken in absolute payment of a debt, made on conflicting evidence and sustained by the evidence, will not be disturbed on appeal; **Bradley, Wheeler & Co. v. Harwi, 43 Kan. 314, 23 Pac. 566**, holding that a note given for the amount of an existing indebtedness is prima facie not a payment or discharge of the debt. Cited in note in 35 L. R. A. (N. S.) 7, on payment by commercial paper.

Harmless error—Immaterial evidence.—Cited in **De Ford v. Orvis, 42 Kan. 302, 21 Pac. 1105**, holding that admission of immaterial evidence is not reversible error; **Meek v. Daugherty, 21 Okl. 559, 97 Pac. 557**, holding that error in admitting evidence is reversible, if prejudicial to substantial rights.

16 KAN. 185, **LORD v. ANDERSON**

Release of partner.—Cited in **Davies v. Jones, 61 Kan. 602, 60 Pac. 314**, holding that a release of one partner discharges the firm debt to an amount for which he agreed to be accountable to the firm under his arrangement with it.

16 KAN. 190, **BENT v. PHILBRICK**

Special findings of fact.—Cited in **Briggs & Watson v. Eggen, 17 Kan. 589; Kansas City v. Bradbury, 45 Kan. 381, 25 Pac. 889, 23 Am. St. Rep. 731; City of Topeka v. Boutwell, 53 Kan. 20, 35 Pac. 819, 27 L. R. A. 593**—holding that in a trial by the court it is error to refuse to make separate findings of fact and law on request made pursuant to statute.

Same—Right to answer.—Cited in **Johnson v. Husband, 22 Kan. 277; City of Wyandotte v. Gibson, 25 Kan. 236; Foster v. Turner, 31 Kan. 58, 1 Pac. 145; Wichita & W. R. Co. v. Feckhelmer, 36 Kan. 45, 12 Pac. 362; Missouri Pac. Ry. Co. v. Cassity, 44 Kan. 207, 24 Pac. 88; Atchison, T. & S. F. R. Co. v. Ayers, 56 Kan. 176, 42 Pac. 722; Atchison, T. & S. F. R. Co. v. Butler, 56 Kan. 433, 43 Pac. 767; Smith v. Wilson, 5 Kan. App. 379, 48 Pac. 436**—holding that a party has a right to have proper special questions submitted to the jury answered by it.

Same—Resubmission of special issues.—Cited in **Atchison, T. & S. F. Ry. Co. v. Hale, 64 Kan. 751, 68 Pac. 612**, holding that, where the jury answers, "Don't know" to special issues, it is error to refuse to resubmit the question.

Defects in pleadings—Waiver.—Cited in **Holden v. Clark, 16 Kan. 346**, holding that failure to verify a reply was waived, where the case was tried as if the answer had been verified; **Kansas Pac. Ry. Co. v. Taylor, 17 Kan. 506**, holding that, though a pleading fails to state a fact essential to the cause of action, if the case is tried as though the fact was alleged, and the fact is proved, the omission in the allegation will be regarded as waived; **Netcott v. Porter, 19 Kan. 131; Bashor & Marx v. Nordyke & Marmon Co., 25 Kan. 222; State ex rel. Bradford v. Malo, 42 Kan. 120, 22 Pac. 349** (dissenting opinion)—holding that a case tried by the parties as if a reply had been filed to an answer containing new matter will be so treated by the appellate court; **Clay v. Hildebrand Bros. & Jones, 84 Kan. 604, 9 Pac. 466**, holding that a case tried as though all the issues were tried must be so considered on appeal.

16 KAN. 192, **SARAHSS v. ARMSTRONG**

Cited in notes in 89 Am. Dec. 695; 49 Am. Rep. 207; 124 Am. St. Rep. 59—on judicial notice.

16 KAN. 195, **ATCHISON, T. & S. F. R. CO. v. WILLIAMS**

Repeal of statutes.—Cited in **Tootle v. Savage, 18 Kan. 192**, holding that Act Feb. 26, 1866, § 5, Laws 1866, c. 19, Gen. St. 1868, c. 93, published as amended in Laws 1871, c. 88, § 1, was repealed by Laws 1872, c. 94, § 6.

16 KAN. 200, ATCHISON, T. & S. F. R. CO. v. CAMPBELL

Cited in *Atchison, T. & S. F. R. Co. v. Bales*, 16 Kan. 252.

Special questions on minor issues.—Cited in *Bird & Mickle Map Co. v. Jones*, 27 Kan. 177, holding that an answer that there was "no evidence" on a special question asked, if incorrect, was not reversible error, where such question only related to a minor fact, and not to an issuable fact.

Conclusiveness of verdict.—Cited in *Missouri Pac. Ry. Co. v. Kincaid*, 21 Kan. 654, holding, though the evidence on fact questions is not very satisfactory, the verdict will not be disturbed, if approved by the trial court.

16 KAN. 209, ATCHISON, T. & S. F. R. CO. v. RICKABAUGH**16 KAN. 209, ATCHISON, T. & S. F. R. CO. v. SHAW****16 KAN. 209, SHEPARD v. PRATT**

Conclusions of witness.—Cited in *Eagle Mfg. Co. v. Jennings*, 29 Kan. 657, 44 Am. Rep. 608; *Chicago, R. I. & P. Ry. Co. v. Stibbs*, 17 Okl. 97, 87 Pac. 293—holding that conclusions of witness are not admissible in evidence.

Secondary evidence—Necessity of accounting for original.—Cited in *Central Branch Union Pac. R. Co. v. Walters*, 24 Kan. 504, holding that it was error to admit in evidence a copy of the original written demand for the value of stock killed, without accounting for the original.

Same—Proof of lost instruments.—Distinguished in *Abbott v. Coleman*, 22 Kan. 250, 31 Am. Rep. 186, on the proof of lost instruments.

Partnership—Essentials.—Cited in *Atchison, T. & S. F. Ry. Co. v. Hucklebridge*, 62 Kan. 506, 64 Pac. 58; *Beard v. Rowland*, 71 Kan. 873, 81 Pac. 188; *Welland v. Sell*, 83 Kan. 229, 109 Pac. 771—holding that a sharing of losses is essential to a partnership.

Cited in note in 115 Am. St. Rep. 440, on what constitutes a partnership; in 18 L. R. A. (N. S.) 1032, 1040, 1078, 1079, on effect of agreement to share profits to create partnership.

Damages—Conversion.—Cited in *Ball v. Campbell*, 30 Kan. 177, 2 Pac. 165, holding that the owner of wheat deposited in an elevator and sold by the elevator company could recover the difference between the price of sale and the market value at the time of or within a reasonable time after the sale, if the price of sale was less; *Simpson v. Alexander*, 35 Kan. 225, 11 Pac. 171, holding that the owner of merchandise converted is entitled to its value at the time of the conversion, with interest to the date of verdict.

Same—Recovery of interest.—Cited in *Dolan v. Van Demark*, 35 Kan. 304, 10 Pac. 848, holding that, in replevin by a chattel mortgagee to recover the chattels, upon awarding damages instead of interest, plaintiff may recover the amount of his claim, with interest.

Cited in note in 28 L. R. A. (N. S.) 32, on interest on unliquidated damages.

Same—Pleading.—Cited in *Salt River Canal Co. v. Hickey*, 4 Ariz. 240, 36 Pac. 171; *Edgerton v. O'Neill*, 4 Kan. App. 73, 46 Pac. 208—holding that items of damage which are the natural and proximate result of the injury need not be specially pleaded, it being sufficient to allege the damages in gross; *Hart v. Parker*, 29 Kan. 765, holding that plaintiff's failure to allege the amount he claims judgment for may be material.

Review of refusal of instructions.—Cited in *Carson v. Funk*, 27 Kan. 524, holding that error cannot be predicated on the refusal of instructions, where the record does not contain all of the instructions given.

Reversible error in instructions.—Cited in *McCook v. Kemp*, 10 Kan. App. 381, 69 Pac. 1100, holding that an erroneous instruction will be considered ground for reversal, unless it is clearly shown not to have been prejudicial.

16 KAN. 217, JUNCTION CITY & FT. K. RY. CO. v. WINGFIELD

Cited in *J. J. Funsten & Co. v. Fox*, 51 Kan. 682, 33 Pac. 806.

Followed generally in *Shadwell v. Hamilton*, 24 Kan. 268.

Case-made—Time for settlement and service.—Cited in *Gimbel & Floreshelm v. Turner*, 36 Kan. 679, 14 Pac. 255, holding that, if a case was not served within the time allowed by the court, the judge had not authority to settle or sign the case; *Atkins v. Nordyke-Marmon Co.*, 60 Kan. 354, 56 Pac. 533, holding the parties cannot extend the time by stipulation for making a case without an order of the court or judge; *Chicago, B. & Q. R. Co. v. Guild*, 8 Kan. App. 368, 55 Pac. 555, holding that under the statutes making and serving a case are distinct acts, and an order extending the time for making a case does not necessarily extend the time for serving it.

16 KAN. 220, SHORT v. NOONER

Judgment in foreclosure suits.—Cited in *Nooner v. Short*, 20 Kan. 624, holding that no judgment should be rendered in a mortgage foreclosure action barring any person's title or equity, until judgment of sale is rendered; *Case v. Bartholow*, 21 Kan. 800, holding that an assignee of a mortgagee stands in the mortgagee's position and is bound by a decree against her.

Distinguished in *Clay v. Hildebrand Bros. & Jones*, 34 Kan. 604, 9 Pac. 466, on decree in mortgage foreclosure actions.

Orders appealable—Finality.—Cited in *Branch v. American Nat. Bank*, 57 Kan. 608, 47 Pac. 518, holding a ruling setting aside an order allowing an annual report of the assignee of an insolvent estate and reopening the matter for consideration on the merits is not appealable; *McMaster v. People's Bank of Edmond*, 13 Okl. 326, 73 Pac. 946, holding that an order vacating a judgment is not appealable.

Pleading adverse interests in foreclosure suit.—Cited in *Hefner v. Northwestern Mut. Life Ins. Co.*, 123 U. S. 747, 8 Sup. Ct. 337, 31 L. Ed. 309, holding in a mortgage foreclosure suit equity may permit a purchaser on a sale for taxes assessed after the date of the mortgage, to be made a party to determine the validity of his title; *Delahay v. Goldie*, 17 Kan. 263, holding that a petition in mechanic's lien proceedings, alleging that certain persons "claim an interest in this controversy adverse to plaintiff, that the extent of such interest, if any, to this plaintiff is unknown, and that they be compelled to set up such interest," will not support a decree against them; *Neitzel v. Hunter*, 19 Kan. 221, holding that an allegation in an action to foreclose a mortgage that a third person "claims an interest in said premises" to a certain amount, "and that said claim consists of a mortgage lien on said premises to secure the payment of said money," without demanding judgment against such person, will not support a judgment barring him from setting up his claim in the premises; *Blandin's Adm'r v. Wade*, 20 Kan. 251; *Bradley v. Parkhurst*, 20 Kan. 462—holding that allegations in a mortgage foreclosure suit that certain persons "have or claim some interest in the premises adverse to plaintiff," the kind of which plaintiff is ignorant of and desires that it be disclosed, is insufficient as against such defendants; *Skinner v. Moore*, 64 Kan. 300, 67 Pac. 827, 91 Am. St. Rep. 244, holding a petition in mortgage foreclosure, alleging that certain defendants "claim to own or hold certain right, title, or interest in" the realty, was insufficient as to such defendants; *Beecher v. Ireland*, 46 Kan. 97, 26 Pac. 448, holding that, in a mortgage foreclosure suit in which B. was served with summons, the petition not referring to B., it will not support a judgment against him, though the cross-petition alleges that B. has purchased the mortgaged property and assumed the debt; *Horton v. Haines*, 23 Okl. 878, 102 Pac. 121, holding that a petition in a mortgage foreclosure suit alleging that defendant "claims some right, title, or interest in or to said premises, but if any interest, right, or title he has in or to said mortgaged premises,

or any part thereof, the same is inferior, subsequent, and subject to the mortgage lien of plaintiff," was sufficient to state a cause of action against a defendant who acquired an interest in the real estate after the mortgage was executed.

16 KAN. 228, McCONNELL v. HAMM

Municipal aid to corporations.—Cited in *Blain v. Riley County Agricultural Society*, 21 Kan. 558; *Central Branch Union Pac. R. Co. v. Smith*, 23 Kan. 745; *City of Geneseo v. Geneseo Natural Gas, Coal, Oil, Salt & Mineral Co.*, 55 Kan. 358, 40 Pac. 655—holding that a statute authorizing a township to issue bonds to a manufacturing company for erecting a dam for manufacturing purposes was unconstitutional, as authorizing public aid for private purposes.

Taxation—Purposes.—Cited in note in 16 Am. St. Rep. 370, on purposes justifying tax or assessment.

16 KAN. 234, VANAUSDELN v. ORENSHAW

16 KAN. 236, CITY OF EMPORIA v. NORTON

Cited in *Kansas City v. Silver*, 74 Kan. 851, 85 Pac. 805.

Statutes—Construction.—Cited in *Prohibitory Amendment Cases*, 24 Kan. 700; *Mason v. Spencer*, 35 Kan. 512, 11 Pac. 402; *Kansas Home Ins. Co. v. Wilder*, 43 Kan. 781, 23 Pac. 1061—holding that it will not be presumed that the Legislature intended to accomplish nothing in enacting a statute; *State ex rel. Coleman v. Kelly*, 71 Kan. 811, 81 Pac. 450, 70 L. R. A. 450, 6 Ann. Cas. 298, holding that, in determining the legislative intent, the purpose of the statute may be looked to, and its effect under different suggested constructions.

Curing defective assessment proceedings.—Cited in *City of Emporia v. Bates*, 16 Kan. 495, holding that, after a defective assessment, a city could, under a statute subsequently enacted, cure such assessment.

16 KAN. 243, POLK v. ANDERSON

16 KAN. 248, SIMPSON v. BORING

Ejectment—Title to support.—Cited in *Scarborough v. Smith*, 18 Kan. 399; *Atchison, T. & S. F. R. Co. v. Rockwood*, 25 Kan. 292; *Atchison, T. & S. F. R. Co. v. Pracht*, 30 Kan. 66, 1 Pac. 319; *Hollenback v. Ess*, 31 Kan. 87, 1 Pac. 275; *Riggs v. Anderson*, 47 Kan. 66, 27 Pac. 112; *Ritchie v. Kansas, N. & D. Ry. Co.*, 55 Kan. 36, 39 Pac. 718; *Laughlin v. Fariss*, 7 Okl. 1, 50 Pac. 254; *Shy v. Brockhause*, 7 Okl. 35, 54 Pac. 306; *Black v. Jackson*, 177 U. S. 349, 20 Sup. Ct. 648, 44 L. Ed. 801—holding that, to support ejectment, plaintiff need only have some kind of an estate, either legal or equitable, which is paramount to defendant's title; *Mooney v. Olsen*, 21 Kan. 691; *Christy v. Richolson*, 48 Kan. 177, 29 Pac. 398—holding priority of possession will support a recovery of land, if neither party shows no better title; *Douglass v. Ruffin*, 38 Kan. 530, 16 Pac. 783, holding that a holding under color and claim of title was sufficient to maintain ejectment against one claiming merely by possession without color of title; *Ordway v. Cowles*, 45 Kan. 447, 25 Pac. 862, holding that one seeking to have a cloud removed from his title must recover on the strength of his own title, and not the weakness of his adversary's; *Redden v. Tefft*, 48 Kan. 302, 29 Pac. 157, on the title necessary to support ejectment; *Chapple v. Kansas Vitriified Brick Co.*, 70 Kan. 723, 79 Pac. 668, holding that either a legal or equitable title will support ejectment; *Horner v. Ellis*, 75 Kan. 675, 90 Pac. 275, 121 Am. St. Rep. 446, holding a cotenant may recover the whole property in ejectment against one who has no title.

16 KAN. 252, ATCHISON, T. & S. F. R. CO. v. BALES

Railroads—Fires—Proximate cause.—Cited in *Chicago, R. I. & P. Ry. Co. v. McBride*, 54 Kan. 172, 37 Pac. 978, holding that the negligent firing of prairie

grass along the right of way, from which the fire spread to plaintiff's property on account of a high wind, was the proximate cause of the destruction of the property; *Kansas City, Ft. S. & M. R. Co. v. Perry*, 65 Kan. 792, 70 Pac. 878, holding that, in absence of positive proof as to the cause of a fire on a railroad right of way, its cause may be shown by circumstantial evidence; *Kansas City, Ft. S. & M. R. Co. v. B. F. Blaker & Co.*, 68 Kan. 244, 75 Pac. 71, 64 L. R. A. 81, 1 Ann. Cas. 883, holding that a fire need not be directly communicated to property to impose liability, and it is immaterial that the fire traversed intervening property before reaching the property consumed; *St. Louis & S. F. R. Co. v. League*, 71 Kan. 79, 80 Pac. 46, holding the evidence sufficient to make it a jury question whether the fire started by the railroad company was the proximate cause of the loss sued for; *Union Pac. Ry. Co. v. McCollum*, 2 Kan. App. 319, 43 Pac. 97, holding that, where a fire set out by a locomotive was extinguished on the day it was started and the premises left in an apparently safe condition, but sparks escaped from the smoldering embers the next day because of high wind, and burned the property, the negligence of the company in setting out the original fire was the proximate cause of the damage.

Cited in note in 38 Am. Dec. 77, on liability of railroad company for fires; in 36 Am. St. Rep. 824, on proximate and remote cause; in 21 L. R. A. 261, on liability for setting fires which spread to property of others.

Negligence as jury question.—Cited in *Missouri Pac. Ry. Co. v. Kincaid*, 29 Kan. 654, holding that the question of negligence in starting a railroad fire was for the jury; *Harter v. Atchison, T. & S. F. R. Co.*, 55 Kan. 250, 38 Pac. 778, holding that plaintiff's evidence of negligence in an action for personal injuries to a switchman was such as to render it erroneous to sustain a demurrer.

16 KAN. 259, WRIGHT v. BACHELLER

Pleading—Amendment.—Cited in *Hargrove v. Woolf*, 34 Kan. 101, 8 Pac. 192, holding that the court properly allowed an interplea to be verified instant, where an interplea was filed and an answer filed to it, and evidence to support the interplea was objected to for want of a verification; *Frazier v. Ebenezer Baptist Church*, 60 Kan. 404, 56 Pac. 752, holding that a party is bound by his pleadings; *Laird v. Farwell*, 60 Kan. 512, 57 Pac. 98; *Consolidated Steel & Wire Co. v. Burnham, Hanna, Munger & Co.*, 8 Okl. 514, 58 Pac. 654—holding that refusal to allow amendments may be substantial error; *German Ins. Co. v. Wright*, 6 Kan. App. 611, 49 Pac. 704, holding that under the statute a court or a judge in vacation may allow pleadings to be filed after the statutory time.

Same—Inconsistent defenses.—Cited in *Cole v. Woodson*, 82 Kan. 272, 4 Pac. 321; *Bierer v. Fretz*, 32 Kan. 329, 4 Pac. 284; *Losch v. Pickett*, 86 Kan. 216, 12 Pac. 822—holding a pleading both affirming and denying an allegation is inconsistent.

Same—Election of defenses.—Cited in *Ferguson v. Prince*, 2 Kan. App. 7, 41 Pac. 988, holding that defendant should be required to elect upon which of two inconsistent defenses he shall stand, and confine his evidence thereto; *Seattle Nat. Bank v. Carter*, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177, holding that a general denial of the answer is inconsistent with an affirmative defense alleging the truth of the matter denied.

Cited in note in 48 L. R. A. 201, on right to plead inconsistent defenses.

Same—Must be full and complete.—Cited in *Allen v. Douglass*, 29 Kan. 412, holding an answer or counterclaim asserting affirmative relief must be as full and complete as a petition.

16 KAN. 270, CHAMBERS v. KING WROUGHT IRON BRIDGE MANUFACTORY

Invalid judgment—Vacation or restraining enforcement.—Cited in *Hanson v. Wolcott*, 19 Kan. 207, holding that a void judgment may be vacated at any

time on defendant's motion, without advising the court that defendant had a defense in the action; *Busenbark v. Busenbark*, 33 Kan. 572, 7 Pac. 245; *Missouri Pac. Ry. Co. v. Reid & Holladay*, 34 Kan. 410, 8 Pac. 846—holding that a judgment obtained to defraud a third person may be perpetually enjoined; *Cook v. Senior*, 3 Kan. App. 278, 45 Pac. 126; *Jones v. Marshall*, 3 Kan. App. 529, 43 Pac. 840—holding that the enforcement of a void judgment, apparently valid and regular on its face, may be perpetually enjoined.

Distinguished in *San Juan & St. Louis Mining & Smelting Co. v. Finch*, 6 Colo. 214; *Meixell v. Kirkpatrick*, 28 Kan. 315—that a judgment which the court had jurisdiction to render and which is merely irregular cannot be perpetually enjoined.

Cited in note in 54 Am. St. Rep. 244, on relief in equity against judgments and other judicial determinations; in 31 L. R. A. 206, on injunctions against judgments for want of jurisdiction or invalidity.

Process—Necessity to confer jurisdiction.—Cited in *Brinkman v. Shaffer*, 23 Kan. 528, holding that a judgment against defendant was void, where the person making appearance for defendant had no authority to do so; *Bradley, Wheeler & Co. v. Harwi*, 2 Kan. App. 272, 42 Pac. 411; holding that jurisdiction of the person may only be acquired by actual or constructive service of process or by a voluntary appearance.

Cited in note in 61 Am. St. Rep. 491, on effect of defects in service of process on jurisdiction.

Same—Service on corporation.—Cited in *Great West Mining Co. v. Woodmas of Alston Mining Co.*, 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204, holding, to bind a corporation, service of process must be made upon the identical agent provided by statute; *Lonkey v. Keyes Silver Mining Co.*, 21 Nev. 312, 31 Pac. 57, 17 L. R. A. 351, holding that service upon a corporation must be made on the principal clerk or secretary.

Same—Service on assistant bank cashier.—Cited in *Karns v. State Bank & Trust Co.*, 31 Nev. 170, 101 Pac. 564, holding that under the statute service on an assistant bank cashier in charge of a branch bank, who is under control of the cashier and has no part in the management of the corporation, is insufficient.

Same—Conclusiveness of return.—Cited in *Great West Mining Co. v. Woodmas of Alston Mining Co.*, 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204, holding that the recital of a return of summons that the person served was the agent of defendant corporation may be impeached; *Mastin v. Gray*, 19 Kan. 458, 27 Am. Rep. 149; *McNeill v. Edie*, 24 Kan. 108; *Goddard v. Harbour*, 56 Kan. 744, 41 Pac. 1055, 54 Am. St. Rep. 608; *Schnack v. Boyd*, 59 Kan. 275, 52 Pac. 374—holding that where the sheriff did not know that the person upon whom service was made was secretary of the corporation served, his return of due service may be attacked collaterally by showing that such person was not secretary.

Cited in note in 124 Am. St. Rep. 766, on conclusiveness of sheriff's return of service, and remedies of persons injured thereby.

16 KAN. 277, RAHM v. KING BROUGHT IRON BRIDGE MANUFACTORY OF TOPEKA, Same case on subsequent appeal, 16 Kan. 530

Corporations—Contracts to pay debt of another.—Cited in *Ehrgott & Krebs v. Bridge Manufactory of Topeka*, 16 Kan. 466, holding that a corporation is not liable on a note executed for it by its officers, without authority and without consideration to it, to a third person for a claim which such third person has against another; *El Capitan Land & Cattle Co. v. Boston-Kansas City Cattle Loan Co.*, 65 Kan. 359, 69 Pac. 332, holding that corporate officers cannot pledge the corporation's note to secure personal debts of the president; *Long Bros. v.*

Hubbard, 6 Kan. App. 878, 50 Pac. 968, holding that a bank cannot become a surety.

16 KAN. 285, BRIGGS v. TYE

Harmless error in rulings on pleadings.—Cited in *Union Pac. Ry. Co. v. Estes*, 37 Kan. 229, 15 Pac. 157, holding that where, after a demurrer is overruled, defendant answers, and plaintiff is then permitted to amend his petition, and defendant answers the amendment, on appeal after trial on the amended petition, the court will not consider the sufficiency of the original petition.

Judicial sale—Confirmation.—Cited in note in 20 Am. St. Rep. 496, on order confirming judicial sale; in 83 Am. Dec. 457 (par. 3), on conclusiveness of decision of court on confirmation of execution sale.

Judgment—When rendered.—Cited in *Rice v. American Nat. Bank of Denver*, 3 Colo. App. 81, 31 Pac. 1024, holding that a justice's judgment rendered against defendant four days before return of the summons is void.

Distinguished in *Barons v. Anderson*, 37 Kan. 390, 15 Pac. 226, holding that a justice's judgment, rendered on motion before the action stood regularly for trial, could be vacated on motion.

16 KAN. 293, MALLORY v. BERRY

Exemptions—Animals.—Cited in *Nuzman v. Schooley*, 36 Kan. 177, 12 Pac. 829; *Brady v. Banta*, 46 Kan. 181, 26 Pac. 441; *Young v. Bell*, 1 Kan. App. 265, 40 Pac. 675—holding that the animals named in Gen. St. 1889, par. 2998, subd. 5, are absolutely exempt, regardless of their use or occupation.

Cited in note in 45 Am. Dec. 255, on property exempt from execution.

Same—Construction of statutes.—Cited in *Donmyer v. Donmyer*, 43 Kan. 444, 23 Pac. 627; *Emmert v. Schmidt*, 65 Kan. 31, 68 Pac. 1072—holding that exemption statutes should be liberally construed to uphold the exemptions; *Edgecomb v. His Creditors*, 19 Nev. 149, 7 Pac. 533 (dissenting opinion); *Nelson v. Fightmaster*, 4 Okl. 38, 44 Pac. 213—construing an exemption statute; *Rockwood v. St. John's Estate*, 10 Okl. 476, 62 Pac. 277, holding that exemption laws should be liberally construed to effectuate their purpose.

Cited in note in 45 Am. Dec. 253, on liberal construction of exemption laws.

16 KAN. 296, COUNTY SEAT OF OSAGE COUNTY, IN RE

County seat removal election—Number of votes required.—Cited in *Town of Eufaula v. Gibson*, 22 Okl. 507, 98 Pac. 565, holding that a majority of the legal ballots, whether intelligible or unintelligible, must be cast for the removal of a county seat to authorize its removal, and that fraudulent, distinguished ballots, blank ballots and those cast by unqualified voters, should not be counted in determining whether a majority was cast for removing the county seat.

Distinguished in *Board of Com'rs of Eagle County v. People ex rel. Love*, 26 Colo. 297, 57 Pac. 1080, holding that, under Sess. Laws 1891, p. 117, in order to remove a county seat which has not been permanently located, a majority of all the legal votes must be cast for some one place.

16 KAN. 302, FOALA & F. RY. CO. v. ANDERSON COUNTY COM'RS, Same case on subsequent appeal, 20 Kan. 534

Power of county to aid railroads.—Cited in *Leavenworth, L. & G. R. Co. v. Com'rs of Douglas County*, 18 Kan. 160, holding that power to issue bonds in aid of a railroad may be granted to a county.

Exercise of authority by boards, etc.—Necessity of collective action.—Cited in *First Nat. Bank of Ft. Scott v. Drake*, 35 Kan. 564, 11 Pac. 445, 57 Am. Rep. 193, holding that bank directors can only act collectively as a board, and the individual consent of a majority of the directors, acting separately, is

insufficient to ratify an unauthorized appropriation of money by the bank; Board of Com'rs of Hamilton County v. Webb, 47 Kan. 104, 27 Pac. 825, holding that a contract made by only two members of the board of county commissioners, without any previous authority from the board, is void; School Dist. No. 39, Pottawatomie County, v. Shelton, 26 Okl. 229, 109 Pac. 67, 138 Am. St. Rep. 962, holding that the board of directors of a school district must act as such in executing a contract binding upon the district, and their individual acts will not bind it.

Same—Notice of meetings.—Cited in Atchison Board of Education v. De Kay, 148 U. S. 591, 13 Sup. Ct. 706, 37 L. Ed. 573, holding that where city bonds were issued by the proper authorities, and interest was duly paid for 20 years, they will not then be declared void on purely technical and trivial grounds, as that notice was not given to all members of the special meeting of the council at which the bonds were issued; Hatch v. Johnson Loan & Trust Co., 79 Fed. 828; American Exch. Nat. Bank of New York v. First Nat. Bank of Spokane Falls, 82 Fed. 961, 27 C. C. A. 274; National Bank of Commerce v. Shumway, 49 Kan. 224, 30 Pac. 411—holding that a long-continued custom of bank directors of holding meetings and transacting business during business hours, whenever a sufficient number were present, gives a standing notice to each director, enabling those present to do business, in absence of by-law or statute; Dixon Tp. v. Board of Com'rs of Sumner County, 25 Kan. 519, holding that the law gives a person an opportunity to be heard before a proceeding will be held to affect him; Aikman v. School Dist. No. 16, Butler County, 27 Kan. 129; Mincer v. School Dist. No. 31, Reno County, 27 Kan. 253—holding where several persons, such as a school board, are authorized to do an act of a public nature requiring deliberation, they should all be convened by notice to each; Board of Com'rs of Leavenworth County v. Hamlin, 31 Kan. 105, 1 Pac. 237; Chicago, K. & W. R. Co. v. Board of Com'rs of Stafford County, 36 Kan. 121, 12 Pac. 593; State ex rel. Bradford v. Commissioners of Seward Co., 36 Kan. 236, 13 Pac. 212; In re Troy, 67 Kan. 186, 72 Pac. 531; Williams v. Board of Com'rs of Broadwater County, 28 Mont. 360, 72 Pac. 755; Mahr v. Board of Com'rs of Pottawatomie County, 26 Okl. 628, 110 Pac. 751—holding the powers of county commissioners are not vested in three commissioners, but in the board as a whole, and it can act only when legally convened, by due notice given each commissioner; Rogers v. Slonaker, 32 Kan. 191, 4 Pac. 138, holding that an appointment by one member of the county court and the county clerk, without notice to the other member, was void; Leavenworth, N. & S. Ry. Co. v. Meyer, 58 Kan. 305, 49 Pac. 89, holding condemnation commissioners must act as a body, and can perform no duty, unless each commissioner has notice of the meeting and an opportunity to attend; Singer v. Salt Lake City Copper Mfg. Co., 17 Utah, 143, 53 Pac. 1024, 70 Am. St. Rep. 773, holding that as a general rule personal notice must be given to each member of a corporate board of directors.

16 KAN. 312, TUCKER v. ALLEN

Deed—Execution in blank.—Cited in Wilkins v. Tourtellott, 28 Kan. 825, holding the grantor under a carte blanche deed may ratify the unauthorized filling in of the description, etc.; Chapman v. Veach, 32 Kan. 167, 4 Pac. 100, holding that where a deed was executed in blank, and afterward filled in with the name of a certain grantee generally, the crops passed to him thereunder, notwithstanding a parol agreement between the original parties.

Same—Delivery.—Cited in Kelsa v. Graves, 64 Kan. 777, 68 Pac. 607; Harmon v. Bowers, 78 Kan. 135, 98 Pac. 51, 17 L. R. A. (N. S.) 502, 16 Ann. Cas. 121; Zeitlow v. Zeitlow, 84 Kan. 713, 115 Pac. 578—holding that a constructive delivery of a deed, or any words or acts showing an intention by grantor that the deed be considered as completely executed, was sufficient.

Same—Ratification.—Cited in *McNulty v. McNulty*, 47 Kan. 208, 27 Pac. 819, holding that a deed delivered without grantor's knowledge may be ratified by him, after he has full knowledge of all the facts, by any words and acts which show a clear intention that the deed should be regarded as properly delivered.

Cited in note in 9 L. R. A. (N. S.) 946, on validation of undelivered deed by ratification or estoppel.

Same—Effect of uncertain description.—Cited in *Abercrombie v. Simmons*, 71 Kan. 538, 81 Pac. 208, 1 L. R. A. (N. S.) 806, 114 Am. St. Rep. 509, 6 Ann. Cas. 239, holding that a deed will not be avoided for uncertainty, if in the light of contemporaneous circumstances the description is made certain.

Same—Validity of conditions.—Cited in note in 95 Am. St. Rep. 223, on validity of conditions and restrictions in deed.

Contracts against public policy—Depot location.—Cited in *Enid Right of Way & Townsite Co. v. Lille*, 15 Okl. 328, 82 Pac. 810 (dissenting opinion), as to whether a contract providing that a railroad depot shall be at a certain point is against public policy.

Estoppel.—Cited in *Brake v. Ballou*, 19 Kan. 397, holding that equity will leave the parties to a fraudulent contract where it finds them; *McKinnis v. Scottish American Mortg. Co.*, 55 Kan. 259, 39 Pac. 1018, holding as a rule a party cannot avoid his own deed by his own illegal acts, and where the parties are equally wrong as to executed contracts the law will not aid either of them.

16 KAN 326, DAY v. WALKER

Usury as defense against innocent indorsee.—Cited in *Gross v. Funk*, 20 Kan. 655, holding that usury cannot be set up as a defense against a negotiable note held by an innocent indorsee before maturity.

16 KAN. 333, LEAVENWORTH, L. & G. R. CO. v. MARIS

Carriers—When liability terminates.—Cited in *Union Pac. Ry. Co. v. Moyer*, 40 Kan. 184, 19 Pac. 639, 10 Am. St. Rep. 183, holding that nine days is an unreasonable time to permit the goods to be in a railroad depot, so that the company was only liable as a warehouseman; *Kansas City, Ft. S. & M. R. Co. v. Patten*, 3 Kan. App. 338, 45 Pac. 108, holding that a carrier is an insurer of a passenger's baggage in transit and for a reasonable time after its arrival at destination to enable the passenger to remove it; *Missouri Pac. Ry. Co. v. Well*, 8 Kan. App. 839, 57 Pac. 853, holding that an instruction that the delivery of goods by a carrier to the consignee's husband without authority was only slight negligence was properly refused; *Missouri Pac. Ry. Co. v. L. Newberger & Bro.*, 67 Kan. 846, 73 Pac. 57; *McGregor v. Oregon R. & Navigation Co.*, 50 Or. 527, 93 Pac. 465, 14 L. R. A. (N. S.) 668—holding that, if the consignee is present when the goods arrive, he must remove them without unreasonable delay, but if he is absent, but lives in the vicinity, the carrier should notify him of the arrival of the goods, and he should remove them within a reasonable time, and cannot hold the carrier as a surety if he fails to do so, and if he is unknown the carrier may put the goods in a warehouse, and its liability as a carrier ceases after a reasonable time.

Cited in notes in 17 L. R. A. 694, 696; 8 Am. Dec. 215, 217; 97 Am. St. Rep. 89, 91—as to when carrier's liability is reduced to that of warehouseman; in 8 L. R. A. (N. S.) 242, on reasonable time for removal of goods, after which liability of carrier as such terminates.

Same—Limitation of liability.—Cited in *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kan. 645, 2 Pac. 821, 46 Am. Rep. 104; *Missouri Pac. Ry. Co. v. Wichita Wholesale Grocery Co.*, 55 Kan. 525, 40 Pac. 899—holding a carrier cannot by contract exempt itself from its own or its agent's negligence.

Cited in note in 32 Am. Dec. 497, on limitation of carrier's liability.

16 KAN. 341, ORNN v. MERCHANTS' NAT. BANK

Collateral attack on judgment record.—Cited in *Crist v. Cosby*, 11 Okl. 635, 69 Pac. 885, holding that a recital in a judgment of a court of record that personal service was made upon defendant cannot be attacked in an injunction proceeding.

Power of national bank to receive conveyance.—Cited in *First Nat. Bank v. Jaffray*, 41 Kan. 694, 21 Pac. 242, holding that under the national banking law a national bank may take real estate as security for a pre-existing indebtedness to it.

16 KAN. 346, HOLDEN v. CLARK

Negotiable instruments—Destruction of negotiability.—Cited in *Clark v. Skeen*, 61 Kan. 526, 60 Pac. 327, 49 L. R. A. 190, 78 Am. St. Rep. 337, holding a stipulation, in an instrument for the payment of a certain sum of money, that upon default in payment of interest the whole amount shall become due at the option of the holder, and then draw a greater rate of interest, does not make it nonnegotiable.

Same—Defense of usury.—Cited in *Gross v. Funk*, 20 Kan. 655, holding that usury cannot be set up against a negotiable note while in the hands of an innocent indorsee, who purchased before maturity.

Pleading—Waiver of defects.—Cited in *Kansas Pac. Ry. Co. v. Taylor*, 17 Kan. 566, holding that an omission to state a fact essential to a cause of action is considered waived where it appears from the record that the case was tried without as if it were alleged and such fact was duly proved and found.

Same—Failure to file reply.—Cited in *Netcott v. Porter*, 19 Kan. 131; *Bashor & Marx v. Nordyke & Marmon Co.*, 25 Kan. 222—holding that where no reply is filed to new matter in the answer, and only one specific objection is made to the sufficiency of the pleadings, and the case is tried as though a reply was filed, it cannot be objected on appeal that no reply was filed.

Waiving defects as to pleading.—Cited in *Briggs v. Latham*, 36 Kan. 255, 13 Pac. 393, 59 Am. Rep. 546, holding that defective pleadings or a want of pleadings may sometimes be cured or waived by subsequent proceedings.

16 KAN. 358, JANSEN v. CITY OF ATCHISON

Streets and bridges—Liability for injuries from defects.—Cited in *City of Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. 705; *Carson v. City of Genesee*, 9 Idaho, 244, 74 Pac. 862, 108 Am. St. Rep. 127; *City of Eudora v. Miller*, 30 Kan. 494, 2 Pac. 685; *Langan v. City of Atchison*, 35 Kan. 318, 11 Pac. 38, 57 Am. Rep. 165; *City of Topeka v. Sherwood*, 39 Kan. 690, 18 Pac. 933; *Board of Com'rs of Franklin County v. City of Ottawa*, 49 Kan. 747, 31 Pac. 788, 33 Am. St. Rep. 396; *Kansas City v. Orr*, 62 Kan. 61, 61 Pac. 61, 50 L. R. A. 783; *City of Ft. Scott v. Peck*, 5 Kan. App. 593, 49 Pac. 111; *City of Guthrie v. Swan*, 5 Okl. 779, 51 Pac. 562—holding that it is a city's duty to keep a street in a reasonably safe condition for the usual modes of travel; *City of Ft. Scott v. Brothers*, 20 Kan. 455; *City of Atchison v. Acheson*, 9 Kan. App. 33, 57 Pac. 248—holding that an incorporated city is liable for injuries caused by negligently permitting a defect in a sidewalk to continue; *Board of Com'rs of Shawnee County v. City of Topeka*, 39 Kan. 197, 18 Pac. 161, on the duty of a city to maintain a bridge within its limits; *Board of Com'rs of Marion County v. Riggs*, 24 Kan. 255, holding that a county is not liable for injuries resulting from a defective bridge, in absence of statute; *City of Abilene v. Cowperthwait*, 52 Kan. 324, 34 Pac. 795; *Dallas v. City of Concordia*, 84 Kan. 734, 115 Pac. 558—holding a city is liable for resulting injuries, if it permits another to dig a pitfall in a street or alley and leaves it unguarded, permitting a pedestrian to fall in it; *Oklahoma City v. Meyers*, 4 Okl. 686, 48 Pac.

552, holding that a city is liable for injuries from a defective sidewalk; *City of Guthrie v. Nix, Haisell & Co.*, 5 Okl. 555, 49 Pac. 917, holding that an abutting owner, who makes an excavation in a sidewalk for his own benefit, cannot recover for resulting injuries against the city, though the city was negligent in permitting the excavation; *James v. Trustees of Wellston Tp.*, 18 Okl. 50, 90 Pac. 100, 13 L. R. A. (N. S.) 1219, 11 Ann. Cas. 938, holding that, in absence of statute, a township is not liable for defects in a highway.

Cited in notes in 20 L. R. A. (N. S.) 518, 519, 584, 586, 690; 63 Am. Dec. 352; 103 Am. St. Rep. 262—on municipal liability to persons injured by defects in, or want of repair of, streets; in 21 L. R. A. 267, 277, on liability of municipality for ice on streets or sidewalks; in 108 Am. St. Rep. 152, as to what municipal corporations are answerable for injuries due to defects in streets and other public places; in 3 L. R. A. (N. S.) 85; 63 Am. Dec. 355 (par. 2), 357—on liability of property owner for neglect to repair streets; in 12 L. R. A. (N. S.) 951, on right of municipality to indemnity from owner or occupant of abutting property for damages recovered for defect in street.

Same—Knowledge of defect.—Cited in *Riggs v. City of Florence*, 27 Kan. 194; *Union St. Ry. Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012; *City of La Harpe v. Greer*, 74 Kan. 74, 85 Pac. 1015; *Junction City v. Blades*, 1 Kan. App. 85, 41 Pac. 677—holding that complaint to city officials is not necessary to charge a city with negligence in permitting defective streets, if the defect has existed so long that knowledge is presumed; *City of Pleasanton v. Rhine*, 8 Kan. App. 452, 54 Pac. 512, holding that a city is only liable for injuries from a defective sidewalk if it had notice of the defect, or it was patent and had continued for so long that notice might be reasonably inferred, or the defect was one which reasonably should have been ascertained and remedied; *City of Guthrie v. Finch*, 13 Okl. 496, 75 Pac. 288, holding that allegations that defendant city negligently permitted a sidewalk to become broken and out of repair, so as to be unsafe and dangerous, "and which sidewalk" the city negligently permitted to remain in a dangerous condition, sufficiently alleged actual or constructive notice by the city of the negligent condition of the sidewalk.

Stare decisis.—Cited in note in 73 Am. St. Rep. 101, on limitations on doctrine of stare decisis.

Demurrer to evidence and direction of verdict.—Cited in *Kansas Pac. Ry. Co. v. Couse*, 17 Kan. 571, holding that a demurrer to the evidence should be sustained only when the court could, after all the evidence on both sides is in, withdraw the case from the jury and decide the case itself; *Chicago, R. I. & P. R. Co. v. Doyle*, 18 Kan. 58; *Waterson v. Rogers*, 21 Kan. 529; *City of Atchison v. Jansen*, 21 Kan. 560; *St. Paul Fire & Marine Ins. Co. v. Kelly*, 43 Kan. 741, 23 Pac. 1046; *Missouri Pac. Ry. Co. v. Johnson*, 44 Kan. 680, 24 Pac. 1116; *Avery v. Union Pac. R. Co.*, 73 Kan. 563, 85 Pac. 600; *Lee v. Ryder*, 1 Kan. App. 203, 41 Pac. 221; *Belcher v. Whitlock*, 6 Okl. 691, 56 Pac. 23—holding it error to sustain demurrer to evidence, unless adverse party has failed to introduce substantial evidence; *Sullivan v. Phenix Ins. Co. of Brooklyn*, 34 Kan. 170, 8 Pac. 112, holding that a motion by defendant for a directed verdict is substantially equivalent to a demurrer to plaintiff's evidence, and a verdict cannot be directed if the evidence fairly tends to establish plaintiff's cause of action; *Atchison, T. & S. F. R. Co. v. Ditmars*, 3 Kan. App. 459, 43 Pac. 833; *City of Hutchinson v. Van Cleve*, 7 Kan. App. 676, 53 Pac. 888—holding that there was no error in overruling a demurrer to plaintiff's evidence, where there was some competent evidence tending to prove the facts essential to a recovery; *Frick v. Reynolds*, 6 Okl. 638, 52 Pac. 391, holding that a motion to withdraw the case from the jury should be granted, where the party having the burden of proof has wholly failed to present any evidence to support his case, and there are no disputed facts, being equivalent to a motion for a directed verdict.

16 KAN. 388, HOBSON v. OGDEN'S EX'RS

Pleadings—Amendment.—Cited in *City of Burlingame v. Kansas Valley Nat. Bank*, 17 Kan. 407, holding that there was no abuse of discretion in refusing to strike a reply because filed one day after time, where it had stood for three years unchallenged, and the parties had consented to judgment for plaintiff, but it was not entered through some oversight.

Same—Admissions.—Cited in *Duff v. Duff*, 71 Cal. 513, 12 Pac. 570, holding that a statement in a petition for letters of administration is not admissible in evidence against petitioner as an admission, unless the petition was signed by him personally, or by an attorney acting within the scope of his authority.

Findings—Conclusiveness.—Cited in *New York Life Ins. Co. v. McGowan*, 18 Kan. 300; *Gibbs v. Gibbs*, 18 Kan. 419; *Weir v. Travelers' Ins. Co.*, 32 Kan. 325, 4 Pac. 267; *Sheldon v. Atkinson*, 38 Kan. 14, 16 Pac. 68—holding that a general finding in ejectment for a party for a certain tract embraced all the facts necessary to sustain his claim thereto; *Winstead v. Standeford*, 21 Kan. 270; *Hargrove v. Woolf*, 34 Kan. 101, 8 Pac. 192; *Tootle v. Brown*, 4 Okl. 612, 46 Pac. 550—holding that the court's findings on conflicting evidence are as conclusive as a verdict, which will not be disturbed, if supported by sufficient evidence; *Betts v. Mills*, 8 Okl. 351, 58 Pac. 957; *McCann v. McCann*, 24 Okl. 284, 103 Pac. 694—holding that a general finding on oral conflicting evidence is a finding of everything necessary to sustain the general finding, and is conclusive on appeal upon all doubtful or disputed questions.

16 KAN. 396, PHILLIPS v. REITZ

Fraudulent conveyances.—Cited in *Ranney-Alton Mercantile Co. v. Hanes*, 9 Okl. 471, 60 Pac. 284, relating to the fraudulent transfer of personality.

Same—Notice to grantee.—Cited in *Houck v. Christy*, 152 Fed. 612, 81 C. C. A. 602, holding that the circumstances charged the purchasers of a bankrupt's property with notice that the sale was made in fraud of creditors; *Crapster v. Williams*, 21 Kan. 109, holding the evidence sufficient to show fraud in executing a chattel mortgage for the purpose of placing the property beyond the reach of the mortgagor's creditors; *McDonald v. Gaunt*, 30 Kan. 693, 2 Pac. 871; *Patterson v. Temple*, 5 Kan. App. 442, 49 Pac. 342—holding that, knowledge putting a reasonably prudent man upon inquiry which would lead to a knowledge of fraud, such party is chargeable with fraud; *Lewis v. Hughes*, 49 Kan. 23, 30 Pac. 177, holding a creditor purchasing of his insolvent debtor, whom he knows is attempting to dispose of his property in fraud of other creditors, must act in the utmost good faith and pay or allow adequate prices for the property; *Tripp & Moore Boot & Shoe Co. v. Martin*, 45 Kan. 765, 26 Pac. 424, holding that, if one acts in good faith in purchasing goods from an agent as the real owner without knowledge of the agency, his payment of the purchase price by a pre-existing debt from the agent is a defense to an action for the price by the real owner; *Hasie v. Connor*, 53 Kan. 713, 37 Pac. 128, holding that a creditor, who in good faith obtains from an insolvent debtor property in payment of an honest debt, will not lose his preference by reason of notice of the fact that the debtor intended thereby to defraud other creditors, if he does not participate in such wrongful intent; *Gollobor v. Martin*, 33 Kan. 252, 6 Pac. 267; *Medore, Martin & Co. v. Marshall*, 54 Kan. 147, 37 Pac. 977; *Vickers v. Buck Stove & Range Co.*, 60 Kan. 508, 57 Pac. 517; *Hudson v. Herman*, 81 Kan. 627, 107 Pac. 35; *Adams v. Snyder*, 8 Kan. App. 245, 55 Pac. 498; *Kansas Moline Plow Co. v. Sherman*, 3 Okl. 204, 41 Pac. 623, 32 L. R. A. 33; *Daly v. Rizzutto*, 59 Wash. 62, 109 Pac. 276, 29 L. R. A. (N. S.) 467—holding that "notice" to a purchaser of goods that the seller was married and the goods community property need only be such information, from any source, as would excite apprehension in an ordinary mind, and prompt one of average prudence to make inquiry.

Same—Participation in fraud.—Cited in note in 82 L. R. A. 37, 45, on participation in fraud of vendor which will invalidate transfer for good consideration as against creditors.

Same—Presumption of fraud.—Cited in note in 24 L. R. A. (N. S.) 1150, as to whether presumption of fraud flowing from retention of chattel by vendor may be overcome.

16 KAN. 402, LANE v. SCOVILLE

Qualification of jurors.—Cited in *State v. Ready*, 44 Kan. 700, 28 Pac. 58, holding that, while a party may ordinarily rest on the testimony given by a juror on his voir dire in regard to his qualifications, where the objection that a juror had served in the same court within the preceding year was first raised after verdict, and it was not shown that the juror would have been challenged, had such fact been known, and no prejudice is shown, the objection is not available to obtain a new trial.

• 16 KAN. 406, SCHOOL DIST. NO. 10 v. COLLINS

16 KAN. 411, ROSS v. CRAWFORD COUNTY COM'RS

Taxation—Judicial review of assessments.—Cited in *Board of Com'rs of Lyon County v. Sergeant*, 24 Kan. 572, holding that a county commissioner's order, made under Comp. Laws 1879, § 5842, correcting a personal property assessment after inquiry, will not prevent an inquiry, in a suit to enjoin the collection of the taxes, as to the amount of the party's property subject to taxation; *Bardrick v. Dillon*, 7 Okl. 535, 54 Pac. 785, on the question of the power of the courts to review assessments of taxes.

Trial by jury.—Cited in *Central Branch Union Pac. R. Co. v. Atchison, T. & S. F. R. Co.*, 28 Kan. 453, holding the constitutional guaranty of a jury trial imposes no restrictions on the exercise of the power of eminent domain; *Loper v. State*, 48 Kan. 540, 29 Pac. 687; *Swanz v. Ramala*, 63 Kan. 633, 66 Pac. 649—holding that the Constitution only guarantees a jury trial in such cases as were triable to a jury before the Constitution was adopted, and in chancery and statutory proceedings the Legislature has power to dispense with a jury trial, and the establishment of boundary lines by a county surveyor under the statute is such a statutory proceeding.

16 KAN. 419, MOODY v. ARTHUR

Cited in *Freeman v. Duncan*, 27 Kan. 784.

Review dependent on preservation of evidence in record.—Cited in *Dewey v. Linscott*, 20 Kan. 684; *Wilson v. Price-Raid Auditing Commission*, 31 Kan. 257, 1 Pac. 587; *State ex rel. Bradford v. Board of Com'rs of Harper County*, 43 Kan. 195, 23 Pac. 101—holding that the evidence may be reviewed, if the case-made is so prepared that it is clear that all the evidence is in it, though it is not expressly so stated therein; *Dewey v. Linscott*, 20 Kan. 684, holding that the recitals in the case-made sufficiently show that it contains the entire testimony; *Fillmore & Co. v. Campbell & Gilbert*, 25 Kan. 107, holding that where the record merely recited, "Plaintiffs rest" and "Defendants rest," but it appeared after such expressions that further evidence was admitted by the trial court, the evidence will not be reviewed, as the record does not purport to contain all the evidence; *Deatherage v. Burkdall*, 38 Kan. 732; *Ferguson v. Willig*, 57 Kan. 453, 46 Pac. 936—holding that it cannot be determined whether the findings and judgment are sustained by the evidence, unless it appears from a fair construction of the record that all of the evidence is contained therein; *Streeter v. Westenhaver*, 1 Kan. App. 730, 41 Pac. 992, holding that, in order to have the evidence reviewed, it must be preserved in a bill of exceptions or

case-made showing that it contained all of the evidence; *Donnell v. Reese*, 6 Kan. App. 563, 51 Pac. 584, holding that where a statement, signed by counsel for plaintiff in error, to the effect that the case-made contains the evidence given at trial, and such evidence is on the same page, and immediately follows the journal entry, and precedes the court's certificate to the case-made, such statement is a part of the case-made certified by the trial judge.

Pleading—Objection to introduction of evidence under.—Cited in *Rush v. Newman*, 58 Fed. 158, 7 C. C. A. 136; *Crowley v. Græsus Gold & Copper Mining Co.*, 12 Idaho, 530, 86 Pac. 536; *First Nat. Bank of Pond Creek v. Cochran*, 17 Okl. 538, 87 Pac. 855—holding that the courts do not favor the method of attacking the petition by objecting to the admission of evidence thereunder, and such objection is not available when the allegations are merely indefinite or state conclusions of law; *Young v. Severy*, 5 Okl. 630, 49 Pac. 1024, holding an allegation of a material matter, though indefinite and otherwise defective, is sufficient, when first questioned by an objection to the introduction of evidence thereunder.

Same—Construction in absence of demurrer.—Cited in *Bank of Glasco v. Marshall*, 5 Kan. App. 252, 47 Pac. 561, holding that, in absence of a demurrer to the petition and motion, the allegations will be construed liberally, and will be held good, unless there is a total failure to allege a material fact.

Lien of tax deed holder—Priority.—Distinguished in *Mercer v. Justice*, 63 Kan. 225, 65 Pac. 219, holding that a tax deed holder, made a party to mortgage foreclosure proceedings, was entitled to a lien for the value of his improvements superior to the mortgage lien, and also to an order of court that he should not be evicted until the value of the improvements was paid.

Constructive trust.—Cited in *Winkfield v. Brinkman*, 21 Kan. 682, holding that one who has acquired the legal title to real estate to which another has a better right, will be considered in equity as the trustee for the true owner, and required to convey him the legal title.

16 KAN. 429, MOODY v. BROWN

16 KAN. 430, CENTER TP. v. HUNT

Public or private interest as affecting right to sue.—Cited in *Atchison, T. & S. F. R. Co. v. State ex rel. Sanders*, 22 Kan. 1, holding that under the Constitution, providing that the proceeds of fines for any breach of the penal laws shall be exclusively applied to the "support of the common schools," a statute giving to an informer, who has sustained no loss, one-half of the proceeds of the fines imposed for violating the statute, is unconstitutional and void; *Ralston v. Dodge City, M. & T. Ry. Co.*, 53 Kan. 337, 86 Pac. 712, holding that a township may bring an action in its own name, but the township officers are not the proper plaintiffs in an action for the township, or in the interest of the people of the township.

Pleading as affidavit.—Cited in *Howard v. Eddy*, 56 Kan. 498, 43 Pac. 1133, holding that allegations of conclusions which do not show any of the facts will not serve as an affidavit to sustain an application for an injunction.

Restraining collection of taxes.—Cited in *Stiles v. City of Guthrie*, 3 Okl. 26, 41 Pac. 383, holding the collection of illegal taxes may be restrained by injunction.

Cited in notes in 69 Am. Dec. 205 (par. 1); 23 Am. Rep. 623—on injunction against collection of taxes and assessments.

16 KAN. 440, CEDAR TP. v. HUNT

16 KAN. 440, CITY OF FREDONIA v. HUNT

16 KAN. 440, STATE v. MAJORS

Party to quo warranto proceedings.—Cited in *State ex rel. Lamkin v. Kelly*, 2 Kan. App. 178, 43 Pac. 299, holding that a county attorney was the proper person to commence quo warranto proceedings to oust a certain person as county treasurer of the county.

Powers of probate courts.—Cited in *State ex rel. Edgerly v. Brown*, 35 Kan. 167, 10 Pac. 508, holding that the Legislature may confer new duties upon probate courts or judges in addition to the ordinary powers authorized by the Constitution; *State v. Durein*, 70 Kan. 13, 80 Pac. 987, holding that the statute authorizing an appeal from the action of the probate judge in refusing to grant permits to sell intoxicants, is valid.

County treasurer—Removal.—Cited in *Loper v. State*, 48 Kan. 540, 29 Pac. 687, holding that, under Gen. St. 1889, par. 1709, an order was properly made by the county commissioner, suspending a defaulting county treasurer and appointing another to act in his place.

16 KAN. 446, ODELL v. DODGE

Elections—Term of office.—Distinguished in *State ex rel. Little v. Wentworth*, 55 Kan. 298, 40 Pac. 648, holding that under Laws 1879, c. 113, § 3, providing that each insane asylum shall have a superintendent, etc., who shall be chosen by the board of trustees and hold office for the term of three years, such officers are entitled to hold their offices for three years from the date each appointment takes effect, no vacant or fractional terms being recognized.

Same—Time of election.—Cited in *Jones v. Gridley*, 20 Kan. 584, holding that, where the first regular elections for justice of the peace were held in April, 1872, elections could be held thereafter in each alternate year.

Same—Postponing elections.—Cited in *Wilson v. Clark*, 63 Kan. 505, 65 Pac. 705, holding that Laws 1901, c. 176 (Gen. St. 1901, §§ 2751-2755), providing for postponing the election of certain county and judicial officers for periods of a year for the purpose of securing uniformity in the commencement of official terms of office, does not conflict with Const. art. 4, § 2, providing for annual elections.

16 KAN. 450, COMMISSIONERS OF LABETTE COUNTY v. FRANKLIN

Mileage fees for sheriff.—Cited in *Titus v. Commissioners of Howard County*, 17 Kan. 368; *Thralls v. Board of Com'rs of Sumner County*, 24 Kan. 504—holding that a sheriff is not entitled to mileage fees for travel to serve a personal property tax warrant, where he returns "No property found."

16 KAN. 452, STATE v. HORNEMAN

Criminal decisions appealable—Order denying discharge.—Cited in *State v. Edwards*, 35 Kan. 105, 10 Pac. 544, holding that an order refusing to discharge an accused was only an intermediate order, and not appealable, only the final judgment being appealable.

Cited in note in 60 Am. Dec. 438, on final and interlocutory judgments and decrees.

Former jeopardy.—Cited in *State v. Colgate*, 31 Kan. 511, 3 Pac. 346, 47 Am. Rep. 507, holding that where a mill and all its contents, including the account books, were burned by a single fire, an acquittal for burning the mill is a good defense to a subsequent prosecution for setting fire to and burning books of account; *State v. Patterson*, 66 Kan. 447, 71 Pac. 860, holding that, in a prosecution of a city treasurer for embezzling city money, a demurrer is properly sustained to a plea by defendant alleging his acquittal of a charge of forging entries in his books of account with intent to defraud the city; *State v. Barber*, 2 Kan.

App. 679, 43 Pac. 800, holding that under the statutes the illegal sale of intoxicants is a different offense from that of keeping a place where intoxicants are sold in violation of law, and an acquittal under a charge of making an illegal sale does not bar a prosecution for keeping a place where illegal sales are made.

Cited in notes in 58 Am. Dec. 541; 41 Am. Rep. 476—on former jeopardy; in 92 Am. St. Rep. 106, on identity of offenses on plea of former jeopardy; in 31 L. R. A. (N. S.) 735, on right to convict for several offenses growing out of same facts.

Same—Trial of plea.—Cited in *Re Miller*, 7 Kan. App. 686, 51 Pac. 922, holding that the plea of former jeopardy cannot be considered in habeas corpus, but must be presented and tried in the court having jurisdiction of the offense charged; *Morris v. Territory*, 1 Okl. Cr. 617, 99 Pac. 760, 101 Pac. 111, holding that, if a plea of former jeopardy shows upon its face a different offense from that for which accused was on trial, it should not be submitted to the jury.

16 KAN. 456, MISSOURI, K. & T. RY. CO. v. WEAVER

Distinguished in *Atchison, T. & S. F. R. Co. v. Gants*, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780.

Excessive damages.—Cited in *Zion v. Southern Pac. Co.*, 67 Fed. 500, holding that a verdict of \$1,700 for ejecting a passenger was excessive; *Chicago, R. I. & P. Ry. Co. v. Frazier*, 66 Kan. 422, 71 Pac. 831, holding that a verdict must not only be excessive, but it must have resulted from passion, prejudice, etc., in order to be ground for a new trial; *Missouri, K. & T. Ry. Co. v. Wade*, 73 Kan. 359, 85 Pac. 415, holding that allowing excessive damages for mental suffering from personal injuries is not alone sufficient to require a new trial; *Van Vrankin v. Kansas City Elevated Ry. Co.*, 84 Kan. 287, 114 Pac. 202, holding that a verdict for \$10,933 for personal injuries from being thrown from a street car was not excessive; *Choctaw, O. & G. R. Co. v. Burgess*, 21 Okl. 653, 97 Pac. 271, holding that the appellate court should not grant a new trial for excessive damages, unless the verdict is so excessive as per se to indicate passion or prejudice.

Cited in note in 26 L. R. A. 392, on power of appellate court over verdict for excessive damages.

Exemplary damages.—Cited in *Kansas Pac. Ry. Co. v. Kessler*, 18 Kan. 523, holding that exemplary damages are properly awarded for personal injuries resulting from gross negligence; *Southern Kansas Ry. Co. v. Rice*, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766, holding that if a passenger is expelled from a train maliciously, or by wanton or gross negligence, he may recover exemplary damages.

Liability of corporations.—Cited in *Wheeler & Wilson Mfg. Co. v. Boyce*, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571, holding that corporations may be liable for exemplary damages for the wrongful acts of their agents in the course of their employment.

Wanton negligence—Contributory negligence as defense.—Cited in *Kansas Pac. Ry. Co. v. Whipple*, 39 Kan. 531, 18 Pac. 730, holding that the fact that one placed himself in a place of danger is no defense to wanton negligence.

Reading judicial opinion to jury.—Cited in *Atchison, T. & S. F. R. Co. v. Dwelle*, 44 Kan. 394, 24 Pac. 500, holding that it was error to read to the jury parts of a judicial opinion giving the writer's idea as to a railroad company's liability, as well as to read to the jury the facts of that case.

Carrier's duty as to passengers.—Cited in note in 32 Am. St. Rep. 97, 99, on carrier's duty to protect passengers from assault.

Master's liability for malicious acts of servant.—Cited in note in 4 L. R. A. (N. S.) 496, on liability for malicious servant's act when master owes special duty to party injured.

16 KAN. 466, MCGLOTHLIN v. MADDEN

Replevin—Property in custodia legis.—Cited in *Green v. McMurtry*, 20 Kan. 189; *Bailey v. Bayne*, 20 Kan. 657—holding that property in the custody of the law cannot be replevied; *Blair v. Shew*, 24 Kan. 280, holding that property in custody of the law cannot be replevied, even if the levies under which it is held are void; *Karr v. Stahl*, 75 Kan. 887, 89 Pac. 669, holding that replevin will not lie to recover property taken by a city marshal under a warrant issued in an action commenced under a void ordinance.

Same—Necessity of statutory affidavit and bond.—Cited in *Goodwin v. Suthelmer*, 8 Kan. App. 212, 55 Pac. 486, holding that one may maintain an action to recover personalty and damages for withholding it, without filing the affidavit and giving bond as required by Code Civ. Proc. §§ 176-178 (Gen. St. 1889, §§ 4259-4261; Gen. St. 1897, c. 95, §§ 176, 177, 178).

16 KAN. 470, HUDSON v. MISSOURI, K. & T. RY. CO.

Torts by servant—Liability of master.—Cited in *Jackson v. Chicago, R. I. & P. Ry. Co.*, 178 Fed. 432, 102 C. O. A. 159; *Sachrowitz v. Atchison, T. & S. F. R. Co.*, 37 Kan. 212, 15 Pac. 242; *Mirick v. Suchy*, 74 Kan. 715, 87 Pac. 1141, 11 Ann. Cas. 366—holding that, to make a master liable for a servant's torts, the wrongful act must be connected with the master's business; *Laird v. Farwell*, 60 Kan. 512, 57 Pac. 98, holding that where an agent of a chattel mortgagee, employed to take charge of the goods, with power of sale, caused the arrest of one for perjury in making an attachment affidavit in an action wherein some of the goods were seized from the agent's possession, his principal was not liable; *Clark v. Folcroft*, 67 Kan. 446, 73 Pac. 86, holding that if a servant was engaged in his own business when he committed a tort, his employer was not liable therefor; *Crelly v. Missouri & Kansas Telephone Co.*, 84 Kan. 19, 113 Pac. 386, 33 L. R. A. (N. S.) 328, holding that an assault by a telephone manager upon an operator who was about to quit the service, committed because she refused to sign a voucher for her wages, was not within the scope of the manager's authority, so that the company was not liable therefor.

Cited in note in 27 L. R. A. 196, on civil responsibility for wrongful or negligent act of servant or agent towards one not sustaining contractual relation.

16 KAN. 475, STATE v. BOWEN

Cited in *Bond v. White*, 24 Kan. 45.

Construction of verdict.—Cited in *Bergdahl v. People*, 27 Colo. 302, 61 Pac. 228, holding that a verdict should be construed as a whole, and all fair intendments made to support it, and it is sufficient if it clearly conveys the intention of the jury; *State v. Frazier*, 53 Kan. 87, 36 Pac. 58, 42 Am. St. Rep. 274, holding that the jury only intended to acquit of rape, and not of attempt to commit rape.

Judicial notice of proceedings in same or other cause.—Cited in *Withanp v. United States*, 127 Fed. 530, 62 C. O. A. 328; *State v. Stevens*, 56 Kan. 720, 44 Pac. 992—holding that, while the court cannot take judicial notice of the record and proceedings in other cases, it takes judicial notice of former proceedings in the case at trial; *Hollenbach v. Schnabel*, 101 Cal. 312, 35 Pac. 872, 40 Am. St. Rep. 57; *In re Mills' Estate*, 40 Or. 424, 67 Pac. 107; *State v. Bates*, 22 Utah, 65, 61 Pac. 905, 83 Am. St. Rep. 768—holding that a court will take judicial notice of all previous matters of record in the court, when necessary in the administration of justice.

Cited in note in 89 Am. Dec. 689, on judicial notice.

Question for court in criminal case.—Cited in *State v. Truskett*, 85 Kan. 804, 118 Pac. 1047, holding that a question purely of law in a criminal case is for the court, but usually questions of fact are for the jury.

Venue of offenses.—Cited in *Re Palms*, 136 U. S. 250, 10 Sup. Ct. 1034, 34 L. Ed. 514, holding that the offense of tendering a contract for the payment of money to induce an officer to violate his official duty may be tried in the district in which the officer received the letter; *Albright v. Territory*, 11 Okl. 497, 69 Pac. 789, holding that an information charging murder need not allege the place of death; *Moran v. Territory*, 14 Okl. 544, 78 Pac. 111, holding that accused must be indicted in the county where the injury was inflicted, and not where decedent's death occurred.

Cited in note in 44 Am. St. Rep. 80, on place where crime is committed: in 3 L. R. A. (N. S.) 1029, on charge of time and place in indictment for homicide.

Homicide—When committed.—Cited in note in 34 L. R. A. 852, on time when homicide deemed committed.

16 KAN. 480, CITY OF OSWEGO v. BELT

Acquittal or discharge of accused—Appeal by state.—Cited in *State v. Phillips*, 33 Kan. 100, 5 Pac. 436; *State v. Lee*, 49 Kan. 570, 31 Pac. 147; *State v. Hickerson*, 55 Kan. 133, 39 Pac. 1045; *State v. Rook*, 61 Kan. 382, 59 Pac. 653, 49 L. R. A. 186—holding that a verdict of not guilty was conclusive, and not appealable by the state, where the trial, which was before the court, was on the merits.

16 KAN. 481, MISSOURI VAL. LIFE INS. CO. v. KELSO

Right of assignee of contract to sue thereon.—Cited in *Carter v. J. S. George & Co.*, 30 Kan. 45, 1 Pac. 58, holding that one to whom a contract was assigned could sue thereon, though it was not originally executed for her benefit.

Paid-up insurance policies.—Cited in note in 15 L. R. A. 454, 455, on paid-up and nonforfeiting policies of life insurance.

16 KAN. 486, EHRGOTT v. BRIDGE MANUFACTORY OF TOPEKA

16 KAN. 488, STONE v. BIRD

Cited in *Burchett v. Purdy*, 2 Okl. 391, 37 Pac. 1053.

Pleading—Remedy in case of nonresponsiveness of answer.—Cited in *City of Wyandotte v. Gibson*, 25 Kan. 236; *Baron v. Brown*, 25 Kan. 410; *Reiley v. Haynes*, 38 Kan. 259, 16 Pac. 440, 5 Am. St. Rep. 737; *City of Atchison v. Rose*, 43 Kan. 606, 23 Pac. 561; *State v. Gray*, 55 Kan. 135, 39 Pac. 1050—holding that, if an answer is not responsive, the remedy is to move to strike it, a mere objection to the answer not being sufficient.

Receiving verdict after adjournment.—Cited in *State v. McKinney*, 31 Kan. 570, 3 Pac. 356, holding that the receiving of a criminal verdict at 11 o'clock at night, when the court had adjourned until the next day, was not reversible error, though the statute requires the verdict to be received in open court, where the judge, counsel, and accused were in the courtroom at that time, and the jury were polled.

Evidence—Res gestæ and declarations.—Cited in *Reiley v. Haynes*, 38 Kan. 259, 16 Pac. 440, 5 Am. St. Rep. 737, holding that declarations by a party to an action in possession of personal property as to his ownership, accompanied by some principal fact which they serve to explain, are sometimes said to be a part of the res gestæ; *Hubbard v. Cheney*, 76 Kan. 222, 31 Pac. 793, 123 Am. St. Rep. 129, holding that the declarations of persons in possession of realty, which illustrate the character of their possession and explain their claims of ownership, are admissible to show the character and extent of their claims; *Butts v. Butts*, 84 Kan. 475, 114 Pac. 1048, holding that, in an action to recover land

claimed under a parol gift from plaintiff's father; declarations by the father, made while in control and possession of the land, are admissible to explain the nature and character of the father's possession; *Perkins v. Territory*, 10 Okl. 506, 63 Pac. 860, holding, where defendant himself as a witness explained an act, it was error to admit evidence as to declarations as to such acts.

Replevin—Property in custodia legis.—Cited in *Wilde v. Rawles*, 13 Colo. 583, 22 Pac. 897, holding that one whose property was wrongfully seized by a sheriff under attachment may recover it in claim and delivery in another court of concurrent jurisdiction.

Cited in note in 25 Am. St. Rep. 257, 258, on replevin against officer.

Same—Demand.—Cited in *Dickson v. Randal*, 19 Kan. 212, holding that the owner of property wrongfully seized under an execution directed against the property of another may maintain replevin therefor, without a prior demand therefor upon the officer.

Sunday—Validity of proceedings had on.—Cited in *Morris v. Shew*, 20 Kan. 661, holding service of an attachment order on Sunday to be illegal and wrongful, entitling the attachment defendant to damages for wrongful seizure; *State v. Muir*, 32 Kan. 481, 4 Pac. 812, holding that, while the verdict may be received on Sunday, it is improper to receive it on Sunday, where neither accused nor his counsel were notified to be present, so as to enable them to poll the jury; *City of Parsons v. Lindsay*, 41 Kan. 386, 21 Pac. 227, 8 L. R. A. 658, 13 Am. St. Rep. 290, holding that a judgment rendered on Sunday is void.

16 KAN. 495, CITY OF EMPORIA v. BATES

Validation of municipal acts.—Cited in *Erskine v. Steele County*, 87 Fed. 630; *City of Emporia v. Whittlesey*, 20 Kan. 17; *Kansas City v. Silver*, 74 Kan. 851, 85 Pac. 805—holding that a statute ratifying county warrants, invalid on the ground that the commissioners had no authority to contract for the services the warrant was given for, was not unconstitutional; *Steele County v. Erskine*, 98 Fed. 215, 39 C. C. A. 173, holding that an act of a municipality, done without authority previously given, may be legalized by a subsequent statute, if the act would have been legal if done under the statute; *Dowell v. City of Portland*, 13 Or. 248, 10 Pac. 308, holding that, in case of an irregular or defective local assessment, a city may make a valid reassessment only where it has legislative authority.

Cited in note in 76 Am. Dec. 536, on power of Legislature to supply defects in assessments for taxes.

16 KAN. 498, COMMISSIONERS OF SEDGWICK COUNTY v. BUNKER

Cited in *Hurt v. Hamilton*, 25 Kan. 76.

Change of boundaries of political divisions—Apportionment of debts and property.—Cited in *Orange County v. Los Angeles County*, 114 Cal. 390, 46 Pac. 173; *Riverside County v. San Bernardino County*, 134 Cal. 517, 66 Pac. 788; *Morrow County v. Hendryx*, 14 Or. 397, 12 Pac. 806—holding that the division of a county and the power to determine what liability for county debts the new county shall assume is in the Legislature alone; *Colusa County v. Glenn County*, 117 Cal. 434, 49 Pac. 457, holding that a county formed out of another is liable for taxes received by it on property in the former county, the division act not having provided for an apportionment; *Commissioners of Ottawa County v. Nelson*, 10 Kan. 234, 27 Am. Rep. 101, holding that act approved March 3, 1873 (Acts 1873, c. 142, §§ 3, 4), part of "An act to regulate taxation on the change of boundary lines," is constitutional; *Chandler v. Reynolds*, 19 Kan. 240, holding that, where territory is detached from a county or township, act approved March 3, 1873 (Acts 1873, c. 142), relating to taxation on change of boundary lines, authorizes taxing the detached territory to pay

prior bonded indebtedness of the county only where the bonds were both "authorized and issued" before the detachment of the territory; Board of Com'rs of Marion County v. Board of Com'rs of Harvey County, 26 Kan. 181, on the liability of a township for bonds issued by a county before the township was detached; State ex rel. Rebb v. Board of Com'rs of Kiowa County, 41 Kan. 630, 21 Pac. 601, holding that Acts 1873, c. 142, to regulate taxation in case of change of boundary lines of counties and townships after a bonded debt is created by popular vote, applies where detached territory is erected into a new county, the same as where attached to an existing county; Vandriam v. Hill, 58 Kan. 611, 50 Pac. 872, holding that the Legislature may determine how the property of a county shall be divided and its debts apportioned on a change of boundaries; In re Apportionment Between Fremont & Big Horn Counties, 8 Wyo. 1, 54 Pac. 1073, holding that provision for apportionment of county debts upon division of a county may be made by general law passed before the dividing act, or by general or special act after the enactment of the dividing act.

Cited in note in 20 Am. St. Rep. 678, on relation of new counties and their officers to old counties.

Same—Power of Legislature.—Cited in School Dist. No. 57 v. Board of Education of City of Emporia, 16 Kan. 536, holding that the Legislature has power to change school district boundaries.

Cited in note in 68 Am. Dec. 296, on mode of enforcing liability of counties and legislative power to modify or impair same.

Retroactive legislation.—Cited in Craft v. Lofinck, 34 Kan. 365, 8 Pac. 359, holding, to enable the Legislature to retrospectively impose a legal liability upon the inhabitants of a part of a township after its division, where no legal liability existed before, there must have been a pre-existing moral liability; Berry v. Kansas City, Ft. S. & M. R. Co., 52 Kan. 759, 34 Pac. 805, 39 Am. St. Rep. 371, holding that Code Civ. Proc. § 422a, is not unconstitutional, upon the ground that it is retroactive, merely giving a new remedy; Board of Education of City of Topeka v. State, 64 Kan. 6, 67 Pac. 559; Inlow v. Board of Com'rs of Graham County, 6 Kan. App. 391, 51 Pac. 65—holding that Acts 1893, c. 128, providing a method of settlement between a school district and a city, where the district is annexed to the city, though retroactive when applied to compel the payment by a city of bonds of a school district annexed before the statute was enacted, is not invalid, since the city was under a moral obligation to pay off the bonds; Mikesell v. Board of Com'rs of Wilson County, 82 Kan. 502, 108 Pac. 829, holding that the "parole law" (Acts 1907, c. 178; Gen. St. 1909, §§ 2459-2472) is not invalid for the reason that it is retroactive, or unconstitutional; Mayor, etc., of City of Guthrie v. Territory ex rel. Losey, 1 Okl. 188, 31 Pac. 190, 21 L. R. A. 841, holding that retroactive laws may be enacted to provide remedies to enforce pre-existing moral obligations, which were not legally enforceable.

Cited in note in 16 Am. Dec. 520 (par. 1), on constitutionality of acts validating married woman's contracts and deeds; in 52 L. R. A. 941, on constitutionality of retroactive statute creating right of action or of set-off.

16 KAN. 507, STATE v. CUMMERFORD

Dismissal for want of parties.—Cited in Richardson v. Great Western Mfg. Co., 3 Kan. App. 445, 43 Pac. 809, holding that the Supreme Court will dismiss a case for want of necessary parties only when it appears that its decision might prejudicially affect the interests of some persons not before it.

16 KAN. 510, LEAVENWORTH, L. & G. B. CO. v. COFFIN

16 KAN. 515, DOUGLASS v. NUZUM

Cited in Hammer v. Rogers, 21 Okl. 367, 98 Pac. 611.

Distinguished in *Sanford v. Weeks*, 39 Kan. 649, 18 Pac. 823; *Board of Com'rs of Marion County v. Welch*, 40 Kan. 767, 20 Pac. 483; *Kennedy v. Haskell*, 67 Kan. 612, 73 Pac. 913.

Quieting title.—Cited in *Pritchard v. Madren*, 24 Kan. 486, on actions to quiet title; *Howe Mach. Co. v. Miner*, 28 Kan. 441, holding that equity will not remove an alleged cloud from title, when the defect appears upon the face of the record through which the opposite party claims title and cannot be cured by limitations; *Schenck v. Wicks*, 23 Utah, 576, 65 Pac. 732, holding that an instrument which on its face shows prima facie such adverse interest in a third party, and is such that, if put in evidence in an action by the real owner to quiet his title, he would be compelled in defense to prove his own title, it constitutes a cloud which equity will remove.

Same—Remedy at law.—Cited in note in 12 L. R. A. (N. S.) 71, on effect of legal remedy upon equitable jurisdiction to remove cloud on title.

Same—Vacant land.—Cited in *Pierce v. Thompson*, 26 Kan. 714; *Utley v. Fee*, 33 Kan. 683, 7 Pac. 555—holding that one who holds the legal title to unoccupied land may maintain an action to quiet title, independent of Code Civ. Proc. § 594.

Same—Necessity of possession.—Cited in *Sale v. Bugher*, 24 Kan. 432; *Cartwright v. McFadden*, 24 Kan. 662—holding that a plaintiff in an action under the statute to quiet title must prove his actual possession by himself or tenant; *Keith v. Keith*, 26 Kan. 26; *Wood v. Nicholson*, 43 Kan. 461, 23 Pac. 587—holding that actual possession or legal title is necessary to maintain the action; *Westbrook v. Schmaus*, 51 Kan. 558, 33 Pac. 306, holding that in an action to quiet title and for equitable relief, other than that provided in Code Civ. Proc. § 594, actual possession by plaintiff need not be shown; *Sutliff v. Smith*, 58 Kan. 559, 50 Pac. 455, holding that a vendor out of possession may bring an equitable action to quiet title, where the vendee in possession will not permit it to be brought in his own name, though he withholds the purchase money until title is perfected.

Same—Adverse claims.—Cited in *Williams v. Moorehead*, 33 Kan. 609, 7 Pac. 226, holding that one who made some claim to the land in controversy was properly made defendant in action to quiet title.

Same—Pleading.—Cited in *Entreken v. Howard*, 16 Kan. 551, holding a petition in an action to quiet title sufficient.

Same—Necessity of alleging adverse possession.—Cited in *Allen v. Douglass*, 29 Kan. 412, holding that an answer which does not show that any one is claiming an adverse title to defendant does not show a cause of action to quiet title, either under the statute or otherwise; *Grove v. Jennings*, 46 Kan. 366, 26 Pac. 738, holding that in a suit to remove cloud from title under a petition similar to an equity suit, and in absence of statute, an allegation of plaintiff's possession is not necessary; *Elliott v. Hudson*, 84 Kan. 7, 113 Pac. 307, holding an allegation of an adverse claim by defendant, based upon tax deeds which were alleged to be void, sufficiently alleged an adverse title to sustain an action to quiet title; *Parker v. Vaughn*, 85 Kan. 324, 116 Pac. 882; *Christy v. Springs*, 11 Okl. 710, 69 Pac. 864—holding that ordinarily plaintiff in an action to quiet title must either allege and prove actual possession or plead in detail the facts on which the claim was based, and, if the petition is drawn in short form, plaintiff must be in possession; *Horton v. Haines*, 23 Okl. 878, 102 Pac. 121, holding that the petition in a mortgage foreclosure action stated a cause of action against a defendant who acquired an interest in the real estate involved after the execution of the mortgage.

Same—Cure of petition by answer.—Cited in *Shinkle v. Meek*, 69 Kan. 368, 76 Pac. 837, holding that where the petition alleged that plaintiff owned the land in dispute in fee, and that defendants had recorded tax deeds thereto, al-

leged to be void, but without alleging possession, and the answer alleged that the land was vacant and unoccupied, plaintiff was entitled under the statute to have his title quieted.

Tax deed—Re-execution of imperfect deed.—Cited in *Fox v. Townsend*, 152 Cal. 51, 91 Pac. 1004, 1007; *Corbin v. Bronson*, 28 Kan. 532; *Young v. Gibson*, 80 Kan. 269, 105 Pac. 3; *Baker v. Lane*, 82 Kan. 715, 109 Pac. 182, 28 L. R. A. (N. S.) 406—holding that a tax certificate holder has a right to a tax deed made to the proper grantee, and the county clerk can be compelled to execute a proper deed, though an imperfect one was previously executed; *Hill-yard v. Bancher*, 85 Kan. 516, 118 Pac. 67, holding that, where the land records showed that title had previously been conveyed to parties under whom defendants claim, subsequent conveyances by the same grantors conveyed nothing.

16 KAN. 521, DOUGLASS v. NUZUM

16 KAN. 527, CUENDET v. LAHMER

Preferences to creditors.—Cited in *Frankhouser v. Ellett*, 22 Kan. 127, 31 Am. Rep. 171; *Bliss & Wood v. Couch*, 46 Kan. 400, 26 Pac. 706; *Douglas County Nat. Bank v. Sands*, 47 Kan. 596, 28 Pac. 620; *Lewis v. Hughs*, 49 Kan. 23, 30 Pac. 177—holding that a creditor who purchases his insolvent debtor's property, knowing he is attempting to dispose of his property in fraud of his creditors, must act in good faith and pay a fair valuation therefor; *Farlin v. Sook*, 30 Kan. 401, 1 Pac. 123, 46 Am. Rep. 100, holding that a debtor may prefer one creditor over another; *Cooper v. First Nat. Bank*, 40 Kan. 5, 18 Pac. 937, holding that a debtor could prefer his wife, a bona fide creditor, though her preference prevented the other creditors from receiving their debts.

16 KAN. 530, RAHM v. KING WROUGHT IRON BRIDGE MANUFACTORY OF TOPEKA

Bona fide purchasers of note—Evidence.—Cited in *Ecton v. Harlan*, 20 Kan. 452; *Reynolds v. Thomas*, 28 Kan. 810; *Mann v. Second Nat. Bank of Springfield, Ohio*, 34 Kan. 746, 10 Pac. 150—holding that the mere possession of a negotiable note is prima facie evidence of all of the facts essential to make the holder a bona fide purchaser; *Lyon v. Martin*, 31 Kan. 411, 2 Pac. 790; *First Nat. Bank of Ft. Scott v. Elliott*, 46 Kan. 32, 26 Pac. 487; *Hardy v. First Nat. Bank of Newton*, 56 Kan. 493, 43 Pac. 1125; *Scott v. Geiser Mfg. Co.*, 70 Kan. 498, 9 Pac. 823; *Challiss v. Woodburn*, 2 Kan. App. 652, 48 Pac. 792; *Winfield Nat. Bank v. McWilliams*, 9 Okl. 493, 60 Pac. 229—holding that it is presumed in absence of contrary evidence, that a negotiable promissory note of which plaintiff alleges ownership, setting out a copy, with all the indorsements, which are without date, was transferred before maturity and that plaintiff was a bona fide holder; *Brook v. Teague*, 52 Kan. 119, 34 Pac. 347, holding that if the maker of a negotiable note shows fraud in its inception, or the circumstances raise a strong suspicion of fraud, the owner must show that he was a bona fide purchaser under circumstances which would create no presumption that he knew the facts which made it invalid.

Cited in note in 11 Am. St. Rep. 323 (par. 2), on burden of proof as to bona fide ownership.

Same—Usury in negotiable note.—Cited in *Gross v. Funk*, 20 Kan. 655, holding that the defense of usury cannot be set up against a bona fide indorsee before maturity of a negotiable instrument.

16 KAN. 534, READ v. JEFFRIES

Cited in *Kansas City, Ft. S. & M. R. Co. v. Murray*, 57 Kan. 697, 47 Pac. 835.

Actions on joint and several judgments.—Cited in *United States v. Houston*, 48 Fed. 207, holding that, in view of Gen. St. Kan. 1889, para. 1101, 4523,

4586, where one of several joint defendants died after judgment, judgment may be revived against his personal representative without joining the other defendants; *Lewis v. Adams*, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423, holding that, where an action on a judgment against several joint debtors is originally commenced against one of them alone, a subsequent amendment, by substituting the names of the other judgment debtors as defendants, does not change the nature of the action against the original defendants, so as to extend the running of limitations; *Stout v. Baker*, 32 Kan. 113, 4 Pac. 141; *Richardson v. Painter*, 80 Kan. 574, 102 Pac. 1099, 133 Am. St. Rep. 224—holding that a personal judgment against two defendants is a joint and several obligation, which plaintiff may enforce against either of them at his option.

Set-off—Claims arising from contract and tort.—Cited in *Fanson v. Linsley*, 20 Kan. 235, holding that, where a wrong is done to another's property with the intention of benefitting the wrongdoer's estate, the law implies a contract by the wrongdoer to pay the injured party all of the benefits received, and if the tort is waived the cause of action on the implied contract may be set off; *Challiss v. Wylie*, 35 Kan. 506, 11 Pac. 438, holding that one whose estate is wronged may sue the wrongdoer on the implied contract for the value of the benefits received by the wrongdoer.

Cited in note in 59 Am. Dec. 483, on scope and office of counterclaim.

16 KAN. 536, SCHOOL DIST. NO. 57 v. BOARD OF EDUCATION OF CITY OF EMPORIA

Attaching school land to city.—Distinguished in *School Dist. No. 74, Kingfisher County, v. Long*, 2 Okl. 460, 37 Pac. 601, as to what land may be attached to a city for school purposes.

16 KAN. 542, SNYDER v. BOARD OF EDUCATION OF CITY OF PAOLA

16 KAN. 546, GREGG v. GEORGE

Check—Demand for payment.—Cited in *Williams v. Braun*, 14 Cal. App. 396, 112 Pac. 465; *Mordis v. Kennedy*, 23 Kan. 408, 33 Am. Rep. 169; *Anderson v. Rodgers*, 53 Kan. 542, 36 Pac. 1067, 27 L. R. A. 248; *Kershaw v. Ladd*, 34 Or. 375, 56 Pac. 402, 44 L. R. A. 236—holding that the payee of a check received in the same place the bank is located must present it at the close of the banking hours of the next business day, and if the bank is at a distance, must be sent for presentment on the next business day after it is received, and presented the next day after its receipt; *Noble v. Doughten*, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A. (N. S.) 1167, holding that failure to demand payment of a check within a reasonable time and give notice of nonpayment do not necessarily discharge the drawer, unless some loss result to him from such lack of diligence.

Cited in note in 53 L. R. A. 432, on effect on drawer's liability of delay in presenting check where drawee remains solvent.

16 KAN. 551, ENTREKEN v. HOWARD

Cited in *Howard v. Entreken*, 24 Kan. 428; *Board of Com'rs. of Marion County v. Welch*, 40 Kan. 767, 20 Pac. 483.

Quieting title—Allegation of actual possession.—Cited in *Cartwright v. McFadden*, 24 Kan. 662, holding that an allegation, in an action to quiet title, that plaintiff is in "peaceable possession" of the property, is prima facie an allegation that he is in the actual possession.

Same—Cure by answer.—Cited in *Sanford v. Weeks*, 39 Kan. 649, 18 Pac. 823, holding that, in a statutory action to quiet title, any defect in the petition, because it did not set out the nature of defendant's claim and the grounds of its

Pac. Ry. Co. v. Harrelson, 44 Kan. 253, 24 Pac. 465, holding that Laws 1885, c. 154, to compel railroad companies to fence their roads by and through lands inclosed with a lawful fence, is constitutional.

Cited in note in 25 L. R. A. 163, on constitutionality of statutes making railroads absolutely liable for fires set out or stock killed; in 31 L. R. A. (N. S.) 862, 864, 866, on constitutionality of statutes requiring railroad to fence tracks and build cattle guards.

Same—Construction of statutes.—Cited in *Kansas Pac. Ry. Co. v. Taylor*, 17 Kan. 566, holding it necessary to show a breach of a railroad's statutory duty to fence before a liability is imposed on it; *Sherman v. Anderson*, 27 Kan. 333, 41 Am. Rep. 414, holding that Acts 1874, c. 94, imposes the duty of fencing a railroad right of way exclusively upon the railroad company as between it and the landowner, and where a railroad company had title to the right of way at a place at which a steer was struck, wrecking a train and killing intestate, and the right of way was unfenced, defendant, who permitted his steer to go upon the right of way and cause the wreck, was not liable for intestate's death; *Atchison, T. & S. F. R. Co. v. Shaft*, 34 Kan. 711, 9 Pac. 464 (dissenting opinion), on question as to construction of railroad fence laws.

Police power.—Cited in *State v. Wilson*, 7 Kan. App. 428, 53 Pac. 371, on the question of the nature of the police power.

Attorney's fees—Validity of statutes.—Cited in *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 686 (dissenting opinion), on the question as to whether a statute giving a plaintiff, recovering against a railroad company for killing stock, reasonable attorney's fees, not to exceed \$10, is constitutional; *Clark v. Ford*, 7 Kan. App. 332, 51 Pac. 938, holding the attorney fee allowed by a jury in an action against a railroad company for damages for killing stock is a part of the amount in controversy; *Davidson v. Jennings*, 27 Colo. 187, 60 Pac. 354, 48 L. R. A. 340, 83 Am. St. Rep. 49; *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280—holding that a statute giving plaintiff in an action to foreclose a mechanic's lien reasonable attorney's fees is not unconstitutional; *Pyramid Land & Stock Co. v. Pierce*, 30 Nev. 237, 95 Pac. 210, holding that a statute giving the party recovering damages against one unlawfully grazing stock on his land an attorney's fee is a proper police regulation and constitutional.

Cited in note in 79 Am. St. Rep. 185, on constitutionality of statutes allowing attorney's fee.

Private action for violation of statute.—Cited in note in 9 L. R. A. (N. S.) 354, on private action for violation of statute not expressly conferring it.

16 KAN. 583, KANSAS PAC. RY. CO. v. YANZ

Cited in *Atchison, T. & S. F. R. Co. v. City of Atchison*, 47 Kan. 712, 28 Pac. 1000.

Attorney's fees as damages.—Cited in *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 686, holding that a statute giving persons establishing a claim against a railroad company for stock injuries, labor, etc., reasonable attorney's fees, not exceeding \$10, denies to the company the equal protection of the law; *Pyramid Land & Stock Co. v. Pierce*, 30 Nev. 237, 95 Pac. 210, holding an attorney's fee may be imposed in favor of one recovering damages for unlawfully grazing on land.

Pleading—Cure and waiver of defects.—Cited in *Missouri River, Ft. S. & G. R. Co. v. Duckett*, 20 Kan. 623; *Kansas Pac. Ry. Co. v. Taylor*, 17 Kan. 566—holding that the most liberal intendment is given to a bill of particulars filed in a justice's court, and if it states every essential fact necessary to a cause of action it will sustain a judgment, though the facts are alleged in the loosest and most indefinite manner; *St. Louis & S. F. Ry. Co. v. McReynolds*, 24 Kan. 368, holding that defendant did not waive any of the defects in a bill of particu-

lars in a justice's action, where it did not appear at trial; *Barrackman v. Girard*, 26 Kan. 284, holding that a bill of particulars in a justice's action was fatally defective, and the defects were not cured by special findings; *Clay v. Hildebrand Bros. & Jones*, 34 Kan. 694, 9 Pac. 466, holding that, though allegations in a petition in mortgage foreclosure that "defendants and each of them, including W., have or claim some interest in the premises," were defective as against W., the defect was cured by W.'s appearance and going to trial; *Atchison, T. & S. F. R. Co. v. Bartlett*, 2 Kan. App. 167, 48 Pac. 284, holding that a bill of particulars in a justice's action for stock injuries was sufficient, when first attacked on appeal, to sustain a judgment for plaintiff.

16 KAN. 587, KANSAS PAC. RY. CO. v. WYANDOTTE COUNTY COM'RS

Equalization of assessments for taxation.—Cited in *Griffith v. Watson*. 19 Kan. 23, holding that, after all of a taxpayer's personalty in a township was listed for taxation, it would be illegal to increase the list or amount of the assessment, even for the township, without notice to the taxpayer; *St. Joseph & D. C. R. Co. v. Smith*, 19 Kan. 225, holding that the valuation of realty, being fixed first by the assessor and not by the owner, may be changed by the board of equalization at a regular meeting, of which legal and public notice is given, without personal notice; *Gillett v. Treasurer of Lyon County*, 30 Kan. 166, 1 Pac. 577, holding that since 1876 the board of equalization has power to equalize the valuation of personalty; *Challiss v. Rigg*, 49 Kan. 119, 30 Pac. 190, on the question of the equalization of taxes on realty by the county board of equalization.

Refundment of taxes paid.—Cited in *Board of Com'rs of Lyon County v. Goddard*, 22 Kan. 389, holding that neither county commissioners nor the county treasurer can refund money upon failure of tax titles, except as required by statute.

Voluntary payments.—Cited in *Lamborn v. Dickinson County*, 97 U. S. 181, 24 L. Ed. 926, holding that a payment of taxes was voluntary and could not be recovered; *Sapp v. Commissioners of Brown County*, 20 Kan. 243; *Atchison, T. & S. F. R. Co. v. Board of Com'rs of Atchison County*, 47 Kan. 722, 28 Pac. 999—holding that persons paying taxes with knowledge of all the facts making them void cannot recover them back; *Thimes v. Stumpf*, 33 Kan. 53, 5 Pac. 431, holding that one who contracted to purchase a homestead, knowing that the vendor's wife did not sign the contract, and all the circumstances which made the contract void, cannot recover back a payment made under the contract, it being voluntary; *City of Atchison v. State ex rel. Tufts*, 34 Kan. 370, 8 Pac. 367, holding that, where taxpayers voluntarily paid illegal taxes levied, the public had no such interest therein as would authorize the state to enjoin the county treasurer from paying out the money, the payments having been voluntary; *Atchison, T. & S. F. R. Co. v. City of Atchison*, 47 Kan. 712, 28 Pac. 1000, holding that a part of taxes illegally paid was an involuntary payment, which could be recovered back; *Connelly v. Board of Com'rs of Trego County*, 64 Kan. 168, 67 Pac. 453; *Pomeroy v. Board of Com'rs of Graham County*, 6 Kan. App. 401, 50 Pac. 1094—holding that illegal taxes paid involuntarily may be recovered; *Kelly v. Board of Com'rs of Miami County*, 85 Kan. 38, 116 Pac. 477, holding that a payment made pursuant to a claim asserted can only be recovered by showing fraud, duress, or mistake of fact; *Ottawa University v. Stratton*, 85 Kan. 246, 116 Pac. 892, holding that illegal taxes, paid under protest, may be recovered as an involuntary payment; *Missouri Pac. Ry. Co. v. Gruendel*, 3 Kan. App. 53, 44 Pac. 439, holding that a payment in condemnation proceedings was voluntary and cannot be recovered; *Board of Com'rs of Wyandotte County v. Kansas City, Ft. S. & M. R. Co.*, 4 Kan. App. 772, 46 Pac. 1013, holding that a payment of taxes under protest, and to prevent the issuance

of tax warrants therefor, is involuntary, and may be recovered, though no warrant was actually issued.

Cited in note in 45 Am. Dec. 156, 163, 164, on compulsory payments and right to recover them back; in 22 Am. Rep. 520, on right to recover back taxes or assessments paid; in 94 Am. St. Rep. 414, 416, on recovery back of voluntary payment.

Distinguished in *Juneau v. Stunkle*, 40 Kan. 756, 20 Pac. 473, where a payment was made with the understanding that if, at final settlement, it was found to be an overpayment, it could be recovered back; *Lowe v. Wells Fargo & Co. Express*, 78 Kan. 105, 96 Pac. 74, holding that money was paid to an express company voluntarily under a mistake of fact, and hence could be recovered.

16 KAN. 601, *WRIGHT v. NOELL*

County superintendent—Women eligible to office.—Cited in *Russell v. Guptill*, 13 Wash. 360, 43 Pac. 340, holding that women may hold the office of county superintendent of schools, under a statute establishing a general uniform system of public schools (Laws 1889-90, p. 348), by implication from section 78 of the act.

Cited in note in 38 L. R. A. 210, 212, on right of woman to hold office.

16 KAN. 608, *STATE v. JONES*

Former jeopardy—Discharge on preliminary examination.—Cited in *State v. Ray*, 81 Kan. 159, 105 Pac. 46, holding that an order discharging accused was not a bar to another preliminary examination for the same offense or further prosecution therefor.

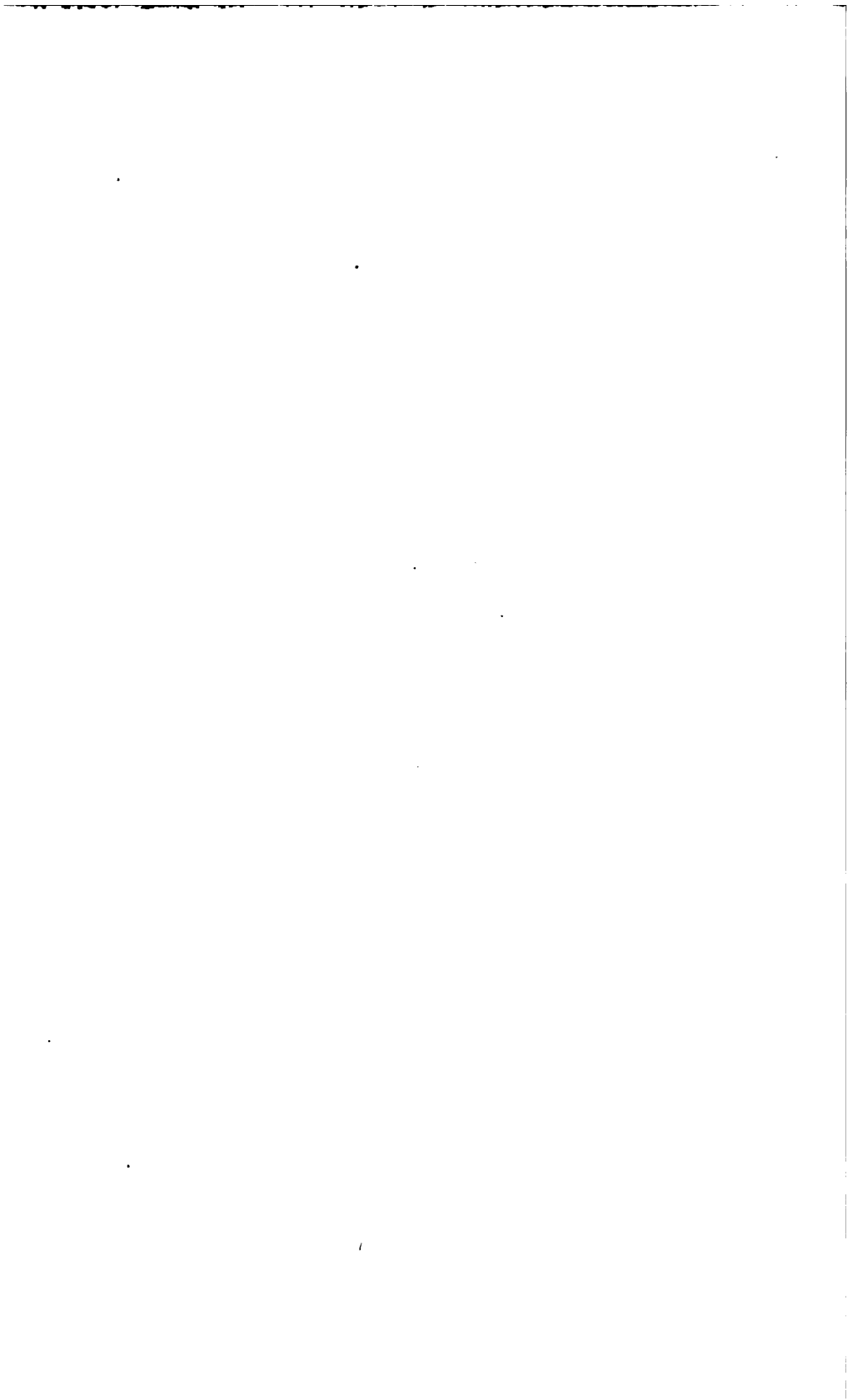
Offenses against females—Knowledge of age.—Cited in *State v. Johnson*, 85 Kan. 54, 116 Pac. 210, holding that, in a prosecution for decoying a female under 18 years of age in a house of prostitution, it is immaterial that accused did not know the girl's age, or that she represented herself to be more than 18 years of age.

Cited in note in 25 L. R. A. (N. S.) 662, on effect of mistake as to age of girl under statute denouncing sexual offenses.

Same—Information in language of statute.—Cited in *State v. Tucker*, 72 Kan. 481, 84 Pac. 126, holding that an information charging the taking away of a girl under 18 years of age for purposes of concubinage in the language of the statute (Gen. St. 1901, § 2020) is sufficient, it not being essential to charge cohabitation and intercourse.

Custody of children—Rights of parents.—Cited in *State v. Angel*, 42 Kan. 216, 21 Pac. 1075; *Miller v. Morrison*, 43 Kan. 446, 23 Pac. 612—holding that the father and mother are equally the natural guardians of the children.





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